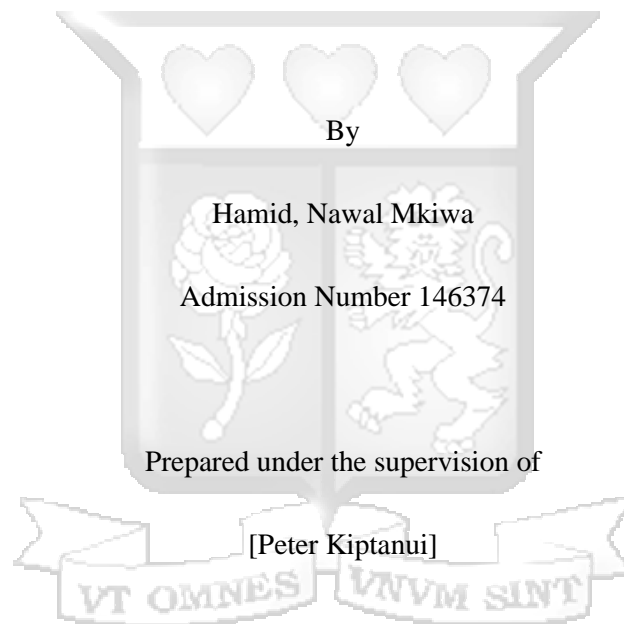


**RECLAIMING TAX SOVEREIGNTY: A CRITICAL ANALYSIS OF
THE OECD MARGINALIZATION OF DEVELOPING COUNTRIES
AND JUSTIFYING UNILATERAL TAX MEASURES AMID
RETALIATORY TRADE RISKS**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree, Strathmore
University Law School

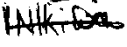


[December 2024]

Word count (18,551)

DECLARATION

I, **NAWAL MKIWA HAMID**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 

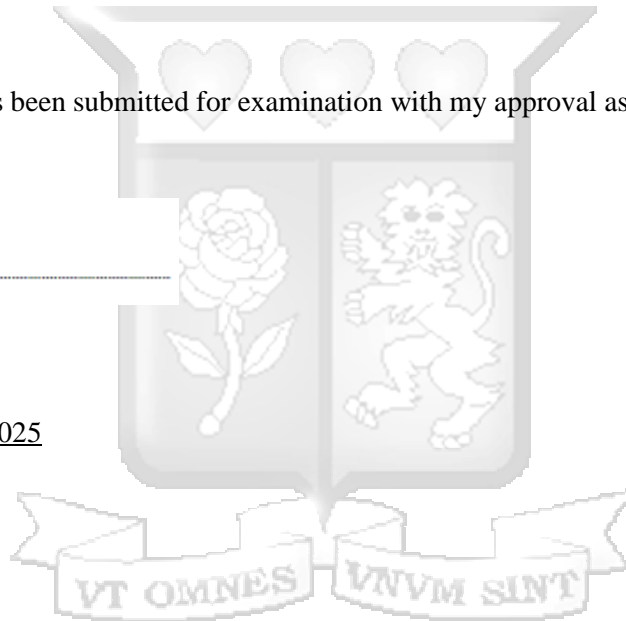
Date: 30th January 2025

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: 

Peter Kiptanui

Date: 30th January 2025



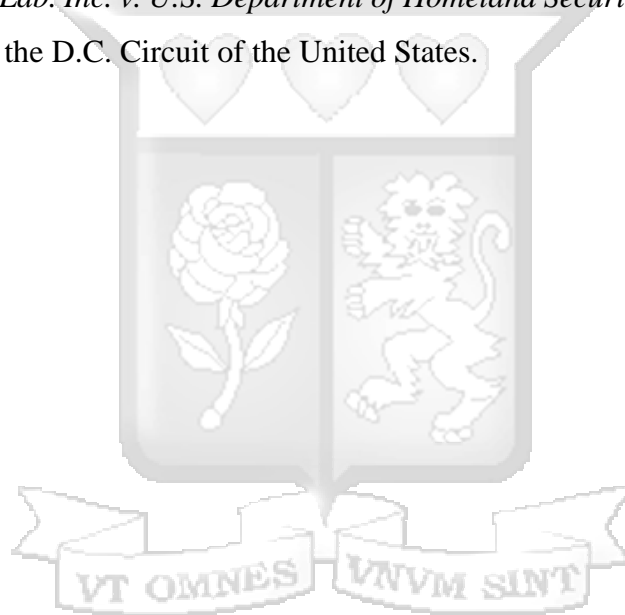
ACKNOWLEDGEMENTS

I would like to express my deepest gratitude to Almighty Allah (S.W.) for His guidance throughout this journey. My heartfelt thanks go to my mother, sisters, and friends for their support and encouragement. I am deeply grateful to my supervisor for his mentorship and guidance which has played an instrumental role in the completion of this work.



LIST OF CASES

1. *Quill Corp. v. North Dakota* (1992), The Supreme Court of the United States.
2. *National Bellas Hess v. Department of Revenue* (1967), The Supreme Court of the United States.
3. *Wayfair Inc. v. South Dakota* (2018), The Supreme Court of the United States.
4. *Geoffrey Inc. v; South Carolina Tax Commission* (1993), The Supreme Court of South Carolina.
5. *Blodgett v. Holden* (1928), The Supreme Court of United States.
6. *Untermeyer v. Anderson* (1928), The Supreme Court of United States.
7. *United States v. Carlton* (1994), The Supreme Court of United States.
8. *Kaspersky Lab. Inc. v. U.S. Department of Homeland Security* (2018), The Court of Appeal for the D.C. Circuit of the United States.



LIST OF LEGAL INSTRUMENTS

List of Kenyan Statutes

Income Tax Act Cap 470, 2022

Income Tax (Digital Service Tax) Regulations No. 207 of 2020

The Finance Act No. 8 of 2020

Information and Communications (Electronic and Domain Name Administration)
Regulations Legal Notice of 116 of 2010.

List of Foreign Statutes

i. Nigeria

Companies Income tax (Significant Economic Presence) Order, 2020 (Nigeria)

ii. India

Income Tax Act, 1961

Finance Act, 2018

iii. The U.S.

Lobbying Disclosure Act, 1995.

Trade Act, 1974

National Defense Authorization Act, 2019

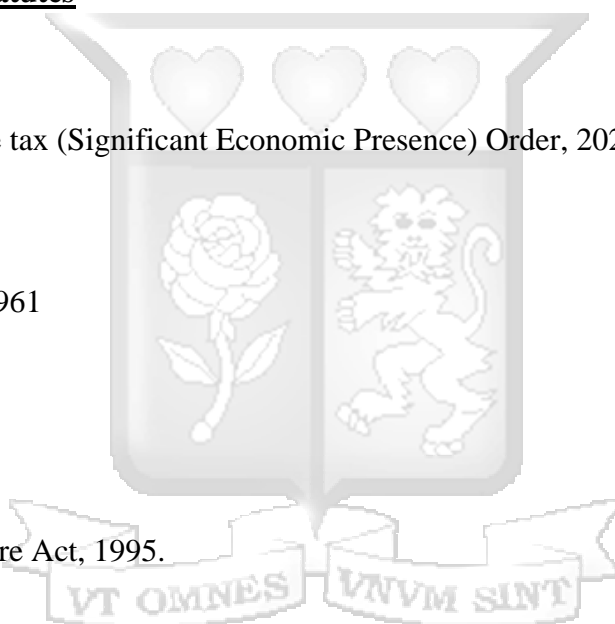
Export Control Form Act, 2018

Federal Acquisition Supply Chain Act, 2018

Immigration and Nationality Act, 1951

iv. France

French General Tax Code Law No. 2019-759 of 24, 2019



List of Treaties

General Agreement on Tariffs and Trade, 1994.

General Agreement on Trade in Services, 1995.



LIST OF ABBREVIATIONS

ADS	Automated Digital Services
ALP	Arm's Length Principle
ATAF	African Tax Administration Forum
BEPS	Base Erosion and Profit Shifting
CbC	Country by Country
CII	Critical Information Infrastructure
CTPA	Centre for Tax Policy and Administration
DST	Digital Service Tax
DTT	Double Taxation Agreement
GAFA	Google, Apple, Facebook, Amazon
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
GMT	Global Minimum Tax
ICT	Information and Communication Technology
IF	Inclusive Framework
MAU	Monthly Active Users
MLI	Multilateral Instrument
MNCs	Multinational Corporations
TRIPS	Trade-Related Aspects of Intellectual Property Rights

OECD	Organization for Economic Cooperation and Development
PE	Permanent Establishment
SEP	Significant Economic Presence
STIP	Strategic Trade and Investment Partnership
USTR	United States Trade Representatives
WTO	World Trade Organization



ABSTRACT

The rapid growth of the digital economy has caused serious gaps in international tax frameworks, with digital multinational corporations (MNCs) who are based in developed countries deriving colossal profits in market jurisdictions without a physical presence. The Organization for Economic Cooperation and Development (OECD) has been in the front line to offer guidelines for the taxation of the digital economy. However, these guidelines have been criticized for their developed-country bias and inadequate consideration of developing countries' needs. To assert their tax sovereignty, developing countries are slowly employing independent unilateral tax measures such as the digital service tax (DST) and significant economic presence (SEP) to secure revenues from the digital economy. However, this has been confronted with concerns over possible trade retaliation measures by developed countries that might perceive such measures as discriminatory to their MNCs. Consequently, the trade retaliatory measures are seen as a ploy to force countries into making trade-offs for their tax sovereignty in return for favorable trade relations, eroding their tax autonomy to create tax policies that reflect their needs. This study critically examines how each update of the OECD initiatives falls short for developing countries and goes ahead to examine the influence of corporate lobbying in shaping the OECD's initiatives with a specific focus on the inconsistent application of the OECD's lobbying recommendations, the concept of revolving doors and the OECD's role as a market-liberal think tank. Furthermore, the study explores the intersection of tax sovereignty and trade obligations by examining Kenya's DST and proposed SEP to draw out inequities and practical barriers such as retaliatory actions from the current framework. The study employs both primary and secondary sources to analyze the OECD framework. As a way forward, the study recommends reforms to ensure an inclusive and equitable global tax framework.

Keywords: Digital Economy, Lobbying, Multinational Companies, Tax Sovereignty, Unilateral Tax Measures, Trade Retaliatory Measures, Kenya, Taxation Framework, Developing Countries, Developed Countries.

TABLE OF CONTENTS

DECLARATION	i
ACKNOWLEDGEMENTS	ii
LIST OF CASES	iii
LIST OF LEGAL INSTRUMENTS	iv
List of Kenyan Statutes	iv
List of Foreign Statutes	iv
i. Nigeria	iv
ii. India	iv
iii. The U.S.	iv
iv. France	iv
List of Treaties	v
LIST OF ABBREVIATIONS	vi
ABSTRACT	viii
1.0 CHAPTER ONE: INTRODUCTION	1
1.1 Background	1
1.2 Statement of Problem	6
1.3 Research Objectives	7
1.4 Research Questions	8
1.5 Hypothesis	8
1.6 Justification	8
1.7 Scope of Study	9
1.8 Theoretical Framework	9
1.8.1 Fiscal Sovereignty Theory	9
1.8.2 Equity in Taxation Theory	10
1.8.3 Global Governance and Dependency Theory	11
1.9 Literature Review	12
1.9.1 Definition and Characteristics of the Digital Economy	12
1.9.2 The Evolution of the Nexus Theory	14
1.9.2.1 The Physical Presence Era	14
1.9.2.2 The Shift Towards Economic Presence	16
1.9.2.3 Understanding Permanent Establishment in International Tax Framework	17
1.9.3 Challenges in Taxing the Digital Economy	19
1.10 Research Methodology	21
1.11 Limitations of the Study	22

1.12 Chapter Breakdown	22
2.0 CHAPTER TWO: EXAMINATION OF OECD’S TAX FRAMEWORK.....	23
2.1 Introduction.....	23
2.2 The Organization for Economic Cooperation and Development	23
2.2.1 Evidence of Bias in OECD Decision-Making Bodies.....	24
2.2.2 The Launch of the BEPS Project	26
2.2.3 The Multilateral Instrument (MLI).....	29
2.2.4 The G20 Inclusive Framework and the Two-Pillar Approach	32
2.2.4.1 Pillar One	32
2.2.4.2 Pillar Two.....	34
2.3 Conclusion	35
3.0 CHAPTER THREE: LOBBYING IN THE OECD.....	36
3.1 Introduction.....	36
3.2 Corporate Lobbying and its Strategies	36
3.3 Deliberative Democracy.....	41
3.3.1 The Inconsistent Application of the OECD’s Lobbying Recommendations	44
3.3.2 Revolving Doors in the OECD	45
3.3.3 OECD as a Market-Liberal Think Tank	48
3.4 Conclusion	51
4.0 CHAPTER FOUR: THE TRADE-OFF BETWEEN TAX SOVEREIGNTY AND INTERNATIONAL TRADE OBLIGATIONS	52
4.1 Introduction.....	52
4.2 Exercising Sovereignty: Unilateral Tax Measures.....	52
4.2.1 DST to SEP in Kenya: A Withdrawn Transition.....	53
4.2.2 Retaliatory Trade Measures	60
4.2.2.1 Direct Retaliatory Measures.....	60
4.2.2.2 Indirect Retaliatory Measures	64
4.2.2.2.1 National Security Concerns.....	64
4.2.2.2.1 Labor Mobility	66
4.3 Unilateral Tax Measures v International Trade Obligations.....	67
4.3.1 Impact of WTO Non-Discrimination Principles on Unilateral Tax Measures	67
4.4 Understanding Trade-Offs.....	69
4.5 Conclusion	69
5.0 Chapter Five: Findings, Recommendations, and Conclusion.....	70
5.1 Introduction.....	70
5.2 Summary of the Main Findings.....	70

5.3 Recommendations 71
5.4 Conclusion 72
PRELIMINARY BIBLIOGRAPHY 73



1.0 CHAPTER ONE: INTRODUCTION

1.1 Background

“The oranges upon the trees in California are not acquired wealth until they are picked, not even at that stage until they are packed, and not even at that stage until they are transported to the place where demand exists and until they are put where the consumer can use them. These stages, up to the point where wealth reaches fruition, may be shared by different territorial authorities.”¹

As highlighted by the League of Nations Report, the journey of an orange embodies value creation in the digital economy.² The process of realizing the orange’s value in multiple stages from production, and distribution to consumption by different stakeholders is symbolic of the wealth derived from the digital space which often does not stem from one jurisdiction but through a series of engagements such as user engagement and data collection that transcend geographical boundaries.³ This concept resonates with the challenges of taxing the digital economy specifically digital MNCs that generate substantial profits from users residents in market jurisdictions without having a “brick-and-mortar” establishment⁴ in that country.⁵ The revolution of the digital economy has transformed the lives of people and remodeled businesses.⁶ The progress of this digital shift was seen during the COVID-19 pandemic where the implementation of lockdowns increased reliance on online services. This was evident in the second quarter of 2020 when Amazon reported a

¹ League of Nations, Report on Double Taxation Submitted to the Financial Committee by Professors Bruins, Einaudi, Seligman, and Sir Josiah Stamp (League of Nations Publications, 1923).

² Mihail, B., ‘Digital Economy and New Value Creation: 15th International Conference on Business Excellence,’ ICBE 202, Springer Proceedings in Business and Economics, 2022, 45.

³ Elijah, C., Pamela, A., and Jonathan F., ‘Understanding the Interplay between Boundary Resources and Government Practices in Influencing Ecosystem Value Co-creation for Digital Platforms: A Case from the Global South,’ 30(2), Journal of Strategic Information Systems, 2021,10.

⁴ OECD, ‘Commentary on Article 5: Concerning the definition of Permanent Establishment,’ in Model Tax Convention on Income and on Capital, (Full Version) OECD Publishing, 2014, 1-2, < https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2014-full-version/commentary-on-article-5-concerning-the-definition-of-permanent-establishment_9789264239081-39-en#page1 >.It provides for some of the elements of PE which includes agency relationships, construction sites and place of business.

⁵ Cardenas Cardenas, G., and Tobes Portillo P., ‘Taxation of Multinational Companies in the Digital Economy: Current Outlook,’ Handbook of International Business Policy, Edward Elgar Publishing, 2024, 425-441.

⁶ World Economic Forum, ‘Expanding participation and boosting growth: The infrastructure needs of the digital economy,’ 2015 <https://www3.weforum.org/docs/WEFUSA_DigitalInfrastructure_Report2015.pdf>.

profit of \$5.2 billion the largest in its inception since 1994⁷ while the global e-commerce share of retail trade rose from 14% in 2019 to 17% in 2020.⁸ The rising influence of the digital economy showcased the challenges of traditional tax systems which are based on the physical nexus principle.⁹ The pandemic has also underlined one major challenge: the difference between the profits generated by MNCs and their contribution to taxes in market jurisdictions. This has also sparked serious concerns about tax base erosion and profit shifting as MNCs avoid paying taxes in markets where they create value.¹⁰ One could blame this on the inherent reliance of tax laws on the concept of permanent establishment which ties tax obligations by corporations to having a physical presence.¹¹ The emergence of the economic nexus principle, a contrast to the physical nexus principle, relies on where value is created rather than the presence of a physical footprint thus forming a basis for the taxation of digital MNCs by market jurisdictions.¹²

⁷ 'Amazon, Apple Thriving on Lockdown', BBC News, 31st July 2022 <<https://www.bbc.com/news/business-53602596>> 18th August 2024. 'Many Companies won't survive the pandemic, Amazon Will Emerge Stronger than Ever, Alana Semuels, 28th July 2020 < <https://time.com/5870826/amazon-coronavirus-jeff-bezos-congress/>> 18th August 2024.

⁸ 'How Covid-19 Triggered the Digital and E-commerce Turning Point,' Andrey Popov, 15th March 2021 <<https://unctad.org/news/how-covid-19-triggered-digital-and-e-commerce-turning-point> > 18th August 2024.

⁹ Sven H., 'The Taxation of Permanent Establishments: A Critical Analysis of the Authorized OECD Approach and its Implementation in German Tax Law,' Springer Gabler, Wiesbaden, 2021, 78. See also Julie Roman L., 'The Evolution and Future of Substantial Nexus in State Taxation of Corporate Income,' 46(5), Boston College Law Review 2005, 1387-1420 <<https://bclawreview.bc.edu/articles/1022> >. She contends that the physical presence standard the substantial economic value and highlights the need of legislative reforms by adopting economic presence. See, Armstrong Gregory T., 'Physical Presence v Virtual Presence: The Cyberspace Challenge to Quill and the Streamlined Sales and Use Tax Act,' 9, The State and Local Tax Lawyer, 2004, 59-86 <<https://www.jstor.org/stable/42721241>>.

¹⁰ OECD, 'Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project,' OECD Publishing, 2015, 107-117. See also, Zhang, Q. and She, J., 'Digital Transformation and Corporate Tax Avoidance: An Analysis Based on Multiple Perspectives and Mechanisms,' 19(9) Plos One, 2024 <<https://journals.plos.org/plosone/article/authors?id=10.1371/journal.pone.0310241> >.

¹¹ Michael, K., 'International Taxation of Permanent Establishments,' Cambridge University Press, Cambridge, 2011, 56. See also, OECD, 'Article 5 Permanent Establishment' in Model Tax Convention on Income and on Capital,' (Full Version), OECD Publishing, 2017. <https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2017-full-version_53228dae-en>. It defines a PE as a "fixed place of business through which the business of an enterprise is wholly or partly carried on."

¹² Knoll, M., 'Tax Nexus in a Digital Economy: Wayfair and the Future,' 132(4) Harvard Law Review, 2019, 1123-1152.

The reliance on taxation of the digital economy by developing countries is due to crucial economic challenges such as high rates of budget deficits,¹³ debt burdens,¹⁴ poverty,¹⁵ limited borrowing options, and slower GDP growth.¹⁶ Additionally, MNCs tend to employ various tactics such as the utilization of tax havens,¹⁷ profit shifting¹⁸, and manipulation of transfer pricing¹⁹ that enable them to allot profits to low-tax jurisdictions, lowering their tax liabilities²⁰ thus exacerbating the economic crisis in developing countries. In 2017, \$850 billion in profits were shifted by MNCs to countries with tax rates below 10%.²¹ Consequently, developing countries lose immense tax revenues for their development.²²

¹³‘Reforms are Needed to Stem a Slow-down in Kenya’s Economic Growth,’ World Bank Group, 10th December 2024 <<https://www.worldbank.org/en/news/press-release/2024/12/10/reforms-are-needed-to-stem-a-slow-down-in-kenya-s-economic-growth> > 18th August 2024. The World Bank revised down Kenya’s economic growth for the year 2024 due to missed revenue targets and high debt servicing costs.

¹⁴‘Unlocking the Development Potential of Public Debt in Sub-Saharan Africa,’ World Bank Group, 15th December 2023 <<https://www.worldbank.org/en/results/2023/12/15/unlocking-the-development-potential-of-public-debt-in-sub-saharan-africa> > 18th August 2024. The World Bank Group reports that Sub-Saharan Africa’s nominal debt reached \$1.14 trillion in 2022 due to factors such as weak debt management etc.

¹⁵ The World Bank Group, ‘Poverty, Prosperity and Planet Report: Pathways Out of the Polycrisis,’ 2024, 85-92 <<https://www.worldbank.org/en/publication/poverty-prosperity-and-planet#:~:text=Pathways%20Out%20of%20the%20Polycrisis&text=This%20report%20offers%20the%20first,are%20impacting%20the%20world%20simultaneously.> >.

¹⁶ ‘The Global Economy on Track Strong but Uneven Growth as Covid-19 Still Weighs,’ The World Bank Group, 8th June 2021 <<https://www.worldbank.org/en/news/feature/2021/06/08/the-global-economy-on-track-for-strong-but-uneven-growth-as-covid-19-still-weighs#:~:text=A%20year%20and%20a%20half,as%20many%20developing%20economies%20lag.>> > 18th August 2024. According to the World Bank Group, the global economy was projected to grow by 5.6% in 2021. However, developing countries’ economies still grappled with COVID-19 impacts.

¹⁷ Garcia-Bernado, J., Jansky, P. and Thomas T., ‘Multinational Corporations and Tax Havens: Evidence from Country-by-Country Reporting,’ 28, International Tax and Public Finance, 2021, 1519-1561 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3672981 >.

¹⁸ Sebastian B., Ruud de Mooij and Li Liu, ‘International Corporate Tax Avoidance: A Review of the Channels, Magnitudes and Blind Spots,’ International Monetary Fund Working Paper 18/168, 2018, 11-25 <<https://www.imf.org/en/Publications/WP/Issues/2018/07/23/International-Corporate-Tax-Avoidance-A-Review-of-the-Channels-Effect-Size-and-Blind-Spots-45999> >.

¹⁹ Mpofu, F.S., Eukeria, M. and Samantha, C.S., ‘An Exposition of Transfer Pricing Motives, Strategies and their Implementation in Tax Avoidance by MNEs in Developing Countries,’ 8(1) Cogent Business and Management, 2021 <<https://www.tandfonline.com/doi/pdf/10.1080/23311975.2021.1944007#:~:text=Abusive%20transfer%20pricing%20results%20in,impacts%20of%20transfer%20pricing%20manipulation.> >.

²⁰ Pandey, K., Yadav, S.S. and Sharma, S., ‘Drivers of Tax Avoidance by MNEs in the Developing Countries under the Digital Economy: A Modified-TISM Approach,’ 20(5), Journal of Advances in Management Research, 2023, 896-919.

²¹ Garcia-Bernado, J. and Jansky, P., ‘Profit Shifting of Multinational Corporations Worldwide,’ 2023 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4435224 >.

²² Kalra, A. and Afzal, M.N.I, “ ‘Transfer Pricing Practices and their Effects on Developing Countries’ Tax Revenue: A Systemic Literature Review,” 7(3), International Trade, Politics and Development, 2023, 172-

This has sparked interest from different stakeholders in the international space to formulate policies in a bid to tax the digital economy equitably and reinforce tax sovereignty for developing countries.²³

There is growing pressure globally to reform tax rules so that digital businesses pay their fair share of national revenues. The OECD has been at the forefront through its BEPS project in discussing these issues, specifically Action 1 which deals with the tax challenges of the digital economy.²⁴ Its initiatives such as the BEPS project and its two-pillar solution have been highly criticized for their limited scope, exclusion of DST, and lower global minimum tax rate among many other issues that have detrimental effects on developing countries.²⁵ Furthermore, there have been recent discussions that the influence of lobbying on the OECD has skewed its initiatives to favor developed countries. In 2010, the OECD released its Recommendation of the Council on Transparency and Integrity in Lobbying²⁶ and further released a publication in 2021 to address the rise of the digital economy that has reformed lobbying tactics making them more complex, diverse, and prone to abuse.²⁷ As much as the OECD has acknowledged the need for transparency in lobbying activities, many have criticized its inconsistent application in regards to the anonymization and

190 < <https://www.emerald.com/insight/content/doi/10.1108/itpd-04-2023-0011/full/html#:~:text=Some%20of%20these%20issues%20include,transfer%20pricing%20on%20other%20economic>>.

²³ Marcin, S., 'Digital Taxation: State of Play and Way Forward,' European Parliamentary Research Service, 2020, 2-8 <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649340/EPRS_BRI\(2020\)649340_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/649340/EPRS_BRI(2020)649340_EN.pdf) >. See also, OECD, Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, 2015 <https://www.oecd.org/en/publications/2015/10/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report_g1g58cdd.html >.

²⁴ OECD, Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, 2015 <https://www.oecd.org/en/publications/2015/10/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report_g1g58cdd.html >.

²⁵ 'The OECD-led Tax Deal Will Only Deepen Inequalities Within and between Countries,' Global Alliance for Tax Justice, 26th August 2022, <<https://globaltaxjustice.org/news/the-oecd-led-tax-deal-will-only-deepen-inequalities-within-and-between-countries/>> 18th August 2024.

²⁶ OECD, Recommendation of the Council on Transparency and Integrity in Lobbying and Influence, OECD/LEGAL/0379 <<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0379> >.

²⁷ OECD, 'Lobbying in the 21st Century: Transparency, Integrity and Access,' OECD Publishing, 2021 <https://www.oecd.org/en/publications/lobbying-in-the-21st-century_c6d8eff8-en.html >.

confidentiality of country-by-country (CbC) reporting that requires companies' data public to promote tax transparency to curb tax abuse.²⁸ Others question whether the same recommendations apply to the organization even though they were drafted for national governments, more particularly the concept of revolving doors where OECD officials can slip between related public and private sectors threatening the integrity of international tax forums.²⁹

The OECD also expressed concerns about the implementation of unilateral tax measures such as DST and SEP at the state level which run the risk of fragmenting the international tax system and are detrimental to economic growth and has advocated for a multilateral approach.³⁰ Pillar 1 of the OECD's two-pillar solution aims to re-allocate taxing rights by re-allocating the profits of the most profitable MNCs from where they earn income to where they sell products and services and imposes the removal of DSTs by countries failure of which such countries will be disallowed their share of Amount A.³¹ Currently, the implementation of unilateral tax measures such as DST has led to trade tensions between the countries implementing these taxes and countries housing the giant digital MNCs. For example, the U.S views these measures as discriminatory against its digital MNCs and has

²⁸ 'OECD Breaks Silence on Lobbying – Tax Justice Network Response, 9th July 2023, <<https://taxjustice.net/press/oecd-breaks-silence-on-lobbying-tax-justice-network-response/>> 18th August 2024.

²⁹ Fung, S., 'The Questionable Legitimacy of the OECD/G20 Beps Project,' Erasmus Law Review, 2, 2017.

³⁰ OECD/G20 Inclusive Framework Releases Additional Administrative Guidance on Pillar Two GloBE Rules and Update on Pillar,' EY Global, 22nd December 2023, < https://www.ey.com/en_gl/technical/tax-alerts/oecd-g20-inclusive-framework-releases-additional-administrative-0#:~:text=It%20also%20addressed%20the%20existing,implemented%20DSTs%20or%20similar%20measures> 18th August 2024.

³¹ OECD, 'The Multilateral Convention to Implement Amount A of Pillar One,' OECD Publishing, 2023 <<https://www.oecd.org/content/dam/oecd/en/topics/policy-issues/cross-border-and-international-tax/multilateral-convention-amount-a-pillar-one-overview.pdf>>. Amount A is the reallocation of a portion of residual profits of large MNCs to market jurisdictions where they generate significant revenue regardless of physical presence.

threatened retaliatory tariffs in response.³² In 2019, the USTR initiated Section 301³³ into France's DST concluding that it was discriminatory and imposed tariffs on French goods even though it was suspended for negotiations.³⁴ The same thing happened to the U.K., India, Spain, Turkey, and Italy in 2021. As of November 2024, the U.S. renewed calls for Italy to suspend its web tax that targets digital MNCs like Meta, Amazon, and Google and threatened retaliatory measures if Italy fails to comply.³⁵ The same concerns arise for developing countries who are gradually implementing these unilateral tax measures to assert their tax sovereignty only that one could argue that it is a justifiable move for developing countries under the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS) General Exception Clause that allows member states to adopt necessary policies that would otherwise contradict WTO's rules to achieve certain legitimate aims.

1.2 Statement of Problem

The rapid growth of the digital economy has enabled MNCs to exploit its distinct features to shift profits and avoid taxes in market jurisdictions where they have a significant economic presence and generate immense profit.³⁶ As a result, developing countries that

³² 'United States Requests USMCA Dispute Settlement Consultations on Canada's Digital Services Tax,' The Office of the USTR, 30th August 2024, <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/august/united-states-requests-usmca-dispute-settlement-consultations-canadas-digital-services-tax#:~:text=%E2%80%9CThe%20United%20States%20opposes%20unilateral,that%20discriminate%20against%20U.S.%20companies.>> 30th September 2024.

³³ Section 301 of the Trade Act 1974 (United States). The section allows the USTR to investigate and take action against foreign trade practices that are unfair, discriminatory or harmful to the U.S. commerce including imposing retaliatory trade measures to address such issues.

³⁴ 'Suspension of Tariff Action in France Digital Services Tax Investigation,' The Office of the USTR, 7th January 2021, <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/january/suspension-tariff-action-france-digital-services-tax-investigation> > 18th August 2024.

³⁵ 'Italy's Digital Tax Gambit—Will US Trade Retaliation Follow?' 9th October 2024, <<https://www.forbes.com/sites/andrewleahy/2024/10/09/italys-digital-tax-gambit-will-us-trade-retaliation-follow/>> 18th November 2024.

³⁶ Riedel, N., 'Quantifying International Tax Avoidance: A Review of the Academic Literature,' 69(2), Review of Economics, 2018, 169-18 <https://www.degruyter.com/document/doi/10.1515/roe-2018-0004/html?lang=en&srsltid=AfmBOorc_G8NaWoTS7Jupl0zcOLenVjz9BwraFvqG7HZ5GX8bTQtPm1S >. Riedel states that shifting profits through intangibles is one of the ways MNCs adopt to profit from low-tax jurisdictions. See also, Ali, S., 'Corporate Taxation and Intangible Assets: A Systematic Literature Review and Future Research Trends,' In: Bilgin, M.H., Danis, H., Demir, E. (eds) Eurasian Business and Economics

heavily rely on corporate taxes to fund essential public services³⁷ experience losses in revenue thus there is a need for sustainable revenue streams to support their economies. These efforts toward a taxed digital economy find their resonance in international frameworks such as the OECD/G20 Inclusive Framework (IF) on BEPS. However, critics point out that these initiatives are biased towards developed countries at the expense of developing countries, prompting them to adopt unilateral tax measures.³⁸ On the other side, these measures have seen much hue and cry globally with threatened retaliatory trade actions.³⁹ This study, therefore, seeks to investigate the OECD guidelines on digital taxation and assess the extent to which these guidelines address the challenges faced by developing countries in taxing digital MNCs or further exacerbate the inequalities within the global tax framework. It also seeks to assess the role of corporate lobbying in shaping the OECD framework. It then goes ahead to make a case for developing countries employing unilateral tax measures to assert their tax sovereignty and narrows its focus to examine Kenya's implementation of DST and SEP and its potential trade implications with the U.S. The study will then propose recommendations to reform the OECD framework and strengthen the fiscal sovereignty of developing countries.

1.3 Research Objectives

1. To analyze the OECD's digital tax guidelines and critique its effectiveness for developing countries.
2. To investigate the influence of corporate lobbying on the OECD tax framework.

Perspectives, 24, Eurasian Studies in Business and Economics, Springer Cham, 2022, 171-189 <https://link.springer.com/chapter/10.1007/978-3-031-15531-4_11>. Ali indicates that MNCs reduce taxable income in high tax jurisdictions by transferring intangible assets like patents to subsidiaries based in low tax jurisdictions or tax havens and allocating profits to these firms through royalty payments.

³⁷ International Monetary Fund, 'Revenue Mobilization in Developing Countries,' IMF Working Paper, 2011, 33-37 <<https://www.imf.org/external/np/pp/eng/2011/030811.pdf>>. This paper asserts a massive dependence of developing countries on corporate taxes and advocates for tax reforms to sustain revenue stability.

³⁸ Oguttu A., 'A Critique from a Developing Country Perspective of the Proposals to Tax the Digital Economy,' 12(4), World Tax Journal, 2020, 799-828 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4223102>.

³⁹ Connor, L.S., 'Reflections from the Brink of Tax Warfare: Developing Countries, Digital Service Taxes and an Opportunity for More Just Global Governance with the OECD's Two-Pillar Solution,' 63(5) Boston College Law Review, 2022, 1797-1861 <<https://bclawreview.bc.edu/articles/34>>.

3. To examine the tension between tax sovereignty and international trade obligations, highlighting the challenges of implementing unilateral tax measures like the DST with a specific focus on Kenya.
4. To provide recommendations for reforming the OECD to improve the fiscal autonomy of developing countries.

1.4 Research Questions

1. How effective are the OECD's digital tax guidelines in addressing the tax challenges faced by developing countries?
2. How does corporate lobbying influence the OECD tax framework?
3. What are the trade-offs between exercising tax sovereignty through unilateral tax measures by developing countries and the risks posed by international trade obligations such as retaliatory measures?
4. What reforms in the OECD can strengthen the fiscal autonomy of developing countries?

1.5 Hypothesis

The existing OECD's digital tax framework does not adequately address the needs of developing countries, and the influence of corporate lobbying exacerbates this situation, resulting in them employing unilateral tax measures to assert their tax sovereignty despite facing potential trade retaliation.

1.6 Justification

The rationale for this study is grounded on the need to address the shortcomings of the OECD-led digital tax initiatives, in addressing the challenges faced by developing countries that are gradually employing unilateral tax measures to assert their tax sovereignty leaving them vulnerable to trade retaliations from developed countries. Additionally, the OECD policies are often biased owing to extensive lobbying and the inconsistent application of the OECD's lobbying recommendations. The findings will contribute to the continuing global debate on digital taxation and its implications for developing countries and provide

recommendations that shall guide policymakers in implementing fair and equitable digital tax policies reflective of developing countries' realities.

1.7 Scope of Study

The scope of this research encompasses a detailed examination of the existing OECD digital tax guidelines, particularly addressing the tax challenges posed by the digital economy for developing countries. It also evaluates Kenya's unilateral tax measures to draw out the challenges faced by developing countries in taxing the digital economy and potential trade retaliations and analyzes the role of lobbying in shaping the global tax framework. The study goes ahead to offer recommendations to enhance fairness and equity in the global digital tax framework.

1.8 Theoretical Framework

1.8.1 Fiscal Sovereignty Theory

The theory holds that fiscal sovereignty is an inalienable right that enables States to create and manage their financial policies and resources independently, free from external forces thus is pegged on the idea that tax is the sine qua non of States reinforcing state autonomy.⁴⁰ It is founded on the principle of national sovereignty which confers governments the power to determine their tax rates, define their taxable income, and establish their systems of revenue collection that conform to their realities.⁴¹ Notably, these sovereign rights come with the responsibility to uphold justice and fairness within the global community.⁴²

Fiscal sovereignty initially revolved around taxing physical presence within a State's borders, an approach effective in industrial economies. However, globalization and the rise

⁴⁰ Diestch, P., 'Rethinking Sovereignty in International Fiscal Policy,' 37, 5, *Review of International Studies*, 2011, 2107-2120 <<https://doi.org/10.1017/S0260210511000349>>. See also, Zgaga, T., 'The Coexistence of Fiscal Sovereignities: The Post-Pandemic European Union in Comparative Perspective,' 11(4) *Politics and Governance*, 2023, 102-111 <<https://doi.org/10.17645/pag.v11i4.7244>>.

⁴¹ Bantekas, I., 'The Contractualization of Fiscal and Parliamentary Sovereignty: Towards a Private International Finance Architecture?' 11(1) *Global Constitutionalism*, 2022, 139-159 <<https://doi.org/10.1017/S2045381721000101>>.

⁴² Roth Brad, R., 'The International Law of Sovereign Equality,' *Sovereign Equality and Moral Disagreements*, Oxford Academic, 2012, 53-92 <<https://doi.org/10.1093/acprof:oso/9780195342666.003.0003>>. The article states that sovereignty is not absolute and is contingent to the fulfillment of certain obligations in the promotion of justice and equity.

of digital MNCs exposed gaps in these traditional frameworks.⁴³ Although efforts like the OECD's double taxation agreements aimed at addressing cross-border transactions and thus promoting international cooperation, they still struggle to counter profit shifting and tax avoidance which have increasingly weakened fiscal sovereignty.⁴⁴ Additionally, digital MNCs that operate in market jurisdictions, generate revenue without a physical presence and fail to contribute a fair share of profits to such jurisdictions threatening their fiscal sovereignty and thus prompting them to rely on emerging concepts such as DST and SEP tax to allocate tax rights based on value creation rather than physical location.

The theory is grounded in principles like non-interference which goes hand in hand with autonomy in decision-making that grants States control over their tax policies.⁴⁵ This principle justifies unilateral measures like DST and SEP by developing countries to meet the needs of their people.⁴⁶ The theory is also rooted in the principle of equity in taxation which advocates for the equitable distribution of taxing rights that challenges OECD's digital tax framework for favoring developed countries. Fiscal sovereignty is important for promoting economic development for developing countries relying on corporate revenue streams to finance fundamental public needs and achieve sustainable development.

1.8.2 Equity in Taxation Theory

Equity in taxation theory states that an individual's contribution to public revenue should be based on their ability to pay and the benefits they receive from public goods.⁴⁷ The theory has its roots in Adam Smith's *Wealth of Nations* where he provided for the canons of taxation that include the principle of fairness.⁴⁸ The benefit principle holds that entities

⁴³ Tsilly, D., 'Substantive Tax Sovereignty Under Globalization,' 29(3) *Tilburg Law Review*, 2024, 1-9 <<https://tilburglawreview.com/articles/10.5334/tlr.399>>. See also, Tsilly, D., 'Klaus Vogel Lecture 2021: Unbundled Tax Sovereignty: Refining the Challenges,' *Bulletin for International Taxation*, 2022, 318-328 <<https://www.ibfd.org/sites/default/files/2022-09/ifa-free-bit-article.pdf>>.

⁴⁴ Van Alperdoon, L., 'BEPS, Tax Sovereignty and Global Justice,' 21(4), *Critical Review of International Social and Political Philosophy*, 2016, 478-499 <<https://doi.org/10.1080/13698230.2016.1220149>>.

⁴⁵ Jens, B., 'The Concept of Sovereignty Revisited,' 17(2) *European Journal of International Law*, 463-474, 2006 <<https://doi.org/10.1093/ejil/chl006>>.

⁴⁶ Morris, W.H., 'Comments on Klaus Vogel Lecture 2021: Unbundled Tax Sovereignty: Refining the Challenges,' 76(7), *Bulletin for International Taxation*, 2022, 329-332 <<https://ssrn.com/abstract=5003216>>

⁴⁷ Dodge, J.M., 'Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles,' Florida State University, College of Law, 2005 <<https://ssrn.com/abstract=696821>>.

⁴⁸ Hutchison, T., 'Adam Smith and the Wealth of Nations,' 19(3) *The Journal of Law and Economics*, 1976, 507-528.

should pay taxes proportionally to the benefits they derive from a State's resources⁴⁹ while the ability to pay principle asserts that those who earn a higher income ought to pay a greater percentage of that income in taxes and vice versa.⁵⁰ Consequently, digital MNCs deriving substantial profits from internet penetration and consumer base in developing countries ought to contribute a fair share of their revenues to developing countries. The theory has two perspectives to it: horizontal equity and vertical equity.⁵¹ Horizontal equity states that where there are two people or entities with the same capability to pay taxes, both should bear the same burden⁵² while vertical equity emphasizes taxing entities with a higher income at a higher rate due to their greater ability to contribute.⁵³ The two perspectives shed light on this study by highlighting the disparities in treating physical-based businesses and digital businesses. While physical-based businesses are taxed based on their physical footprint in a jurisdiction, digital businesses avoid paying taxes because of a lack of physical nexus. The shortcomings of the OECD digital tax framework that are to be discussed in the later chapters will showcase how it fails to create a level playing field for physical and digital economies by allowing tax avoidance by digital MNCs who are mostly based in developed countries at the expense of developing countries.

1.8.3 Global Governance and Dependency Theory

Global governance emphasizes the collaborative role of international organizations, States, and non-state actors in addressing global challenges to ensure fairness and equality in decision-making.⁵⁴ Institutions such as the OECD play a vital role in global tax matters to address BEPS and the taxation of the digital economy. However, in practice, the dominance of developed countries in decision-making skews these frameworks in their favor. Thus, there is a need to examine the influence of corporate lobbying in the OECD framework. The dependence theory grounded in Marxist theory highlights the history of class struggle

⁴⁹ Weinzeirl, M., 'Revisiting the Classical View of Benefit-Based Taxation,' 128(612) *The Economic Journal* 2018, F37-F64 <<https://www.jstor.org/stable/45023084>>.

⁵⁰ Pressman, M., 'The Ability to Pay in Tax Law: Clarifying the Concepts Egalitarian and Utilitarian Justifications and the Interactions between the Two,' *New York University Journal of Legislation and Public Policy*, 141, 2018 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3053641#>.

⁵¹ Duclos, J.Y., 'Horizontal and Vertical Equity. In: *The New Palgrave Dictionary of Economics*,' Palgrave Macmillan, 2008, 1-6.

⁵² Musgrave, R.A., 'Horizontal Equity Once More,' 43(2) *National Tax Journal*, 1990, 113-122.

⁵³ Murphy L., and Thomas N., 'Traditional Criteria of Tax Equity', in *The Myth of Ownership: Taxes and Justice*, Oxford Academic, 2002, 12-39 <<https://doi.org/10.1093/0195150163.003.0002>>.

⁵⁴ Zürn, M., 'A Theory of Global Governance: Authority, Legitimacy, and Contestation,' *Oxford Academic*, 2018 <<https://doi.org/10.1093/oso/9780198819974.001.0001>>.

and economic exploitation between developed and developing countries⁵⁵ and goes further to critique neoliberal policies advanced by institutions like the OECD in exacerbating existing inequalities by prioritizing the interests of developed countries over those of developing countries. The dependency theory illustrates the consistent subordination of developing countries by developed countries through global economic systems to extract resources and wealth from the ‘periphery’ to the ‘core’.⁵⁶ This is evident in the challenges developing nations face in the OECD and in implementing unilateral tax measures which are likely to be met by international backlash and retaliatory trade measures. This theory explains how such frameworks perpetuate structural inequalities, erode fiscal sovereignty, and limit revenue generation.

1.9 Literature Review

1.9.1 Definition and Characteristics of the Digital Economy

The evolving nature of the digital economy explains why the concept lacks a unified accepted definition. However, scholars and international organizations have made various attempts at conceptualizing it. Don Tapscott offered an initial understanding of the concept when he defined it as a form of economic activity propelled by digital technologies such as ICT that played a pivotal role in connecting consumers and businesses.⁵⁷ His definition was highly criticized for being overly broad and not accommodating new digital models. The OECD came in to refine the definition by categorizing the digital economy into ‘digital products’ and ‘digitized business models’ and goes ahead to highlight its reliance on data, digital platforms, and user interactions.⁵⁸ Authors like Verina and Titko have argued that

⁵⁵ Mahoney, J. and Diana Rodríguez-Franco, 'Dependency Theory', in Carol Lancaster, and Nicolas van de Walle (eds), *The Oxford Handbook of the Politics of Development*, Oxford Handbooks , 2018, <<https://doi.org/10.1093/oxfordhb/9780199845156.013.13>>. See, Dietz, J. L., ‘Dependency Theory: A Review Article,’ [in Review of *Dependency and Development in Latin America; Mexican Agriculture 1521-1630: Transformation of the Mode of Production*, by F. H. Cardoso, E. Faletto, & A. G. Frank], 14, 3, *Journal of Economic Issues*, 1980, 751–758 <[https://www.jstor.org/stable/3340297#:~:text=The%20work%20of%20the%20dependency,changing%20world%20capitalist%20system%20\(Frank%2C](https://www.jstor.org/stable/3340297#:~:text=The%20work%20of%20the%20dependency,changing%20world%20capitalist%20system%20(Frank%2C)>.

⁵⁶ Hout, W., ‘Dependency Theory,’ In M. Clarke, & X. Zhao (Eds.), *Elgar Encyclopedia of Development*, Edward Elgar Publishing, 2023, 162-166 <https://pure.eur.nl/ws/portalfiles/portal/116167434/Hout_-_Dependency_theory_-_for_Pure.pdf>.

⁵⁷ Tapscott, D., ‘The digital economy: promise and peril in the age of networked intelligence,’ 1997. See also, Bazzoun, M., ‘The Digital Economy,’ 5(9), *International Journal of Social Science and Economics Invention*, 2019, 116-117 <https://www.researchgate.net/publication/338845259_The_Digital_Economy>.

⁵⁸ OECD, ‘Addressing the Tax Challenges of the Digital Economy: Action 1-2015 Final Report.’ OECD Publishing 2015, 142.

this approach oversimplifies the complexities of digital transformation. They assert that the OECD's definition overlooks the blurred lines between digital and traditional businesses given that more traditional businesses are trying to incorporate digital elements in their models.⁵⁹ Others have attempted to define the digital economy through a factor approach. For instance, the OECD Interim Report of 2018 provided three factors: dependence on data analytics, network scalability, and content creation and user participation.⁶⁰ According to Zeamari and Laurier, this is a reductionist view that does not consider the versatile nature of the digital economy. They go ahead to argue that such an approach overlooks hybrid models and advocate for a recursive approach that would take into account technological advancements and be based on the types of economic activities instead of a rigid approach.⁶¹ Others have defined the digital economy by categorizing them into business models such as access models, subscription models, and advertising models.⁶² Such an approach reflects a grouping of similar revenue-generation mechanisms. Brenner contends that such an approach is static and fails to showcase the dynamic nature of the digital economy which often adapts to market trends by adopting multiple models.⁶³ For instance, Amazon combines all three models to generate revenue.⁶⁴

Traditional business models have been revamped by the digital economy which depends on new paradigms such as global scalability, automation, and data-driven decision-making. McAfee and Brynjolfsson illustrate how the digital economy has led businesses to grow without investing proportionally in physical infrastructure.⁶⁵ According to Statista, global digital economy revenue topped \$3 trillion in 2022 with Amazon and Alphabet contributing

⁵⁹ Verina, N. and Titko, J., 'Digital Transformation: Conceptual Framework,' Proceedings of the 6th International Scientific Conference in Business, Management and Economics Engineering, 2017, 723-725.

⁶⁰ 'The OECD Interim Report on Tax Challenges Arising from Digitalization: An Overview,' EY Global, 21st March 2018 <<https://globaltaxnews.ey.com/news/2018-5441-the-oecd-s-interim-report-on-tax-challenges-arising-from-digitalisation-an-overview> > 18th August 2024.

⁶¹ Zeamari, I. and Laurier, W., 'Defining Digital Platforms: A Systematic Literature Review,' in Bach Tobji, M.A., Jallouli, R., Sadok, H., Lajfari, K., Mafamane, D., Mahboub, H. (eds) Digital Economy, Emerging Technologies and Business Innovation, Springer, Cham, 2024, 59-72.

⁶² European Parliament, 'Tax Challenges in the Digital Economy,' 2016, 14 <[https://www.europarl.europa.eu/RegData/etudes/STUD/2016/579002/IPOL_STU\(2016\)579002_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/579002/IPOL_STU(2016)579002_EN.pdf)>.

⁶³ Brenner, B., 'Transformative Sustainable Business Models in the Light of the Digital Imperative—A Global Business Economics Perspective,' 10(12), Sustainability, 2018, 4-8 <https://www.mdpi.com/2071-1050/10/12/4428?utm_source=chatgpt.com >.

⁶⁴ 'Amazon Business Model—The Ecommerce Giants Revenue Stream,' Anurag Jain, 20th September 2024 <<https://oyelabs.com/amazon-business-model/>> 20th November 2024.

⁶⁵ Brynjolfsson, E., and McAfee, A., 'The Second Machine Age: Work, Progress, and Prosperity in a Time of Brilliant Technologies,' W.W. Norton and Company, New York, 2014, 98.

\$513 billion and \$282 billion respectively.⁶⁶ It would be apt to say that these large digital MNCs have revolutionized competition and caused a transformative effect on the digital economy.⁶⁷ What is of more importance is the dominating countries in the digital economy. The U.S. and China have and still dominate the digital economy⁶⁸ with both accumulating 75% of the world's market capitalization of digital companies.⁶⁹ Key actors such as Amazon, Alphabet, Meta, Tencent, and Alibaba drive this dominance. This power concentration on the US-China axis dominated by a handful of digital MNCs contributes to power imbalances leading to global inequalities as developing countries cannot compete in such spaces due to a lack of infrastructure and resources. It is also worth noting that the rise of user-generating value has significantly changed how economic benefits and taxing rights are distributed. Zucman emphasizes that digital platforms gain substantial value from user participation through source jurisdictions which are often sidelined because they often fail to capture corresponding tax revenues.⁷⁰

1.9.2 The Evolution of the Nexus Theory

1.9.2.1 The Physical Presence Era

The nexus theory forms the basis for defining taxable connections in both traditional and digital economies. International tax law tries to address issues like taxing rights over income derived from cross-border digital activities.⁷¹ Historically, physical presence allowed countries to impose taxes where income was generated, typically where businesses

⁶⁶ 'The 100 Largest Companies in the World by Market Capitalization in 2023,' Statista, 4th July 2024 <<https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-capitalization/>> 18th August 2024.

⁶⁷ European Parliament, 'Challenges for Competition Policy in a Digitalised Economy,' 2015, 29 <https://www.europarl.europa.eu/RegData/etudes/STUD/2015/542235/IPOL_STU%282015%29542235_EN.pdf?utm_source=chatgpt.com>.

⁶⁸ Hong Y., and Harwit, E., 'China's Globalizing Internet: History, Power and Governance,' 13(1), Chinese Journal of Communication, 2020, 15.

⁶⁹ 'Global Efforts Needed to Spread Digital Economy Benefits, UN Report Says,' UNCTAD, 4th September 2019 <https://unctad.org/news/global-efforts-needed-spread-digital-economy-benefits-un-report-says?utm_source=chatgpt.com> 18th September 2024.

⁷⁰ Weber, M., 'Emmanuel Saez and Gabriel Zucman: The Triumph of Injustice: How the Rich Dodge Taxes and How to Make Them Pay,' School of Finance, University of St.Gallen, 2020, 2-4 <https://www.researchgate.net/publication/343640580_Emmanuel_Saez_and_Gabriel_Zucman_The_Triumph_of_Injustice_How_the_Rich_Dodge_Taxes_and_How_to_Make_Them_Pay>.

⁷¹ Li, H., 'The Nexus Standard and its Implications for International Tax Competition and Soft Law,' 11(8) Osgoode Hall Law School of York University, 2020, 48.

had a physical presence. This was upheld in *Quill Corp v. North Dakota*,⁷² which maintained that businesses must have a physical presence within a state to be subject to tax. Note that the standard of physical presence was established back in 1967⁷³ as a prerequisite for tax enforcement claiming that the failure to meet that standard violated the Commerce Clause.⁷⁴ A four-fold test that consisted of substantial nexus,⁷⁵ fair apportionment,⁷⁶ non-discrimination,⁷⁷ and fair relations to service provided⁷⁸ was then founded to validate the legitimacy of state taxation under the Commerce Clause to avoid undue interference with interstate commerce.⁷⁹ The *Quill Corp Case* reiterated the *National Bellas Hess* decision which was a basis for the traditional physical nexus principle. This approach, according to *Avi-Yonah*, became inadequate in the digital age.⁸⁰ Companies like Amazon, Facebook, and Google derive significant revenue from countries without physical imprints, leading to BEPS.⁸¹

Avi-Yonah, along with scholars such as Kim Brooks and Richard Vann, has argued that taxation on physical presence, wherein tax obligations are imposed on corporations domiciled in certain jurisdictions, primarily benefits developed nations at the expense of

⁷² *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

⁷³ *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967). The case drew a bright-line rule restricting the State from taxing businesses outside the State.

⁷⁴ United States Constitution, Article I, Section 8, Clause 3. It states 'The Congress shall have power [...] to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.'

⁷⁵ Kolarik W.J., 'Untangling Substantial Nexus,' 64(4), *The Tax Lawyer*, 2011, 851-900 <<https://www.jstor.org/stable/23210390>>. The substantial nexus states that they ought to be a connection between the taxpayer and the taxing state.

⁷⁶ Bradley, W.J., 'The Meaning of Fair Apportionment and the Prohibition on Extraterritorial State Taxation,' 71, *Fordham Law Review*, 2005, 149. Fair apportionment requires that tax should be equitably allocated. This means that it should target only activities linked to the State to prevent businesses from being subject to double taxation across multiple jurisdictions.

⁷⁷ Knoll M.S., and Ruth M., 'The Dormant Commerce Clause and State Tax Discrimination,' 32, *Virginia Tax Review*, 2013, 318-326 <https://virginialawreview.org/wp-content/uploads/2020/12/KnollMason_Online.pdf>. It is of essence that the tax should not unfairly target interstate commerce by for example levying higher taxes on businesses based outside the State compared to in-State businesses.

⁷⁸ Brady P., 'Reimagining Due Process: A New Approach to Regulating State Taxing Authority,' 28, *Cornell Journal of Law and Public Policy*, 2019 <<https://www3.lawschool.cornell.edu/research/JLPP/upload/Plastaras-final.pdf>>.

⁷⁹ *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274 (1977).

⁸⁰ *Avi-Yonah R.S.*, 'International Tax as International Law: An Analysis of the International Tax Regime,' *University of Michigan Law School*, 2007, 10-12.

⁸¹ Schön, W., 'Ten Questions About Why and How to Tax the Digitalised Economy,' 11, *Working Paper of the Max Planck Institute for Tax Law and Public Finance*, 2017, 3 <<https://ssrn.com/abstract=3091496>>.

developing economies.⁸² Brooks emphasizes that there is gross inequality in global tax apportionment, where large MNCs pay taxes primarily in their home countries, despite earning substantial revenues in market jurisdictions.⁸³ Vann argues that at the base, all digital platforms rely on data generated by users in source countries.⁸⁴ As a result, it was necessary to revolutionize the physical nexus theory to recognize and accommodate the role of market jurisdictions, often source countries, in contributing to value creation.⁸⁵

1.9.2.2 The Shift Towards Economic Presence

The transition from physical to economic nexus has been central to the debate on international digital taxation. This shift was solidified by the landmark Wayfair Incorporation case which overturned the Quill decision by ruling that substantial economic presence alone, even without physical operations, is enough to create tax liability.⁸⁶ The concept of economic presence was introduced by the South Carolina Supreme Court in 1993. It held that the economic value derived from the use of intangible property such as a trademark within a jurisdiction is sufficient in determining the existence of a nexus for taxation.⁸⁷ This case forms the foundation for understanding how the nexus principle has evolved to adapt to the digital economy. Michael Knoll discusses how the economic nexus principle established in Wayfair has been adopted by jurisdictions worldwide, paving the way for measures like SEP.⁸⁸ Lackner, on the other hand, criticizes the delay in the adoption of the economic nexus principle due to the rising rate of States facing revenue deficits more specifically developing countries.⁸⁹

⁸² Avi-Yonah R.S., 'The New International Tax Regime,' 125(19) *Journal of International Economic Law*, 2021.

⁸³ Brooks, K., 'Taxation in a Global Economy: The Relationship between Income Taxation and International Trade and Investment,' Intersentia Publishing, 2009. See also Avi-Yonah R.S., 'The International Tax Regime in the Twenty First Century: The Rise of BEPS and the End of the Arm's Length Principle?' 1, *Florida Tax Review*, 2019, 1-17.

⁸⁴ Vann, R.J., 'Taxing International Business Income: Dividing the Spoils,' 2, *Oxford University Press in Tax Law Design and Drafting*, 2010.

⁸⁵ John A.S., 'State Income Tax Jurisdiction: Reflections on the Past and the Future,' 537(45), *Tax Law Review*, 2003.

⁸⁶ *Wayfair Inc. v South Dakota* 585, U.S. 138 S.Ct. 2080, 2018.

⁸⁷ *Geoffrey Inc. v South Carolina Tax Commission*, 437 S.E.2d 13 (S.C. 1993).

⁸⁸ Knoll, M., 'Tax Nexus in a Digital Economy: Wayfair and the Future,' 132(4), *Harvard Law Review*, 132, 4, 2019, 1123-1152.

⁸⁹ Lackner J.R., 'The Evolution and Future of Substantial Nexus in State Taxation for Corporate Income,' 46, *Boston College Law Review*, 2005, 1387.

1.9.2.3 Understanding Permanent Establishment in International Tax Framework

The concept of PE is critical in determining which jurisdiction has the right to tax business profits. However, there have been contentions regarding how this concept favors residence-based taxation⁹⁰ over source-based taxation.⁹¹ The OECD Model in Article 5 defines PE as a fixed place of business through which the business of an enterprise is wholly or partly carried on.⁹² The commentary on Article 5 expanded the definition to include agency and construction PE and excluded preparatory and auxiliary activities.⁹³ This definition is based on residence-based taxation by granting rights to the jurisdiction where the business is headquartered. Many argue that it disproportionately benefits developed nations where most of the digital MNCs are located.⁹⁴ Cockfield for example critiques the model by terming it as outdated since it ignores the reality of the digital economy⁹⁵ whereas Pistone and Hongler state that the model inadequately captures the value generated in source countries through digital platforms. Notably, the 2017 update to the Commentary on Article 5 acknowledges the challenges posed by the digital economy.⁹⁶ The UN Model Tax Convention, on the other hand, provides broader taxing rights to source countries that provide a service PE that allows for the taxation of services provided in a jurisdiction

⁹⁰ Perry, V. J., 'Chapter 7 Residence-Based Taxation: A History and Current Issues.' In *Corporate Income Taxes under Pressure, USA, International Monetary Fund, 2021* <<https://www.elibrary.imf.org/display/book/9781513511771/ch007.xml>>. It is a tax system where a country taxes the worldwide income of its residents regardless of where the income is earned.

⁹¹ Beer, S., & Michielse, G., 'Chapter 11 Strengthening Source-Based Taxation,' In *Corporate Income Taxes under Pressure. USA: International Monetary Fund, 2021*, <<https://www.elibrary.imf.org/display/book/9781513511771/ch011.xml>>. It is a tax system where a country taxes income earned within its borders regardless of whether the individual or business earning the income is resident or non-resident.

⁹² OECD (2019), "Article 5 Permanent establishment", in *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing.

⁹³ OECD, 'Commentary on Article 5: Concerning the definition of Permanent Establishment,' in *Model Tax Convention on Income and on Capital, (Full Version) OECD Publishing, 2014, 1-2*, <https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2014-full-version/commentary-on-article-5-concerning-the-definition-of-permanent-establishment_9789264239081-39-en#page1>. It provides for some of the elements of PE which includes agency relationships, construction sites and place of business.

⁹⁴ Eytayo-Oyesode, Oladiwura Ayeyemi, 'Source-Based Taxing Rights from the OECD to the UN Model Conventions: Unavailing Efforts and an Argument for Reform,' 13(1), *Law and Development Review*, 2020, 193-227.

⁹⁵ Cockfield A.J., 'The Rise of the OECD as Informal 'World Tax Organization' through National Responses to E-commerce Tax Challenges,' 8, *Yale Journal of Law and Technology*, 2006, 144-145 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=916555>.

⁹⁶ OECD, 'Commentary on Article 5', in *Model Tax Convention on Income and on Capital: Condensed Version 2017*, OECD Publishing, 2017.

without having a physical presence.⁹⁷ Brauner praises the UN for this approach but notes that it is ineffective in developing countries due to the lack of administrative capacity in implementation.⁹⁸ Pistone and Hongler go ahead to warn on the over-reliance on ‘service day’ thresholds by MNCs to avoid creating a taxable presence in source countries.⁹⁹ Additionally, the UN’s Article 12B on taxation of income from automated digital services (ADS) shows a departure from PE as it allows source countries to tax income from ADS through a gross withholding tax regardless of whether the entity has a PE there.¹⁰⁰

The rise of the digital economy has shown that digital MNCs can generate significant revenue in jurisdictions without having a fixed presence. This has led to calls to redefine PE to address the challenges of the digital economy. One of which is the virtual service PE that allows for the taxation of services provided remotely in a jurisdiction.¹⁰¹ Pistone and Hongler argue for this re-definition noting that it reflects the economic reality.¹⁰² However, Cockfields is of the view that it places immense compliance burdens in developing countries. Avi-Yonah proposes a threshold-based PE which he calls a de minimis threshold.¹⁰³ This threshold aims to exclude negligible digital activities from taxation and focus on significant economic contributions. Yonah views it as a safeguard against

⁹⁷ UN, United Nations Model Double Taxation Convention between Developed and Developing Countries, United Nations Publishing, 2017, 143-208. A service PE is where an entity provides services through its employees in another country even without a physical presence.

⁹⁸ Báez, A., and Brauner, Y., ‘Taxing the Digital Economy Post BEPS ... Seriously’ University of Florida Levin College of Law Research Paper No. 19-16, 2019, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3347503>.

⁹⁹ Hongler P., and Pistone, P., ‘Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy’ Vienna University of Economics and Business, 2015. There are two thresholds for a service PE: services ought to be provided for more than 183 days within a 12month period in the other state and the services provided ought to be for the same connected project.

¹⁰⁰ Article 12B of the United Nations Model Double Taxation Convention between Developed and Developing Countries, 2021, 216-217 <https://financing.desa.un.org/sites/default/files/2023-05/UN%20Model_2021.pdf>.

¹⁰¹ Báez, A., and Brauner, Y., ‘Taxing the Digital Economy Post BEPS ... Seriously’ University of Florida Levin College of Law Research Paper No. 19-16, 2019, 43-46 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3347503>.

¹⁰² Hongler P., and Pistone, P., ‘Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy’ Vienna University of Economics and Business, 2015, 3-4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2586196>.

¹⁰³ Harpaz, A., ‘Taxation of the Digital Economy: Adapting a Twentieth-Century Tax System to a Twenty-First-Century Economy,’ 46(57) Yale Journal, International Laq, 2021, 95-99 <https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=2613&context=fac_artchop>.

overreach but cautions against high thresholds that would exclude developing countries from benefiting. The concept of SEP, which Hongler and Pistone view as transformative, allocates taxing rights based on user engagement, data collection, and digital activity.¹⁰⁴ However, SEP lacks international consensus with many developed countries trying to protect their corporate tax base.

1.9.3 Challenges in Taxing the Digital Economy

The difficulties in taxing the digital economy stem from issues such as BEPS, allocation of taxing rights, and cross-border transactions which have highlighted the flaws in the international tax framework. BEPS is defined as tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no tax jurisdictions where there is little or no economic activity.¹⁰⁵ Zucman approximates that there are \$240 billion in revenue losses annually due to BEPS.¹⁰⁶ This shows that such strategies erode higher jurisdictions' tax base, causing significant revenue loss globally. However, Desai and Dharmphala claim that not all profit shifting results in loss of revenue. They give an example of how some countries benefit from investments because of low tax rates.¹⁰⁷ Avi-Yonah argues that BEPS undermines fiscal sovereignty and critiques OECD's BEPS guidelines for focusing on residence taxation leaving source countries, particularly developing countries, disadvantaged.¹⁰⁸ Cockfield praises the OECD's efforts to curb BEPS and argues that unilateral measures lead to double taxation and fragmentation. There are recent developments that address this issue. The OECD IF on BEPS introduced Pillar One and Pillar Two that reallocate taxing rights to market jurisdictions for specific digital

¹⁰⁴ OECD, Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, 2015, 107-117.

¹⁰⁵ OECD, Action Plan on Base Erosion and Profit Shifting, OECD Publishing, 2013 <

¹⁰⁶ Zucman, G., 'The Hidden Wealth of Nations: The Scourage of Tax Havens,' UC Berkley, 2015.

¹⁰⁷ Mihir, A.D. and Dhamika, D., 'Revisiting the Uneasy Case for Corporate Taxation in an Uneasy World,' 6, Journal of the British Academy, 2018, 247-284 <[>".>](https://www.researchgate.net/publication/329795266_Revisiting_the_uneasy_case_for_corporate_taxation_in_an_uneasy_world)

¹⁰⁸ Daurer, V., and Krever, R., 'Choosing between the UN and OECD Tax Policy Models: An African Case Study,' 22(1), African Journal of International and Comparative Law 1-21, WU International Taxation Research Paper Series No. 2014 - 16, 2014 <[>".>](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2499980&utm_source=chatgpt.com)

businesses and establish a global minimum tax rate of 15% respectively.¹⁰⁹ Hongler and Pistone argue that these measures still do not adequately account for the fiscal needs of developing countries thus exacerbating inequalities in tax revenues.¹¹⁰

Globalization has enabled cross-border transactions, a major challenge in the taxation of digital economies. Cross-border transactions have been defined as economic activities conducted between entities in different jurisdictions and include the assignment of goods, services, capital, and many more.¹¹¹ Cockfield contends that the reliance on the traditional PE principle which fails to capture the economic value generated through digital platforms complicates cross-border transactions.¹¹² There have been concerns that replacing PE with new metrics such as SEP will lead to increased administrative burdens and overreach. Others advocate for a digital presence-based approach to align taxing rights with economic value from source countries. Efforts to address this include the OECD's Pillar One and unilateral tax measures. Zucman supports unilateral measures and views them as necessary for countries marginalized by OECD's residence-based framework.¹¹³ However, Brauner argues that such measures risk creating retaliatory trade measures from developed nations.¹¹⁴

The allocation of tax rights is another major challenge. Bilateral treaties under the OECD and UN Model Convention govern the allocation of rights which is usually to residence jurisdictions. Pistone and Hongler argue that the traditional allocation framework works in favor of developed countries and advocates for implementing SEP principles to allocate tax

¹⁰⁹ OECD, 'Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy,' OECD Publishing, 2021, 1-8 <<https://www.oecd.org/content/dam/oecd/en/topics/policy-issues/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf>>.

¹¹⁰ Hongler P., and Pistone, P., 'Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy' Vienna University of Economics and Business, 2015, 3-4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2586196>.

¹¹¹ FBR-GIZ, 'Cross Border Transactions and Tax Treaties,' Tax Reform Component Governance Programme, <<https://download1.fbr.gov.pk/Docs/20132191124640867FBR-GIZpppcrossbordertransactions-taxtreaties.pdf>>.

¹¹² Cockfield, A.J., 'Tax Wars: The Battle over Taxing Global Digital Commerce,' 161, Tax Notes, 2018, 1331 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3309920>

¹¹³ Clausing, K.A. and Saez, E., and Zucman, G., 'Ending Corporate Tax Avoidance and Tax Competition: A Plan to Collect the Tax Deficit of Multinationals,' UCLA School of Law, Law-Econ Research Paper No. 20-12, 2021 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3655850>.

¹¹⁴ Báez, A., and Brauner, Y., 'Taxing the Digital Economy Post BEPS ... Seriously' University of Florida Levin College of Law Research Paper No. 19-16, 2019, 43-46 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3347503>.

rights.¹¹⁵ Aut warns against this and states that the redefinition of allocating principles will cause instability in the international tax system and emphasizes stability and predictability which is well achieved by the traditional allocation framework.¹¹⁶ Pistone and Hongler counter-argue that predictability should not come at the expense of fairness.¹¹⁷ Avi Yonah on the other hand advocates for taxation rights based on measurable factors such as user engagement claiming that it would balance the interest of both source and residence jurisdictions.¹¹⁸ ATAF has been on the frontline of these discussions advocating for regional cooperation to strengthen developing countries' negotiating power¹¹⁹ and counter the dominance of OECD's framework.¹²⁰

The literature review highlights the challenges faced by developing countries in the global tax framework and calls for reforms to address these challenges.

1.10 Research Methodology

This research will employ a doctrinal legal methodology employing both primary and secondary resources. The primary sources will include relevant statutes and treaties in taxing the digital economy and international trade law while the secondary sources include journals, case laws, reports, and research papers. This methodology aims to contribute a nuanced theoretical understanding of the implications of the OECD digital tax framework on developing countries and provide insights into how best to accommodate developing countries in these policies.

¹¹⁵ Hongler P., and Pistone, P., 'Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy' Vienna University of Economics and Business, 2015, 3-4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2586196 >.

¹¹⁶ Ault, H. J., 'Some Reflections on the OECD and the Sources of International Tax Principles,' 70(12) Reprinted from Tax Notes International, Working Paper of the Max Planck Institute for Tax Law and Public Finance No. 2013-03, 2013, 1195 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2287834 >.

¹¹⁷ Hongler P., and Pistone, P., 'Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy' Vienna University of Economics and Business, 2015, 3-4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2586196 >.

¹¹⁸ Avi-Yonah, R.S., Young Ran (Christine) Kim, and Karen S., 'A New Framework for Digital Taxation,' 63(2) Harvard International Law Journal, 2022, 338-341 <<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=3778&context=articles> >.

¹¹⁹ West, C., 'Emerging Treaty Policies in Africa: Evidence from the African Tax Administration Forum Models,' 75(1) Bulletin for International Taxation, 2021 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5003029&utm_source=chatgpt.com >.

¹²⁰ 'Africa Steps Up to Reshape International Tax Rules,' Kudzai Mataba, 20th October 2023 <https://www.iisd.org/articles/insight/africa-steps-reshape-international-tax-rules?utm_source=chatgpt.com > 10th August 2024.

1.11 Limitations of the Study

The study primarily examines the inadequacies of the OECD framework and its impacts on developing countries. The study is based on doctrinal legal research which may not fully capture the ever-changing nature of digital economies. Time limitations on doctrinal research may also hinder the depth of the study, compromising its comprehensiveness and overlook critical and recent developments in digital economy taxation. Additionally, the fast-paced evolution of the digital economy and regulatory frameworks presents difficulties, as doctrinal research alone may not predict market trends and future regulatory needs limiting the applicability of the findings in shaping effective regulatory frameworks.

1.12 Chapter Breakdown

Chapter One provides a background to the study. It outlines the research problem, objectives, and the significance of addressing the taxation of digital economies. The chapter concludes with a presentation of the research questions and the study's overall structure.

Chapter two addresses the first research question by analyzing and critiquing the OECD digital tax framework and assessing its effectiveness to developing countries by demonstrating how it favors developed countries.

Chapter four analyzes how corporate lobbying influences the OECD framework and its implications on developing countries.

Aligned with the third research question, chapter three analyzes the effectiveness of unilateral tax measures employed by developing countries like Kenya, the challenges of administrative constraints, and retaliatory trade measures.

Chapter five consolidates the findings and offers recommendations.

2.0 CHAPTER TWO: EXAMINATION OF OECD'S TAX FRAMEWORK

2.1 Introduction

This chapter examines each OECD-led initiative in taxing the digital economy and discusses its implications for developing countries while focusing on key aspects such as the OECD's structural flaws, governance deficiencies, and inequitable implementation process to draw out the democratic shortcomings of the OECD.

2.2 The Organization for Economic Cooperation and Development

The history of the OECD dates back to when its predecessor, the Organization for European Economic Co-operation (OEEC) was established in 1948¹²¹ with the primary objective of administering funds from the Marshall Plan.¹²² It would achieve this by promoting cooperation between European States and reducing trade barriers to foster economic recovery.¹²³ The OEEC then transitioned to OECD in 1961 after it expanded its mandate to global economic cooperation by including non-European members.¹²⁴ In 1963, the OECD went ahead to establish its model tax convention.¹²⁵ The convention was formed to establish a system of negotiating bilateral tax treaties to prohibit tax evasion and abolish double taxation in cross-border transactions.¹²⁶ With time, the model recognized the implications

¹²¹ OECD, 'The Organisation of European Economic Co-operation (OEEC),' 2023 <<https://www.oecd.org/en/about/history/the-organisation-for-european-economic-co-operation-oeec.html>>.

¹²² De Long, J.B. and Eichengreen, B., 'The Marshall Plan: History's Most Successful Structural Adjustment Program,' in *Postwar Economic Reconstruction and Lessons for the East Today*, MIT Press, 1993, 192-210. The Marshall Plan was a U.S. initiative to provide aid to Western Europe after the destruction of the economy by World War II.

¹²³ Milward, A.S., 'The Reconstruction of Western Europe,' University of California Press, 1945-1951, 123-155.

¹²⁴ Leimgruber, M., and Schmelzer, M., 'From the Marshall Plan to Global Governance: Historical Transformations of the OEEC/OECD, 1948 to Present,' in *The OECD and the International Political Economy since 1948*, Palgrave Macmillan, 2017, 23-61.

¹²⁵ Christians, A., 'The OECD's Influence on Global Tax Policy,' 34(3) *Brooklyn Journal of International Law*, 2010, 881-884. See, OECD, 'Model Tax Convention on Income and on Capital,' OECD Publishing, 2017 < https://www.oecd.org/en/publications/2017/12/model-tax-convention-on-income-and-on-capital-condensed-version-2017_g1g8769b.html#top> Note that the OECD Model Tax Convention is not a binding treaty but a model for negotiation thus does not impose any legal obligations on countries that choose to adopt it.

¹²⁶ OECD, 'Commentary on Article 23A and 23B Methods for elimination of double taxation,' in *Model Tax Convention on Income and on Capital 2010*, OECD Publishing, Paris, 2012. Notably, Article 23A states that income derived from a source in another contracting country shall be exempted from tax in the taxpayer's

of the digital economy in matters of tax such as the erosion of conventional concepts such as permanent establishment.¹²⁷ Businesses could now operate in countries without having a physical footprint and not be taxed on their income leading to the formation of the BEPs project Action Plan 1 which addressed the challenges of taxing the digital economy¹²⁸ and Pillar one¹²⁹ and Pillar two¹³⁰ frameworks. Below, I analyze the OECD's decision-making organs and initiatives while highlighting how they have been perceived to be inadequate in meeting the needs of developing countries.

2.2.1 Evidence of Bias in OECD Decision-Making Bodies

The OECD Council is the decision-making body that comprises representatives from each member state and the EU which are predominantly developed nations and is chaired by the Secretary-General.¹³¹ Note that decisions in the council are made by consensus¹³² which may disadvantage developing countries that lack equal representation and negotiating power in the OECD.¹³³ Its Secretariat provides technical expertise and policy advice to member states.¹³⁴ Decisions within the IF begin from the subordinate working committees that are composed of national experts whose work is to develop proposals and frameworks

resident country provided it has already been taxed in the source country. On the other hand, Article 23B states that the resident country taxes the income derived from the source country but allows a tax credit for the tax paid in the source country.

¹²⁷ OECD, 'Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7,' Final Report, OECD Publishing, 2015 <https://www.oecd.org/en/publications/preventing-the-artificial-avoidance-of-permanent-establishment-status-action-7-2015-final-report_9789264241220-en.html>.

¹²⁸ OECD, 'Addressing the Tax Challenges of the Digital Economy, Action 1,' Final Report, OECD Publishing, 2015 <https://www.oecd.org/en/publications/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report_9789264241046-en.html>.

¹²⁹ OECD, 'Tax Challenges Arising from Digital Taxation - Report on Pillar One Blueprint,' OECD Publishing, 2020 <https://www.oecd.org/en/publications/tax-challenges-arising-from-digitalisation-report-on-pillar-one-blueprint_beba0634-en.html>. It introduces a new nexus allowing market jurisdictions to tax MNC's profits.

¹³⁰ OECD, 'Tax Challenges Arising from Digital Taxation - Report on Pillar One Blueprint,' OECD Publishing, 2020 <https://www.oecd.org/en/publications/tax-challenges-arising-from-digitalisation-report-on-pillar-two-blueprint_abb4c3d1-en.html>. It imposes a 15% global minimum corporate tax rate to prevent profit shifting to tax havens.

¹³¹ <<https://www.oecd.org/en/about/organisational-structure.html?t>>

¹³² OECD, 'Background Brief: inclusive framework on BEPS,' OECD Publishing, 2017, 12.

¹³³ Adinda, W., Myrthe B., Johanna, K. and Thijmen, R., 'Report on the BEPS Inclusive Framework of the OECD,' SOMO, 2021, 10 <<https://www.somo.nl/wp-content/uploads/2021/11/Final-Report-IRSP-SOMO-August-2021.pdf>>.

¹³⁴ 'Organizational Structure,' OECD <<https://www.oecd.org/en/about/organisational-structure.html?t>> 18th August 2024.

for international tax standards.¹³⁵ The proposals are then reviewed and refined by the steering committee which is often viewed as a political tool and determine whether the issues in the proposals should advance to the next stage.¹³⁶ The OECD secretariat then chips in to organize, coordinate, and oversee these meetings and often plays a crucial role in shaping the directions of deliberations. Once the steering committee finalizes its recommendations, the proposals are forwarded to the Committee on Fiscal Affairs (CFA), where senior officials from the IF member states deliberate and seek consensus.¹³⁷ The decision-making process is often intended to ensure inclusivity which is usually not the case given the financial and political influence of developed countries and the Secretariat's bias. Once a consensus is reached, the agreed decisions are adopted and implemented by member states.

The Secretariat comprises individuals who prepare meetings, frame issues and steer discussions reflecting a homogeneity that often results in bias. This bias stems from its composition, its approach to agenda setting, and its handling of proposals from developing countries. The Secretariat predominantly comprises staff from developed countries who work in the interest of the OECD as an organization.¹³⁸ Thus the interests of developed countries often overshadow the concerns of developing countries. It also wields significant power in shaping the agenda and framing issues in IF meetings. For example, developing countries have repeatedly pushed for discussions on the taxation of extractive industries, a critical sector for most of these countries but the OECD focused on issues around digital taxation and global minimum tax which is more important for its members and not the rest of the countries.¹³⁹ Even in instances where developing countries submit proposals, they

¹³⁵ Adinda W., Myrthe B., Johanna K. and Thijmen R. 'Report on the BEPS Inclusive Framework of the OECD,' SOMO, 2021, 8

<<https://www.somo.nl/wp-content/uploads/2021/11/Final-Report-IRSP-SOMO-August-2021.pdf>>.

¹³⁶ Adinda W., Myrthe B., Johanna K. and Thijmen R. 'Report on the BEPS Inclusive Framework of the OECD,' SOMO, 2021, 9

<<https://www.somo.nl/wp-content/uploads/2021/11/Final-Report-IRSP-SOMO-August-2021.pdf>>.

¹³⁷ Adinda W., Myrthe B., Johanna K. and Thijmen R. 'Report on the BEPS Inclusive Framework of the OECD,' SOMO, 2021, 8

<<https://www.somo.nl/wp-content/uploads/2021/11/Final-Report-IRSP-SOMO-August-2021.pdf>>.

¹³⁸ Kingma, S., 'Inclusive Global Tax Governance in the Post-BEPS Era,' IBFD, 2019, 206-207.

¹³⁹ Adinda W., Myrthe B., Johanna K. and Thijmen R. 'Report on the BEPS Inclusive Framework of the OECD,' SOMO, 2021, 16 <<https://www.somo.nl/wp-content/uploads/2021/11/Final-Report-IRSP-SOMO-August-2021.pdf>>.

are treated as peripheral regardless of how carefully crafted they are.¹⁴⁰ Once submitted they are mentioned in passing and with time fizzle out compared to proposals from developed countries that are highlighted and often form the basis of how other issues are framed.¹⁴¹ Furthermore, the complexity of the BEPS project and the high pace and language barrier of negotiations reflect the lack of know-how or complex technicalities of the international tax framework that most developing countries lack expertise in that the OECD disregards.¹⁴² Lastly, the exclusion of regional proposals like that of the G24 that was submitted in 2019 during the regional meetings coordinated to discuss the two-pillar solution in Paris was not included in the OECD unified approach that excluded the G24 proposals on SEP in the Pillar One solution.¹⁴³ All this illustrates a structural bias in the OECD decision-making process.

2.2.2 The Launch of the BEPS Project

The BEPS Project was formed in 2013 following concerns about MNCs exploiting gaps and mismatches in international tax rules to reduce their tax liability. In a bid to form a fair and transparent global tax system, the G20 requested the OECD to launch the BEPs project to curb tax avoidance by MNCs through a series of policy reforms.¹⁴⁴ The G20 is an intergovernmental forum comprising 19 countries and the European Union with its membership being made up of both developed and emerging economies that represent almost 85% and 75% of the global GDP and international trade respectively.¹⁴⁵ The G20 mainly focuses on addressing economic challenges and acts as a political catalyst for

¹⁴⁰ Adinda W., Myrthe B., Johanna K. and Thijmen R. 'Report on the BEPS Inclusive Framework of the OECD,' SOMO, 2021, 17 <<https://www.somo.nl/wp-content/uploads/2021/11/Final-Report-IRSP-SOMO-August-2021.pdf>>.

¹⁴¹ Adinda W., Myrthe B., Johanna K. and Thijmen R. 'Report on the BEPS Inclusive Framework of the OECD,' SOMO, 2021, 17 <<https://www.somo.nl/wp-content/uploads/2021/11/Final-Report-IRSP-SOMO-August-2021.pdf>>.

¹⁴² Adinda W., Myrthe B., Johanna K. and Thijmen R. 'Report on the BEPS Inclusive Framework of the OECD,' SOMO, 2021, 11 <<https://www.somo.nl/wp-content/uploads/2021/11/Final-Report-IRSP-SOMO-August-2021.pdf>>.

¹⁴³ Adinda W., Myrthe B., Johanna K. and Thijmen R. 'Report on the BEPS Inclusive Framework of the OECD,' SOMO, 2021, 27. <<https://www.somo.nl/wp-content/uploads/2021/11/Final-Report-IRSP-SOMO-August-2021.pdf>>. G24 primarily comprises of developing countries from Africa, Asia, Latin America and the Caribbean and was established to coordinate the positions of developing countries on international monetary and development finance issues.

¹⁴⁴ Fung, S., 'The Questionable Legitimacy of the OECD/G20 BEPS Project,' 2, *Erasmus Law Review*, 2017.

¹⁴⁵ G20, 'G20 - Background Brief,' 2023, 2 <https://www.g20.in/en/docs/2022/G20_Background_Brief.pdf>.

endorsing international initiatives such as the BEPS project. The project was then centered around three pillars: ensuring coherence in corporate income taxation across borders, reinforcing substance requirements in tax standards, and improving tax predictability and transparency.¹⁴⁶ The project birthed a 15 Action Plan that sought to address tax challenges such as treaty abuse, harmful tax practices, and transfer pricing manipulation.¹⁴⁷ However, the time constraint of developing and publishing the project by 2015 led to the rapid pace of discussion with many questioning whether genuine consensus could be achieved under such constraints favoring expediency over inclusivity.¹⁴⁸

One of the major criticisms of the BEPS project is its democratic legitimacy regarding the extent to which the framework excludes meaningful representation of developing countries. The OECD and the G20 are often viewed as institutions that inherently favor developed countries thus them being primary architects of the project, it is more likely to be skewed to favor developed countries.¹⁴⁹ Although the G20 is broader in scope than the G7, it excludes a majority of the developing countries thus resulting in a framework that does not adequately take into consideration the needs of the global community but just a few.¹⁵⁰ Additionally, the OECD is often viewed as a 'rich man's club' since it formulates policies to benefit its member states alone.¹⁵¹ The framework then exclusively marginalizes non-member states, consequently showcasing the interests of its dominant participants while undermining their tax sovereignty. The IF faces the same criticism for its limited inclusion

¹⁴⁶ OECD, 'Action Plan on Base Erosion and Profit Shifting' OECD Publishing, 2013, 13-14. See, OECD, 'Mandatory Disclosure Rules, Action 12 – 2015 Final Report,' OECD Publishing, 3.

¹⁴⁷ OECD, 'Action Plan on Base Erosion and Profit Shifting' OECD Publishing, 2013, 13-14. See, OECD, 'Mandatory Disclosure Rules, Action 12 – 2015 Final Report,' OECD Publishing, 2015, 3.

¹⁴⁸ Fung, S., 'The Questionable Legitimacy of the OECD/G20 BEPS Project,' 2, *Erasmus Law Review*, 2017, 76.

¹⁴⁹ Christians, A., 'Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20', 19(5), *Northwestern Journal of Law & Social Policy*, 2010.

¹⁵⁰ Vestergaard J., 'The G20 and Beyond: Towards Effective Global Economic Governance', DIIS Report 4, 2011, 6. The Norwegian Foreign Minister Jonas Gahr Støre described the G20 as 'a self-appointed group', where its 'composition is determined by the major countries and powers. It may be more representative than the G7 or the G8, in which only the richest countries are represented, but it is still arbitrary. We no longer live in the 19th century, a time when the major powers met and redrew the map of the world. No one needs a new Congress of Vienna.' The G7 comprises of advanced economies such as Canada, France, Germany, Italy, Japan, the U.K. and the U.S. that are known for their economic influence and focus on global economic governance, security and development issues. Notably, G8 was formed because of Russia joining but it reverted back to G7 in 2014 when Russia was suspended following its annexation of Crimea.

¹⁵¹ Article 1 (a) of the Convention on the Organisation for Economic Cooperation and Development, 1960. It states, 'The main aim of the OECD is to promote policies designed 'to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy.'

of developing countries. Of the 147 jurisdictions involved in contributing to policy formulation, only 48 represent developing countries.¹⁵² As a result, key reforms fail to reflect their needs and have significant ramifications on their tax sovereignty. One of the impacts evidenced by this is the exclusion of DST in the Pillar One Framework which demonstrates resistance from developed countries who are primarily against source-based taxation.¹⁵³ DST sought to address the challenges of taxing digital MNCs. Many have advocated for the inclusion of developing countries through channels like the United Nations to promote fairness.¹⁵⁴

The governance structure of both the OECD and the G20 raises concerns about accountability. This is because the G20 operates as an informal forum without a formal legal personality, treaty, or charter and its decision-making is very opaque as its summit deliberations are usually held behind closed doors and outcomes communicated through communiqués leaving little to no room for stakeholder participation and external scrutiny.¹⁵⁵ The OECD's decision-making power, on the other hand, resides with its council which excludes non-member states from participating. As much as the BEPS project incorporated discussions with non-OECD and non-G20 countries, these discussions were mostly superficial offering limited opportunities for meaningful participation.¹⁵⁶ A hierarchical structure is demonstrated where decisions made by a select few are imposed on a broader less empowered global community which ultimately undermines the

¹⁵² OECD, 'Developing Countries and the OECD/G20 Inclusive Framework on BEPS,' OECD REPORT FOR THE G20 FINANCE MINISTERS AND CENTRAL BANK GOVERNORS, 2021, 4 <https://www.oecd.org/content/dam/oecd/en/publications/reports/2021/10/developing-countries-and-the-oecd-g20-inclusive-framework-on-beps_971ab5fe/170270aa-en.pdf>. See, Brauner Y., 'Serenity Now! The (Not So) Inclusive Framework and the Multilateral Instrument,' University of Florida Levin College of Law, Legal Studies Research Paper No. 22-6, 2021, 21-30 <<https://www.lse.ac.uk/law/Assets/Documents/tax/2023-gts-folder/6.pdf>>.

¹⁵³ PwC, 'OECD releases Multilateral Convention to implement Amount A of Pillar One,' 2022, 2 <<https://www.pwc.com/gx/en/tax/newsletters/tax-policy-bulletin/assets/pwc-oecd-releases-multilateral-convention-to-implement-amount-a-of-p1-v2.pdf>>.

¹⁵⁴ 'Inclusive International Tax Systems Crucial in Strengthening Developing Countries' Fiscal Policies, Green Transition, Speakers Tell Economic and Social Council,' The United Nations, 13th March 2023 <<https://press.un.org/en/2023/ecosoc7116.doc.htm#:~:text=Fair%20and%20inclusive%20tax%20systems,International%20Cooperation%20in%20Tax%20Matters.>>> 20th September 2024.

¹⁵⁵ 'Developing Countries, Global Financial Governance and the Group of ,' Gerry Helleiner, 1st November 2001, <https://fpif.org/developing_countries_global_financial_governance_and_the_group_of_twenty/> 20th September 2024.

¹⁵⁶ Essers, P., 'International Tax Justice between Machiavelli and Habermas', 54, Bulletin for International Taxation, 2014, 57.

legitimacy of the BEPS project. The principle of sovereign equality is compromised by the dominance of powerful states in shaping the BEPS framework. Non-OECD and developing countries that are expected to implement the BEPS standards had no role in their formulation imposing a top-down approach that exacerbates the marginalization of smaller economies which raises the question of whether the framework is fair and inclusive.¹⁵⁷

Additionally, developing countries now joining the BEPS project are due to face technical and administrative challenges in implementing these reforms into their domestic legislation since they lack financial resources and technical expertise which further widens the gap between developed and developing countries.¹⁵⁸ More ironically, the BEPS project which was initially aimed to promote global cooperation has ended up encouraging unilateral tax measures as alternatives to the BEPS recommendations.¹⁵⁹

2.2.3 The Multilateral Instrument (MLI)

The MLI was introduced under the OECD/G20 BEPS to tackle treaty-related tax challenges in the global space in 2016.¹⁶⁰ It allowed for the simultaneous amendment of multiple bilateral tax treaties in a bid to simplify the implementation of BEPS measures and reduce tax avoidance through treaty shopping and other exploitative practices to address issues related to treaty abuse, the definition of PE, and double taxation disputes. Notably, the MLI works differently from an amending protocol to a bilateral tax treaty which usually alters the treaty's text directly.¹⁶¹ The MLI functions alongside existing treaties by merely adjusting their application to accommodate for BEPS measures and only takes effect if both treaty partners agree to adopt the same modifications.¹⁶² While it is a major diplomatic milestone, its implementation has raised major concerns for developing countries that face systemic disadvantages within the global tax space.

¹⁵⁷ Christiano, T., 'A Democratic Theory of Territory and Some Puzzles about Global Democracy', 37, *Journal of Social Philosophy*, 2006, 94.

¹⁵⁸ German Cooperation, 'Implementing OECD/G20 BEPS Package in Developing Countries,' IBFD, 2018, 3-17.

¹⁵⁹ Athanasiou, A., 'Unilateral Actions Continues to Plague BEPS, Saint-Amans Says', *Tax Notes*, 2016.

¹⁶⁰ OECD, 'Action 15: A Mandate for the Development of Multilateral Instrument on Tax Treaty Measures to Tackle BEPS,' *OECD BEPS PROJECT, Final Report*, 2015.

¹⁶¹ Tax Justice Network Africa, 'The Multilateral Instrument and Domestic Resource Mobilization in East Africa,' 2019, 4 <<https://taxjusticeafrica.net/sites/default/files/publications/MLI%20Report.pdf>>.

¹⁶² Tax Justice Network Africa, 'The Multilateral Instrument and Domestic Resource Mobilization in East Africa,' 2019, 4 <<https://taxjusticeafrica.net/sites/default/files/publications/MLI%20Report.pdf>>.

The MLI is structured to work in two categories of clauses: mandatory and optional provisions. The mandatory provisions which are commonly regarded as minimum standards¹⁶³ touch on fundamental BEPS issues such as dispute resolution mechanisms and anti-treaty shopping rules and are only enforceable if both parties agree to include them in the particular treaty. The optional provisions, on the other hand, are additional measures that States can adopt such as binding arbitration clauses and narrower definitions of PE that require mutual agreement between contracting parties. Note that the nature of these provisions makes it impossible to achieve a uniform implementation outcome, particularly for developing countries with administrative constraints. This is because such countries have limited resources and technical expertise to integrate these provisions into their domestic tax systems and thus do not benefit fully from MLI.

Additionally, most MLI provisions are optional leading to uneven adoption across States. For example, 29 countries opted to adopt an anti-abuse rule for PE in third jurisdictions.¹⁶⁴ Developing countries which are usually source jurisdictions, are more likely to adopt provisions that shift taxing rights in their favor. However, the adoption of such provisions hit a dead end because of the non-agreement of capital-exporting treaty partners who are based in the global north making it impossible for developing countries to adopt measures that would secure additional tax revenues. Furthermore, studies have shown little to no change in curbing treaty shopping even after the implementation of MLI. Treaty shopping enables MNCs to exploit tax treaties to minimize their tax liabilities often at the expense of source countries and developing countries.

Lastly, The OECD has put in place binding arbitration provisions for tax disputes. Article 25 of its Model Tax Convention states that when contracting States cannot solve a tax dispute through Mutual Agreement Procedure (MAP), the case may proceed to arbitration and that the arbitration decision is binding.¹⁶⁵ As such, arbitration is viewed as a last resort

¹⁶³ OECD, 'Actions 5, 6, 13 and 14: Countering Harmful Tax Practices, Treaty Abuse. Transfer Pricing Documentation, and Dispute Resolution Mechanisms,' OECD BEPS PROJECT FRAMEWORK, Final Report, 2015.

¹⁶⁴ OECD, 'Article 10: Anti-Abuse Rules of Permanent Establishments situated in Third Jurisdictions, Multilateral Convention to Implement Tax Treaty Related Measures to BEPS MLI,' OECD Secretariat, 2016.

¹⁶⁵ OECD, 'Commentary on Article 25: Concerning the Mutual Agreement Procedure', in Model Tax Convention on Income and on Capital 2017 (Full Version), OECD Publishing, Paris, 2019, 68-70

under paragraph 5 of Article 25.¹⁶⁶ This is also provided for under Action 14 of the OECD/G20 BEPS which provides for the adoption of the first three paragraphs of Article 25 in double tax treaties as a way to promote legal certainty and incentivize States to resolve tax disputes promptly.¹⁶⁷ However, note that the wording in Par 1-3 of Article 25 does not ensure the proper resolution of tax disputes. It goes ahead to state ‘endeavor to resolve’ which does not guarantee the effective resolution of disputes through MAPs. This is backed up by OECD studies that show that MAP proceedings take longer than two years and are potentially not finalized thus there is a need for binding arbitration.¹⁶⁸ Developing countries have not accepted binding arbitration for several reasons. One, it is seen as infringing on State sovereignty because for some States arbitration awards cannot override domestic tax rulings.¹⁶⁹ Additionally, the final decision-making is perceived to have shifted from national jurisdictions to a foreign arbitration panel.¹⁷⁰ Two, the nature of arbitration proceedings being confidential limits the access to information to learn from best practices. Lastly, international arbitration requires immense financial resources that developing countries struggle with. Many developing countries are advocating for the use of MAP since it offers a more collaborative and less adversarial means of resolving disputes.

<<https://www.oecd-ilibrary.org/docserver/g2g972ee-en.pdf?expires=1734341352&id=id&accname=guest&checksum=C50F741AEF24C697EF98A786CAB27CFA>>.

¹⁶⁶ ‘Analyzing Mandatory Binding Arbitration and the MAP,’ Isaac Gonzallo and Anarella Calderoni,^{7th} September, 2021 <<https://www.ciat.org/ciatblog-analyzing-mandatory-binding-arbitration-and-the-map/?lang=en>> 20th September 2024.

¹⁶⁷ Tax Justice Network Africa, ‘The Multilateral Instrument and Domestic Resource Mobilization in East Africa,’ 2019, 11.

¹⁶⁸ ‘OECD Releases Information on MAP and Advance Pricing Arrangements,’ the OECD,^{15th} November 2024< <https://www.oecd.org/en/about/news/announcements/2024/11/oecd-releases-information-and-statistics-on-mutual-agreement-procedures-and-advance-pricing-arrangements.html>> 20th November 2024.

¹⁶⁹ Hearson, M., and Tucker, T.N., ‘An Unacceptable Surrender of Fiscal Sovereignty: The Neoliberal Turn to International Tax Arbitration,’ 21(1), Cambridge University Press, 2023, 225-228 and 232-236 <<https://www.cambridge.org/core/services/aop-cambridge-core/content/view/C3E4CDD17A00C985AEFC782CB3ADC2D0/S1537592721000967a.pdf/an-unacceptable-surrender-of-fiscal-sovereignty-the-neoliberal-turn-to-international-tax-arbitration.pdf>>. See also Section 251(1) of the Constitution of the Federal Republic of Nigeria (1999) grants the Federal High Court exclusive jurisdictions over corporate tax matters.

¹⁷⁰ Farah, H., ‘Mandatory Arbitration of International Tax Disputes: A Solution in Search of a Problem,’ 9(8), Florida Tax Review, 2009, 713-715; 739-740; 748 <<https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1159&context=fttr>>.

2.2.4 The G20 Inclusive Framework and the Two-Pillar Approach

After the publication of the BEPS project, the IF introduced Pillar One and Pillar Two to address the tax challenges of the digital economy. The IF was established in 2016 to provide a platform where all countries including developing countries could participate on an equal footing. Note that the two-pillar solution was introduced in 2019 in a bid to come up with a ‘new international tax architecture.’¹⁷¹

2.2.4.1 Pillar One

The OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations formed a framework for applying the Arm’s Length Principle (ALP).¹⁷² This principle provides that a transfer price between related entities will be considered adequate if it reflects the price that would have been set between independent entities in comparable transactions and comparable circumstances ensuring that profits are fairly distributed among countries where MNCs operate thus mitigating tax avoidance.¹⁷³ With the rise of the digital economy which relies on intangible assets, user participation, and economic presence, the ALP became ineffective since it required finding independent arm’s length transaction benchmarks of transfer pricing and struggled to find where value is created. Some scholars advocate for formulary apportionment¹⁷⁴ and digital service tax to remedy the situation. However, Pillar One replaced the ALP and introduced new profit allocation rules for MNCs.

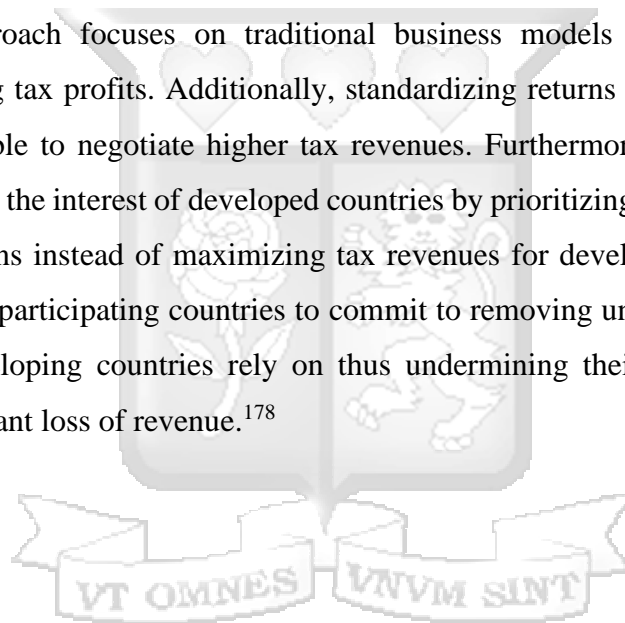
¹⁷¹ OECD, ‘Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy,’ OECD Publishing, 2021, 1-8.

¹⁷² OECD, ‘OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022,’ OECD Publishing, Paris, 2022 <https://www.oecd.org/en/publications/2022/01/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-2022_57104b3a.html>.

¹⁷³ OECD, ‘OECD Transfer Pricing Guidelines,’ OECD Publishing, 2022, 29-34 <<https://www.oecd-ilibrary.org/docserver/38ed6a34-en.pdf?expires=1734340005&id=id&accname=guest&checksum=7C086E53F93EC844157A0F922C3CBF87>>.

¹⁷⁴ Matheson, T., Beer, S., Coelho, M. D., Liu, L., and Luca, O., ‘Chapter 14 Formulary Apportionment in Theory and Practice’. In Corporate Income Taxes under Pressure. USA: International Monetary Fund, 2021, 283-305 <<https://www.elibrary.imf.org/display/book/9781513511771/ch014.xml>>. Formulary Apportionment allocates profits based on measurable factors such as assets and number of sales.

Pillar One attempts to reallocate taxing rights to market jurisdictions in response to the challenges of taxing the digital economy. However, the high revenue threshold and limited scope of Amounts A and B raise concerns about equity. Amount A operationalizes Pillar One by targeting residual profits of the most profitable MNCs. It imposes a revenue threshold of £20 billion with a 10% revenue profitability criteria which is an equivalent of 25% of residual profits¹⁷⁵ narrowing the pool of companies to only 100 MNCs as reported by the OECD in 2022.¹⁷⁶ This means that the threshold excludes smaller but impactful MNCs operating in developing countries such as ride-hailing companies which generate a substantial amount of profit but fall below this threshold. Amount B tries to simplify the application of transfer pricing rules to reduce disputes by standardizing the remuneration of routine marketing and distribution activities that MNCs rely upon based on a fixed rate.¹⁷⁷ This approach focuses on traditional business models and routine activities ultimately limiting tax profits. Additionally, standardizing returns means that developing countries are unable to negotiate higher tax revenues. Furthermore, this standardization inclines more with the interest of developed countries by prioritizing reducing disputes and compliance burdens instead of maximizing tax revenues for developing countries. Pillar One also requires participating countries to commit to removing unilateral measures such as DST that developing countries rely on thus undermining their tax sovereignty and leading to significant loss of revenue.¹⁷⁸



¹⁷⁵ OECD, 'Fact Sheet Amount A,' Progress Report on Amount A Pillar One, OECD Publishing <<https://www.oecd.org/content/dam/oecd/en/topics/policy-issues/cross-border-and-international-tax/pillar-one-amount-a-fact-sheet.pdf>>.

¹⁷⁶ OECD, 'Progress Report on the Administration and Tax Certainty Aspects of Amount A of Pillar One: Two-Pillar Solution to the Tax Challenges of the Digitalization of the Economy, OECD Publishing, Paris, 2022 <https://www.oecd.org/en/publications/progress-report-on-the-administration-and-tax-certainty-aspects-of-amount-a-of-pillar-one_2437139f-en.html>.

¹⁷⁷ Eden, L., 'Pillar One Amount B: Simplifying the Arm's Length Principle for Baseline Distribution Activities (Submission to the OECD/Inclusive Framework on 1 September 2023 in Response to the 12 July 2023 Public Consultation Document on Pillar One Amount B),' 2023, 2-8 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4560131>.

¹⁷⁸ Gravelle, J.G., 'The OECD/G20 Pillar 1 and Digital Services Taxes: A Comparison,' Congressional Research Service, 2024, 12-13 <<https://crsreports.congress.gov/product/pdf/R/R47988#:~:text=Pillar%201%20would%20allocate%2025,deferred%20to%20as%20Amount%20A.>>.

2.2.4.2 Pillar Two

Pillar Two introduces a global minimum tax (GMT) rate of 15% by targeting MNCs with an annual revenue of £750 million.¹⁷⁹ Its implementation is based on three rules.¹⁸⁰ The Income Inclusion Rule obligates a parent company to pay a top-up tax when its subsidiary or branch is taxed below the GMT ensuring that profits derived from low-tax jurisdictions are taxed up to the GMT.¹⁸¹ The Undertaxed Payment Rule is a secondary measure that allows countries to deny deductions if the IIR is not adequately enforced. This limits the amount of deductions a parent company subsidiary can make. The Subject to Tax Rule allows developing countries to enforce a withholding tax on certain cross-border transactions such as payment of royalties that are usually taxed below a nominal rate of 9% in the recipient's jurisdiction.¹⁸² Note that these transactions are usually shifted to lower tax jurisdictions thus the rule works in favor of developed countries. One of the implications of GMT on developing countries is that it undermines the competitive advantage of developing countries in attracting foreign investment since the use of tax incentives such as tax holidays and tax credits¹⁸³ will be ineffective.¹⁸⁴ If a developing country imposes a lower tax rate of 10%, the parent company country could impose a 5% tax to meet the GMT, potentially undermining the use of tax incentives and tax

¹⁷⁹ OECD, 'Tax Challenges Arising from Digitalization of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris,' 2021 <https://www.oecd-ilibrary.org/taxation/tax-challenges-arising-from-digitalisation-of-the-economy-global-anti-base-erosion-model-rules-pillar-two_782bac33-en>.

¹⁸⁰ OECD, 'Tax Challenges Arising from the Digitalization of the Economy- Global Anti-Base Erosion Model Rules (Pillar Two),' OECD Publishing 2021 <<https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/global-minimum-tax/pillar-two-model-rules-in-a-nutshell.pdf>>.

¹⁸¹ OECD, 'Tax Challenges Arising from Digitalization-Report on Pillar Two Blueprint,' OECD Publishing, 2020, 123-141 <<https://www.oecd-ilibrary.org/docserver/33895d4d-en.pdf?expires=1734332345&id=id&accname=guest&checksum=1EB7004E039EB425FA61DA7B745ED4C4>>.

¹⁸² OECD, 'Tax Challenges Arising from the Digitalization of the Economy – Subject to Tax Rule (Pillar Two): Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, 2023 <https://www.oecd.org/en/publications/tax-challenges-arising-from-the-digitalisation-of-the-economy-subject-to-tax-rule-pillar-two_9afd6856-en.html>.

¹⁸³ Arginelli, P. and Reboli, F., 'Tax Credits and Pillar Two: An Assessment in the Light of the Upcoming Implementation of the Global Minimum Tax,' in Complexity and Sustainability in Megaprojects, 2024, 69-88.

¹⁸⁴ 'OECD Releases Report on Interaction of Tax Incentives and Pillar Two,' EY Global, 13th October 2022 <<https://taxnews.ey.com/news/2022-1543-oecd-releases-report-on-interaction-of-tax-incentives-and-pillar-two>> 20th September 2024.

competition.¹⁸⁵ Additionally, the GMT primarily benefits developed countries since most developing countries impose a corporate tax of up to 30% thus risk losing out and ultimately eroding their tax sovereignty. The 15% GMT is considered too low by many.¹⁸⁶ The above illustrations showcase that Pillar Two fully entrenches a ‘race to the bottom’ in the international tax system.

2.3 Conclusion

This chapter demonstrates how the OECD framework favors developed countries leaving developing countries with minimal benefits and jeopardizing their tax sovereignty in the broader global tax forum. Amendments that emphasize the priorities of developing countries are much needed to ensure an equitable tax framework for the digital economy. The next chapter seeks to investigate how lobbying has played a role in the marginalization of developing countries within the OECD-led framework.



¹⁸⁵ Arginelli P. and Reboli F., ‘Pillar Two and Tax Competition: What is the Future of Tax Incentives?’ in *Complexity and Sustainability in Megaprojects*, 2024. See, Rixen, T., ‘Tax Competition and Inequality: The Case for Global Tax Governance,’ 17(4), *Global Governance*, 2011, 447–467.

¹⁸⁶ Oguttu, A.W., ‘Preventing International Tax Competition and the Race to the Bottom: A Critique of the OECD Pillar Two Model Rules for Taxing the Digital Economy – A Developing Country Perspective,’ 76(11), *Bulletin for International Taxation*, 2022.

3.0 CHAPTER THREE: LOBBYING IN THE OECD

3.1 Introduction

Lobbying has played a critical role in shaping tax policies as it serves the potential to refine and advance tax systems. However, it often tends to distort the very policies it seeks to shape by allowing various stakeholders in the tax space to use their economic and political influence to steer policies to align with their interests.¹⁸⁷ As a result, lobbying proven to be a double-edged instrument, has become a powerful influence in shaping tax policies even that of the OECD's BEPS project which has been highly criticized for favoring the interest of elite and corporate entities normally based in developed countries at the expense of developing countries. This chapter seeks to analyze and examine the OECD lobbying recommendations and their inadequacies. The first section discusses the general concept of corporate lobbying and its various strategies. The second section employs elements of the deliberative democracy principle in examining the inconsistent application of the OECD's lobbying recommendations, the concept of revolving doors, and the OECD's role as a market-liberal think tank by highlighting how lobbying has influenced the BEPS project and its ramifications on developing countries.

3.2 Corporate Lobbying and its Strategies

Lobbying, in its most basic sense, is an undertaking to influence the decision-making of governments mostly through first-hand communication with government representatives.¹⁸⁸ It involves three strategies: obtaining access, communicating a group's position on a particular issue to a lawmaker, and persuading them to make decisions that favor the group.¹⁸⁹ Corporate lobbying involves employing lobbyists to engage with policymakers to advocate for laws that are favorable to corporate entities over the broader public interest which often happens behind closed doors.¹⁹⁰ From a legal perspective,

¹⁸⁷ Gelepithis, M., and Hearson, M., 'The politics of taxing multinational firms in a digital age,' 29(5), *Journal of European Public Policy*, 2021, 708–727.

¹⁸⁸ Black's Law Dictionary, 11th Edition, 2019 <[https://www.law.cornell.edu/constitution-conan/amendment/1/lobbying#:~:text=To%20lobby%20means%20generally%20to,Black's%20Law%20Dictionary%20\(11th%20ed.\)](https://www.law.cornell.edu/constitution-conan/amendment/1/lobbying#:~:text=To%20lobby%20means%20generally%20to,Black's%20Law%20Dictionary%20(11th%20ed.))>.

¹⁸⁹ Yoshioka, T., 'Lobbying,' In: Anheier, H.K., Toepler, S. (eds) *International Encyclopedia of Civil Society*. Springer, 2010, 950-955.

¹⁹⁰ Nazur, F.J., 'Corporate Influence: Exploring the Relationship between Lobbying and Corporate Power,' 1, *Systemic Justice Journal: Critical Corporate Theory Collection*, 2021, 1-2 <<https://systemicjustice.org/article/corporate-influence/>>.

lobbying is a legitimate practice governed by laws that oversee political influence.¹⁹¹ For instance, the U.S. Lobbying Disclosure Act obligates lobbyists to register and disclose their activities to ensure that corporate interests are fairly and transparently represented in government.¹⁹²

Lobbying can advance the public interest by providing policymakers with information necessary for sound decision-making and emphasizing the critical role of corporate lobbyists in promoting democracy as it ensures that various perspectives are taken into consideration.¹⁹³ The relationship between lobbying and public interest is multifaceted. Côté situates lobbying within the sphere of a democratic society arguing that it only becomes a legitimate activity when it is conducted in a transparent, legal, and ethical manner.¹⁹⁴ He goes ahead to hold that it is an unavoidable aspect of modern governance and that the three safeguards prevent lobbying from devolving into a tool for undue influence and corruption allowing it to facilitate an informed and fair policymaking process.¹⁹⁵ Transparency, in lobbying, is not a mere procedural necessity but a vital tool that restores public trust and combat cynicism towards institutions.¹⁹⁶ Public interest ought to be central as it is a core principle in governance and discretionary authority ought to always align with the public interest and any attempt to divert it to private entities for private gain undermines the foundational legislation.¹⁹⁷ Guy Tremblay and Henri Bun extend this concept and tie transparency to democratic integrity by holding that democracy

¹⁹¹ Crepaz, M., 'Why do we have Lobbying Rules? Investigating the Introduction of Lobbying Laws in EU and OECD Member States,' 6(3) *Interest Groups and Advocacy*, 2017, 231-235 <https://pureadmin.qub.ac.uk/ws/portalfiles/portal/248005418/Preprint_IGA_Why_Do_We_Have_Rules_on_Lobbying_final_manuscript.pdf>.

¹⁹² The Lobbying Disclosure Act of 1995 (United States). <<https://lobbyingdisclosure.house.gov/lda.html>>.

¹⁹³ Laboutková, Š., Šimral, V., Vymětal, P., 'Democracy and Lobbying.' In: *Transparent Lobbying and Democracy*. Palgrave Macmillan, Cham, 2020, 31-49.

¹⁹⁴ Côté, A.C., 'Lobbying and the Public Interest,' *Canadian Parliament Review*, 2006, 29 <http://www.revparl.ca/29/3/29n3_06e_CôtéA.pdf>. Xavier Delacroix (ed.), *Influencer la démocratie, démocratiser l'influence: enjeux et perspectives d'un lobbyisme démythifié*, Association française des conseillers en affaires publiques, Paris, 2004. Xavier introduces the concept of 'democratising influence' positing that as much as lobbying is seen as an elite activity it can be a tool to promote democracy if it is inclusive and transparent.

¹⁹⁵ Côté, A.C., 'Lobbying and the Public Interest,' *Canadian Parliament Review*, 2006, 30 <http://www.revparl.ca/29/3/29n3_06e_CôtéA.pdf>.

¹⁹⁶ Côté, A.C., 'Lobbying and the Public Interest,' *Canadian Parliament Review*, 2006, 31 <http://www.revparl.ca/29/3/29n3_06e_CôtéA.pdf>.

¹⁹⁷ Côté, A.C., 'Lobbying and the Public Interest,' *Canadian Parliament Review*, 2006, 30 <http://www.revparl.ca/29/3/29n3_06e_CôtéA.pdf>. See, Pierre, I., and Lemieux D., *L'action gouvernementale: Précis du droit des institutions administratives*, (2e éd.), Éditions Yvon Blais, Montreal, 2002, 67.

cannot be achieved if the citizens are not made aware of the influences behind government decisions.¹⁹⁸ They analyze lobbying transparency within a wider human rights and constitutional perspective, underscoring that secrecy in lobbying compromises fundamental democratic rights such as the right to expression which could weaken public trust and cultivate a sense of alienation and disempowerment in society.¹⁹⁹ Note that regarding tax matters, the fundamental democratic rights that are undermined include but are not limited to the right to fair representation, the right to equal treatment, the right to public participation, and the right to non-discrimination. The prevailing view is that lobbying and public interest can co-exist only if it is conducted in a transparent, legal, and ethical manner. Failure of this can lead to undue influence and erode public trust in democratic institutions.

Lobbying can also result in regulatory capture²⁰⁰ where policy regulators are influenced and controlled by the interests of lobbyists resulting in policies that benefit a few corporate entities at the expense of public welfare.²⁰¹ Regulatory capture transcends coercion or blatant bias and manifests through subtle cultural and institutional influences. It views ‘public interest’ as a malleable concept that is used by corporate entities to achieve their interests by disguising private advantage under the notion of serving the common good.²⁰² This is what is known as the cultural schemas that underpin regulatory capture.²⁰³ This framework denotes that capture does not occur through overt conflict but through a shared consensus where the resulting influence of lobbyists makes policymakers equate the interests of certain lobbyists with public interest which ultimately marginalizes competing

¹⁹⁸ Côté, A.C., ‘Lobbying and the Public Interest,’ *Canadian Parliament Review*, 2006, 31 <http://www.revparl.ca/29/3/29n3_06e_CôtéA.pdf>. See, Henri, B. and Guy, T., “Le droit du public de savoir qui cherche à influencer le gouvernement: un droit fondamental” in *Les développements récents en matière de lobbyisme*, report of the mini conference by the Barreau du Québec, Service de la formation permanente, Montreal, February 4, 2005, 3.

¹⁹⁹ Côté, A.C., ‘Lobbying and the Public Interest,’ *Canadian Parliament Review*, 2006, 30 <http://www.revparl.ca/29/3/29n3_06e_CôtéA.pdf>.

²⁰⁰ BÓ, E. D., ‘REGULATORY CAPTURE: A REVIEW,’ 22(2), *Oxford Review of Economic Policy*, 2006, 203–225.

²⁰¹ Davis, H., ‘Corruption, Lobbying and Capture: A Comprehensive Review of Corruption in the United States,’ 1(1), *Florida Pre-Law Review*, 2024.

²⁰² Li, W.Y., ‘Regulatory Capture’s Third Face of Power,’ 21(2), *Oxford University Press and the Society for the Advancement for Socio-Economic*, 2023, 1221.

²⁰³ Boutyline, A. and Soter, L. K., ‘Cultural Schemas: What They Are, How to Find Them, and What to Do Once You’ve Caught One’, 86, *American Sociological Review*, 2021, 728–758.

interests.²⁰⁴

Regulatory capture takes place in two stages: emergence and institutionalization.²⁰⁵ Emergence involves integrating themselves into policymaking forums in a view to reshape their cultural concepts to include their objectives through tactics such as network embedding and schema extension which allow corporates to form relationships with policymakers to influence them and reshape shared cultural concepts of public interest in a bid to present their objectives as logical, reasonable and in alignment with the needs of the society.²⁰⁶ Conversely, institutionalization showcases the actual entrenchment of regulatory capture within regulatory frameworks through knowledge production and recursive institutional reproduction.²⁰⁷ The former demonstrates the alliance between lobbyists and regulatory forums to produce research studies and data that endorse and justify industry positions²⁰⁸ while the latter secures these positions by including them in the regulatory framework for continuity and permanence across different industries and institutions.²⁰⁹ Most importantly, the interplay between cultural and material sources of power showcases how corporations mobilize their resources to gain influence and transform economic power into cultural capital to ensure the success of their lobbying activities. Furthermore, the persistence of its influence is secured through recursive institutional production where regulatory policies are upheld and amplified in various levels of governance.²¹⁰

For example, the OECD's BEPS project along with its IF showcases how developed

²⁰⁴ Li, W.Y., 'Regulatory Capture's Third Face of Power,' 21 (2) Oxford University Press and the Society for the Advancement for Socio-Economic, 2023, 1220. See, Rilinger, G., 'Who Captures Whom? Regulatory Misperceptions and the Timing of Cognitive Capture', Regulation & Governance, 17, 2023, 43–60. Rilinger examines the cognitive and psychological dimensions of capture that illustrate how lobbyists use the concept of 'public interest' to manipulate policymakers into conceding to their interests.

²⁰⁵ Li, W.Y., 'Regulatory Capture's Third Face of Power,' 21(2), Oxford University Press and the Society for the Advancement for Socio-Economic, 2023, 1221.

²⁰⁶ Li, W.Y., 'Regulatory Capture's Third Face of Power,' 21(2), Oxford University Press and the Society for the Advancement for Socio-Economic, 2023, 1221-1222.

²⁰⁷ Li, W.Y., 'Regulatory Capture's Third Face of Power,' 21(2), Oxford University Press and the Society for the Advancement for Socio-Economic, 2023, 1223.

²⁰⁸ Li, W.Y., 'Regulatory Capture's Third Face of Power,' 21(2) Oxford University Press and the Society for the Advancement for Socio-Economic, 2023, 1223.

²⁰⁹ Li, W.Y., 'Regulatory Capture's Third Face of Power,' 21(2), Oxford University Press and the Society for the Advancement for Socio-Economic, 2023, 1223. & 1232.

²¹⁰ Halliday, T. C., and Carruthers, B. G., 'The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes', 112, American Journal of Sociology, 2007, 1135–1202. See, Li, W.Y., 'Regulatory Capture's Third Face of Power,' 21(2) Oxford University Press and the Society for the Advancement for Socio-Economic, 2023, 1235.

countries have utilized existing cultural concepts of fairness and free-market principles to shape international tax reforms in line with their interests. It presents the initiative as a necessity for digital MNCs to contribute their 'fair share' of taxes and hides behind this veil of the accepted practice of equitable taxation in the digital economy especially in the aftermath of an outcry of tax avoidance by digital MNCs like Amazon. Additionally, Pillar Two's GMT is portrayed to curb harmful tax competition by setting a baseline for corporate tax rates in a bid to promote fair competition while at the same time protecting the tax bases of developed countries.²¹¹ These initiatives are cemented through the IF, a coalition of 147 countries led by G20 and G7 nations which accentuates the interest of developed countries while presenting the framework as globally inclusive which overshadows the views of developing countries.²¹² By formulating their interests within culturally accepted notions, developed countries have managed to push forward their agendas while maintaining a presentation of global consensus.

MNCs employ a variety of strategies to influence international tax policies. One of them is direct lobbying also referred to as inside lobbying. It focuses on direct engagements with decision-makers and involves one-on-one meetings, private discussions, offering expertise to influence policies, and drafting policy proposals for decision-makers to consider.²¹³ Alphabet and Amazon were the top internet firms with the most lobbying spending in 2018 with taxes continuing to get many mentions in Amazon's lobbying report.²¹⁴ In addition to direct lobbying, MNCs can influence policy by sponsoring academic research and think tanks that produce studies that support their interests and policy references. Furthermore, MNCs leverage industry associations and public relations campaigns to influence tax policies. Industry groups such as the Information Technology Industry Council represent their members' interests and have consistently opposed unilateral tax measures such as

²¹¹ Chen, J. and Chow, W., 'Global Minimum Tax Reform and the Future of Tax Competition,' *Bulletin for International Taxation*, 2023, 314-318 <https://www.ibfd.org/sites/default/files/2024-03/oecd_international-global-minimum-tax-reform-and-the-future-of-tax-competition-ibfd.pdf>.

²¹² 'Members of the OECD/G20 Inclusive Framework on BEPS,' The OECD, 28th May 2024 <<https://www.oecd.org/content/dam/oecd/en/topics/policy-issues/beps/inclusive-framework-on-beps-composition.pdf>> 20th September 2024.

²¹³ Dür, A., and Mateo G., 'Lobbying in the Face of Politicization: Interest Group Strategies in Trade Policy,' 31(1), *Journal of European Public Policy*, 212-238 <<https://www.tandfonline.com/doi/epdf/10.1080/13501763.2023.2203161?needAccess=true>>. See, Junk, W. M., 'Two logics of NGO advocacy: Understanding inside and outside lobbying on EU environmental policies,' 23(2), *Journal of European Public Policy*, 2016, 236-254.

²¹⁴ 'Tech Lobby: Internet Giants Spend Record Amounts, Electronics Firms Trim Budgets,' Deborah D'souza, 25th June 2019 <<https://www.investopedia.com/tech/what-are-tech-giants-lobbying-trump-era/#toc-who-spent-what>> 20th September 2024.

DST and claim that Pillar One thresholds are overly complex.²¹⁵ MNCs also use advertising strategies to influence public opinion.²¹⁶ Amazon's 'We Pay All Our Taxes' aimed to divert attention from their tax practices.²¹⁷

The effects of lobbying strategies are that they undermine the legitimacy of tax laws and negatively impact trust in the tax system.²¹⁸ Many contend that lobbying is a governance problem that cannot be done away with but ought to be addressed to restore taxpayers' trust.²¹⁹ Corporate lobbying exacerbates global power imbalances leading to economic inequality. Wealthy MNCs who are often based in developed countries have effectively used their economic power, financial resources, and political influence to steer frameworks to align with their interests thus dominating global tax policies.²²⁰ As a result, the fiscal sovereignty of developing countries is undermined by limiting their ability to influence tax policies to reflect their realities.²²¹ At the domestic level, corporate lobbying causes inequalities by restricting tax liabilities by seeking lower tax rates and tax exemptions.²²² At the global level, it allows for disproportionate tax policies that benefit developed countries which heightens global inequalities and hinders the realization of State tax sovereignty.

3.3 Deliberative Democracy

This section examines the interaction of lobbying in the OECD-led tax framework through deliberative democracy highlighting how the inconsistent application of the OECD's Principles of Transparency and Integrity in Lobbying, the concept of revolving doors, and the OECD's role as a market liberal have influenced the BEPS project and its IF.

²¹⁵ ITI, 'ITI Response to OECD Public Consultation: The Secretariat Proposal for a Unified Approach to the Nexus and Profit Allocation Challenges Arising from Digitalization (Pillar 1), 2019.

²¹⁶ Kollman, K., 'Outside Lobbying: Public Opinion and Interest Group Strategies,' Princeton University Press, 1998.

²¹⁷ 'Amazon to Joe Biden: We Pay All the Taxes We Owe,' Lydia DePillis, 13th June 2019 <<https://edition.cnn.com/2019/06/13/business/biden-amazon/index.html>> 20th September 2024.

²¹⁸ Vijver, A., 'Morality of Lobbying for Tax Benefits: A Kantian Perspective,' 181(1)Journal of Business Ethics, Springer, 2022 57-68.

²¹⁹ Christians, A., 'Trust in the Tax System: The Problem of Lobbying,' Building Trust in Taxation, 2017, 151 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3097535>.

²²⁰ Gelepithis, M., and Hearson, M., 'The politics of taxing multinational firms in a digital age,' 29(5), Journal of European Public Policy, 2021, 708–727.

²²¹ Marceau, N., and Smart, M., 'Corporate Lobbying and Commitment Failure in Capital Taxation,' 93(1) The American Economic Review, 2003, 241–251.

²²² Marceau, N., and Smart, M., 'Corporate Lobbying and Commitment Failure in Capital Taxation,' 93(1) The American Economic Review, 2003, 241–251.

As much as the broader concept of democracy seems to be incompatible with the international tenet of state sovereignty because it relies on the majority rule which conflicts with the principle of sovereign equality that calls for an equal playing field and voice of States in decision-making, deliberative democracy endeavors to address this division. It moves away from power hierarchies and emphasizes inclusivity and mutual reasoning to secure meaningful dialogues among equals in international forums and do away with dictatorship by dominant powers.²²³ Such an approach addresses legitimacy concerns in international governance forums like the OECD by creating a forum that aligns with democratic ideals even in the presence of complexities of state sovereignty, more specifically, tax sovereignty in the global space.²²⁴

The theory is rooted in Habermas' critical theory which aims at fostering collective communication and empowers individuals to question and reform systems of domination whether direct or ideological.²²⁵ In international law, the parties involved are mostly States thus the analysis of this theory will be based on State parties. The theory involves emancipation²²⁶ which promotes autonomy and self-determination by analyzing societal structures and transforming them.²²⁷ In modern domination, it is a manifestation of systemic forces such as capitalism and bureaucracy that ultimately intrude on the personal and cultural realities of States²²⁸ undermining State freedom and meaningful participation. By prioritizing communicative action, the theory acts as a resistance to these systemic forces by reclaiming inclusivity and transformative dialogue.

On the other hand, communicative rationality, a major foundation of deliberative democracy, distinguishes itself from instrumental rationality which is based on efficiency and control.²²⁹ It reinforces mutual understanding and builds consensus through rational-critical dialogue. It advocates for decisions to be evaluated based on their intrinsic merit

²²³ Rostbøll, C. F., 'Emancipation or Accommodation?' 34(7) *Philosophy and Social Criticism*, 2008, 707–736.

²²⁴ Dryzek, J. S., 'Deliberative democracy and beyond: Liberals, critics, contestations,' Oxford University Press, 2000.

²²⁵ Dryzek, J. S., 'Deliberative democracy and beyond: Liberals, critics, contestations,' Oxford University Press, 2000, 20-21.

²²⁶ Chambers, S. A., 'The lessons of Rancière,' Oxford University Press, 2010, 147-148.

²²⁷ Kompridis, N., 'Critique and disclosure: Critical theory between past and future,' Cambridge, MA: MIT Press, 2006, 20.

²²⁸ Habermas, J., 'Theory and Practice,' London: Heinemann, 1974, 196.

²²⁹ Habermas, J., 'Between facts and norms: Contributions to a discourse theory of law and democracy,' Cambridge, MA: MIT Press, 1996, 104.

rather than being shaped by manipulation and coercion.²³⁰ Crucial to this is the ‘discourse principle’ which holds that decisions are legitimate only if they result from free and reasoned deliberation among equals and aims to confront unjust power structures at the same time create a forum for States to collectively justify decisions through transparent and inclusive dialogue to strengthen democratic legitimacy.²³¹ The ‘ideal speech situation’ is used as a guiding tool by imagining a situation where all participants interact as equals with a shared goal of reaching a mutual understanding at the exclusion of coercion.²³² It is a measure of evaluating and refining actual deliberative practices by challenging dominant ideologies that uphold systemic inequities and marginalization.²³³

The theory criticizes systemic forms of domination, specifically in State bureaucracy and market capitalism.²³⁴ In the international arena, bureaucracy focuses on rigid structures by prioritizing efficiency and control over State values and agency leading to the alienation of State self-determination.²³⁵ Market capitalism on the other hand reforms international relations into commodities by prioritizing the economic goals of a few over marginalized interests.²³⁶ These structures result in the colonization of marginalized interests by restricting State autonomy.²³⁷ Deliberative democracy counters these issues by creating spaces for collective action and ‘international’ reasoning. It allows States to resist colonization of their interests and regain their agency.²³⁸

A key hurdle for deliberative democracy is the idea of ‘bracketing’ which is defined as

²³⁰ Dryzek, J. S., ‘Deliberative democracy and beyond: Liberals, critics, contestations,’ Oxford University Press, 2002, 2 and 22.

²³¹ Dryzek, J. S., ‘Foundations and frontiers of deliberative governance,’ Oxford: Oxford University Press, 2010, 23.

²³² Dryzek, J. S., ‘Discursive designs: Critical theory and political institutions,’ 31(3), *American Journal of Political Science*, 1987, 661. Dryzek argues that while the concept of the ideal speech is criticized for being overly idealistic, it was originally designed as a tool to critique and identify grounds for dissent in public discourse.

²³³ Rostbøll, C. F., ‘Dissent, criticism, and transformative political action in deliberative Democracy,’ 12(1), *Critical Review of International Social and Political Philosophy*, 2009, 21-22.

²³⁴ Honneth, A., ‘Disrespect: The normative foundations of critical theory,’ Cambridge: Polity, 2007, 69.

²³⁵ Muldoon, J., ‘International Organization and Bureaucracy,’ *Oxford Research Encyclopedia of International Studies*, 2018.

²³⁶ Buzan, B., and Lawson, G., ‘Capitalism and the emergent world order,’ 90(1), *International Affairs*, 2014, 71– 91.

²³⁷ Habermas, J., ‘The structural transformation of the public sphere: An inquiry into a category of bourgeois society,’ Cambridge: Polity, 1992.

²³⁸ Ypi, L., ‘Global justice and avant-garde political agency. Oxford: Oxford University Press, 2012, 40-44.

putting aside social disparities temporarily to showcase a semblance of equality and is criticized for not tackling the underlying systemic obstacles that limit actual participation.²³⁹ An effective deliberation directly addresses these disparities and ensures that all participants have the necessary opportunities and resources for meaningful participation. The principle of the ‘right to justification’ counters bracketing by demanding political or economic claims be justified to those impacted through reciprocal reasoning thus reconstructing deliberation into a tool for challenging authority.²⁴⁰

Many have argued that deliberative democracy is theoretically appealing as it faces practical challenges since it is almost impossible to maintain equal access, rationality, and freedom from coercion in societies plagued by deep inequalities given that most dominant groups exert excessive pressure and control over outcomes. On top of that, the attention on consensus risks sidelining dissenting voices as the pursuit of agreement may overshadow alternative viewpoints.²⁴¹ With the above issues, there is a need to broaden the scope of deliberative discussions by integrating informal public institutions with formal institutions for the inclusivity of marginalized voices and to encourage broad participation. Reflexivity can be adapted to demand deliberative professionals assess their ideas and methods to curb ideological biases.²⁴² Additionally, pluralism can be used to recognize the value of dissenting opinions as they enhance the deliberative process and lead to impactful results.²⁴³

3.3.1 The Inconsistent Application of the OECD’s Lobbying Recommendations

The OECD’s inconsistent application of the OECD’s lobbying recommendations undermines the principle of deliberative democracy. The OECD has aggressively lobbied against the UN tax convention and has pressured member states to avoid stricter tax

²³⁹ Fraser, N., ‘Rethinking the public sphere: A contribution to the critique of actually existing democracy,’ 25(25-26), *Social Text*, 64-67.

²⁴⁰ Forst, R., ‘The right to justification: Elements of a constructivist theory of justice,’ Columbia University Press, 2012.

²⁴¹ Tucker, A., ‘Pre-emptive democracy: Oligarchic tendencies in deliberative Democracy,’ 56(1), *Political Studies*, 2008, 127–147.

²⁴² Hammond, M., ‘Deliberative democracy as a critical theory,’ 22(7), *Critical Review of International Social and Political Philosophy*, 2019, 788.

²⁴³ Bohman, J., ‘Theories, practices, and pluralism,’ 29(4), *Philosophy of the Social Sciences*, 1999, 459–480.

transparency measures showcasing the prioritized interests of a few developed countries.²⁴⁴ Its non-inclusive decision-making process reflects existing power imbalances. The OECD has failed to provide transparency in multinational tax reporting advocating for anonymized CbC reporting²⁴⁵ and has resisted initiatives like Australia's public disclosure laws shielding MNCs from accountability.²⁴⁶ The aspect of confidentiality beats the whole essence of corporate lobbying reporting. This is a setback for developing countries that rely on transparency to mobilize resources to hold MNCs accountable.

3.3.2 Revolving Doors in the OECD

The revolving door is a process where individuals fill in key positions in public and private sectors specifically in an industry where they have led a major position,²⁴⁷ thus showcasing one of the significant aspects of governance which is the cross-organizational flow of knowledge, connections, and power in decision-making that can either promote or jeopardize democratic accountability.²⁴⁸ In essence, the revolving door facilitates the exchange of specialized knowledge, networks, and insights between the public and private sectors.²⁴⁹ Proponents argue that this flow leads to more effective regulatory frameworks that are grounded in industry knowledge by enhancing cooperation. Critics, however, draw attention to the potential dangers by pointing out that individuals who move between public and private employment often provide not only knowledge but also exclusive access to decision-making.²⁵⁰ Such access distorts the playing field since private influence, even

²⁴⁴ 'Global Tax Rulemaker Under Fire Australia Pressured to Delay Global Tax Transparency Breakthrough,' Mark Bou Mansour, 23rd June 2023 <<https://taxjustice.net/press/global-tax-rulemaker-under-fire-after-australia-pressured-to-delay-global-tax-transparency-breakthrough/>> 20th September 2024.. See, Wiese, R., Jalles, J.T., Jakob de Haan, 'Structural reforms and income distribution: new evidence for OECD countries,' 76(4), Oxford Economic Papers, 2024, 1071–1088.

²⁴⁵ Hugger, F., 'The Impact of Country-by-Country Reporting on Corporate Tax Avoidance,' ifo Working Paper 304, Leibniz Institute for Economic Research, University of Munich, 2020, 8-9.

²⁴⁶ 'OECD Breaks Silence on Lobbying – Tax Justice Network Reports,' Mark Bou Mansour, 9th July 2023 <<https://taxjustice.net/press/oecd-breaks-silence-on-lobbying-tax-justice-network-response/>> 20th September 2024,

²⁴⁷ Blach-Ørsten, Mark, Ida Willig, and Leif Hemming Pederson., 'PR, lobbying and democracy: Mapping the revolving door in Denmark from 1981 to 2015.' 38(2), Nordicom Review, 2017, 19-31.

²⁴⁸ Pons-Hernandez, M., 'Power(ful) Connections: Exploring the Revolving Doors Phenomenon as a Form of State Corporate Crime,' 30, Critical Criminology, 2022, 305-320.

²⁴⁹ Coen, D., and Provost Collin, 'Revolving Doors,' In: Harris, P., Bitonti, A., Fleisher, C., Skorkjær Binderkrantz, A. (eds) The Palgrave Encyclopedia of Interest Groups, Lobbying and Public Affairs, 2020, 1-7.

²⁵⁰ Belli, S.S., and Stevens F., 'Revolving Doors in Europe: Does Hiring from the Public Sector Facilitate Access?' Journal of Public Policy, 2024, 1-18.

though discreet, disproportionately influences public policy by relying on informal rather than formal channels of lobbying which beats the element of inclusivity in deliberative democracy resulting in regulatory capture.²⁵¹

Regulatory capture occurs when regulations designed to act in the public good are bent for a particular industry. It results in globally upheld rules in favor of certain groups, not only in those direct and specific issues but also in more subtle forms. This is where now the regulators, through intensive engagements or even shared professional ties with the industries with which they work, begin to take industry views, half-consciously. Hence, it takes a narrow regulatory approach by favoring private interests at the expense of broader welfare.²⁵² It is clearer how the revolving door relates to regulatory capture when it is at its entry phase.²⁵³ As it brings in some part of the very precious knowledge specific to the industry, the movement from private sector jobs into public offices would not fail to create more situations in which the biased knowledge would be balanced with biased loyalty to previous employers,²⁵⁴ shaping regulatory decisions and sometimes helping form policies in a way favorable to previous industries.²⁵⁵ There might be, therefore, real or perceived conflicts of interest. Conversely, it gradually erodes the principle of governance in isolation, distorting regulatory results in ways that are difficult to identify or contest.²⁵⁶

Privileged access and loyalty to private interests is another concern. The transition of public officials to private sectors comes with leveraging one's insider knowledge and connections to maneuver through regulatory systems²⁵⁷ which gives industries an upper hand in steering policies in their directions. The revolving door also amplifies conflict of

²⁵¹ Egerod, B.C., Rasmussen, K.A., and Jens van der Ploeg, 'Revolving Door Benefits? The Consequences of the Revolving Door for Political Access,' 13, *Interests Groups and Advocacy*, 2023, 311-332.

²⁵² Hong, S., and Jeehun L., 'Capture and the bureaucratic mafia: does the revolving door erode bureaucratic integrity?' 166, *Public Choice*, 2016, 69-86.

²⁵³ Agrell, P. J., and Gautier, A., 'A theory of soft capture.' 119(3), *Scandinavian Journal of Economics*, 2017, 571-596.

²⁵⁴ Tai, L., 'Regulatory capture and quality,' 37(3), *Journal of Public Policy*, 2017, 261-286.

²⁵⁵ Carpenter, D., and David M., 'Introduction.' In *Preventing Regulatory Capture: Special Interest Influence and How to Limit It*, edited by Daniel Carpenter and David A. Moss. Cambridge: Cambridge University Press, 2014, 13.

²⁵⁶ Yackee, S.W., 'Reconsidering Agency Capture During Regulatory Policymaking,' In *Preventing Regulatory Capture: Special Interest Influence and How to Limit It*, edited by Daniel Carpenter and David A. Moss. Cambridge: Cambridge University Press, 2014, 292-325.

²⁵⁷ Yackee, S.W., 'Reconsidering Agency Capture During Regulatory Policymaking,' In *Preventing Regulatory Capture: Special Interest Influence and How to Limit It*, edited by Daniel Carpenter and David A. Moss. Cambridge: Cambridge University Press, 2014, 292-325.

interest as it often places individuals in front of a public duty conflicting with a private advantage. For instance, government officials who are involved with a particular industry advocate policies that will benefit that sector at the cost of public well-being.²⁵⁸ Whether real or apparent, they undermine trust in the governmental institution and reduce the credibility of a regulatory system.²⁵⁹ Measures such as cooling-off periods and disclosure rules have been put in place to manage these risks. However, the enforcement is rather patchy, and thus their effectiveness is limited. Moreover, it brings ethical issues to the forefront in terms of governance and policymaking because it creates a perception of overbearing influence that saps public confidence in regulatory bodies and advances skepticism over the integrity of policy choices.²⁶⁰ When government or even international governing bodies are perceived to be prioritizing the interests of a privileged few, the whole social contract and achievement of the common good is compromised.

In the context of the OECD's role in the international tax framework, the revolving door phenomenon is starkly illustrated by Pascal Saint-Aman's 2022 shift from leading the OECD Centre for Tax Policy and Administration (CTPA) to Brunswick Group, a private lobbying firm.²⁶¹ This transition exposes deep systemic flaws that jeopardize the credibility of public decision-making. Saint-Amans, a key figure behind major global tax reforms like the OECD's IF moved directly into a private sector role advising businesses on influencing tax policy stakeholders. This move heightens conflict of interest concerns, the exploitation of insider knowledge, and a shift in loyalty from public to private interests. Such transitions grant private entities undue advantage, leveraging relationships and expertise acquired in public office,²⁶² eroding public confidence, and raising questions about the neutrality of ongoing negotiations such as those regarding the GMT. The OECD's 2010 Recommendations on Transparency and Integrity in Lobbying propose

²⁵⁸ OECD., 'Managing Conflict of Interest in the Public Service. OECD Guidelines and Country Experiences,' OECD Publishing, 2003.

²⁵⁹ Boyce, G. and Cindy D., 'Conflict of interest in policing and the public sector,' 11(5) Public Management Review, 2009, 601-640.

²⁶⁰ Skidmore, M. J., 'Ethics and public service,' 537, The Annals of the American Academy of Political and Social Science, 1995, 25-36.

²⁶¹ 'Pascal Saint-Amans Joins Brunswick Group as a Partner,' Brunswick, 19th September 2022 <<https://www.brunswickgroup.com/pascal-saint-amans-joins-brunswick-group-as-a-partner-i22150/>> 22nd November 2024.

²⁶² 'OECD Must End Dangerous Revolving Door with Private Sector,' Financial Transparency Coalition, 26th October 2022 <<https://financialtransparency.org/oecd-must-end-dangerous-revolving-door-private-sector/>> 22nd November 2024.

safeguards to address such risks, including mandatory cooling-off periods, preventing conflict of interests, and prohibiting the misuse of confidential information for governments and not the OECD itself.²⁶³ The absence of stringent enforcement mechanisms within the OECD reveals a troubling double standard since the organization's weak implementation allows situations like Saint-Aman's career shift to continue unchecked.

Firms such as the Brunswick Group which specializes in advising corporations on advocacy strategies to shape government regulations, illustrate how corporate influence often dominates policy development. The firm's candid acknowledgment of its role in steering discussions and decisions underscores the structural nature of this power.²⁶⁴ This reflects the political dynamics of the Inclusive Framework as skewed in favor of wealthy nations and MNCs, leaving the interests of the global south increasingly marginalized. This exposes significant inconsistency within the OECD's professed commitment to transparency and inclusivity. The stark imbalance in access and influence reveals a systemic bias toward elite interests. This not only calls into question the legitimacy of the OECD's initiatives but also reinforces the persistent global inequities in tax governance.

3.3.3 OECD as a Market-Liberal Think Tank

The OECD has continuously operated as a think tank grounded in the principles of market liberalism which has had strong implications for its approach to international tax governance and the organization's role in global policy setting.²⁶⁵ Originally established as an organization to promote liberal capitalism, the organization has emphasized market neutrality and free trade thus favoring capital-exporting countries.²⁶⁶ This ideological foundation is deeply ingrained in the international tax framework that the OECD created

²⁶³ OECD, 'Recommendation of the Council on Principles for Transparency and Integrity in Lobbying,' OECD Publishing, 2010.

²⁶⁴ 'Pascal Saint-Amans Joins Brunswick Group as a Partner,' Brunswick, 19th September 2022 <<https://www.brunswickgroup.com/pascal-saint-amans-joins-brunswick-group-as-a-partner-i22150/>> 22nd November 2024.

²⁶⁵ Schmelzer, M., 'The Hegemony of Growth: The OECD and the Making of Economic Growth Paradigm,' Cambridge University Press, 2016, 326 and 355.

²⁶⁶ Bayne, N., 'Making Sense of Western Economic Policies: The Role of the OECD,' 43(2), *The World Today*, 1987, 27– 30.

in a bid to lower market distortions and promote cross-border investments.²⁶⁷ Sadly, these systems are skewed by allocating taxing rights to developed countries which conforms with the economic interests of the OECD's key members and has bolstered systemic inequalities in international tax governance.²⁶⁸

The OECD's role in the BEPS project exemplifies its capacity to influence global tax policy. Although presented as a solution to combat tax avoidance, the outcomes of the BEPS initiative reveal compromises that align more closely with the interests of wealthy nations than with those of developing countries.²⁶⁹ For instance, the CbC reporting framework, intended to increase transparency, was weakened through lobbying. High reporting thresholds, confidentiality rules, and restrictions on the use of data reduced the framework's ability to address the tax challenges faced by developing nations, which rely heavily on corporate tax revenue.²⁷⁰ By prioritizing corporate confidentiality over public accountability, the OECD has promoted policies that safeguard elite interests at the expense of fairness and equity.

These factors have placed developing countries at a distinct disadvantage. Despite being the most affected by the BEPS project, developing countries were largely excluded from the initial phases of the project.²⁷¹ Even when they joined the IF, their participation was watered down to 'associates' who were only conferred with adopting standards that had initially been established by more affluent countries.²⁷² This hierarchical approach limits

²⁶⁷ Klausen, G., 'The OECD Model Tax Convention: Explaining the OECD's Legitimation Strategies and Why States Adhere to the Principle of Exclusive Rights to Tax Royalties in the State of Residence,' University of Oslo, 2014, 24 and 25. See, Middlebrook, P., 'Building a "fragile consensus": Liberalisation and State Fragility,' OECD Development Co-operation Working Paper. 7, 2012, 10.

²⁶⁸ Grahame J., 'Understanding the Beps and Other OECD Tax Initiatives Including the Inclusive Framework in the Context of Treaties and State Inequality,' Journal of Tax Administration, Forthcoming, 2023, 47-51.

²⁶⁹ West, C., 'The Relevance of the BEPS Recommendations on Developing Countries,' Final Report, Ministry of Foreign Affairs, Netherlands Policy and Operations Evaluation Department, 2021, 17.

²⁷⁰ Oguttu, A., 'Curtailling BEPS Through Enforcing Corporate Transparency: The Challenges of Implementing Country-by-Country Reporting in Developing Countries and the Case for Making Public Country-by-Country Reporting Mandatory.' In: World tax journal, 12, 4, 2020, 799-828.

²⁷¹ OECD, 'OECD/G20 Base Erosion and Profit Shifting Project: Information Brief, 2014 Deliverables,' 2014. This brief is evidence that developing countries were not involved in the ascent stages of the BEPS project. The OECD Committee on Fiscal Affairs oversaw the project with 44 countries participating on an equal footing. This included all OECD member states as well as the BEPS associates which comprised of eight non-OECD countries that is Argentina, Brazil, China, Colombia, India, Indonesia, Latvia, Russia, Saudi Arabia and South Africa.

²⁷² Essers, P.H.J., 'International Tax Justice between Machiavelli and Habermas,' 68(2), Bulletin for International Taxation, 2014, 57. He argues that while the OECD tries to make the BEPS process inclusive

their influence and fails to address their unique challenges, such as inadequate administrative capacity or access to data to tackle aggressive transfer pricing. The OECD's frameworks provide little meaningful support to address these gaps, leaving developing nations at a disadvantage.²⁷³

The OECD's role as a market-liberal think tank reveals its dual function as shaping global tax policy and enabling lobbying by powerful stakeholders. By framing debates, promoting neoliberal principles, and controlling the narrative, the OECD has cemented its influence in international economic governance which has successfully secured the interests of developed countries and their MNCs.²⁷⁴ There is a need for stricter regulations of lobbying and alternative forums for tax policy engagements. Many have advocated for a global tax body under the UN purposefully to provide a more inclusive and democratic forum where all countries are equally represented.²⁷⁵ Such a recommendation is plausible although countries should not forget the several instances that the UN has been perceived as 'undemocratic'.²⁷⁶ Táíwò's proposal for creating a 'new house'²⁷⁷ is in parallel with those advocating for a new world tax organization that is independent of the influence of both the OECD and the UN.²⁷⁸ These changes are necessary failures of which the OECD will continue to compromise the stability of the global tax system.

by consulting stakeholders, it lacks democratic legitimacy as not all countries are equally involved in decision making.

²⁷³ Action Aid, 'The BEPS Process: Failing to Deliver for Developing Countries,' Action Aid Organization, 2014, 1-7.

²⁷⁴ Leopoldo, P., 'The OECD Global Tax Deal and Developing Countries: Where Do We Stand?' Caribbean Tax Law Journal, Forthcoming, 2023, 1-6.

²⁷⁵ Hugo, T.G., 'A UN Tax Convention? Exploring the Merits and Feasibility of a New International Convention on Tax and Financial Transparency,' Norwegian Academy of International Law, 2022.

²⁷⁶ Ghassim, F., Koenig-Archibugi, M., Cabrera, L., 'Public Opinion on Institutional Designs for the United Nations: An International Survey Experiment,' 66(3), International Studies Quarterly, 2022, 6-10. See, < <https://www.oxjournal.org/power-dynamics-and-inequality-between-countries-in-the-united> > 16th September 2024.

²⁷⁷ Táíwò, O.O., 'Elite Capture: How the Powerful Took Over Identity Politics (And Everything Else),' Haymarket Books, 2021, 85-114. She conceptualizes building a new house to curb elite capture. Building a new house is a metaphor illustrating the need to construct entirely new systems and frameworks rather than merely attempting to patch up existing structures that are inherently flawed.

²⁷⁸ Kuhn, K., Cadzow, L., Heitmüller, F., Hearson, M. and Randriamanalina, T., 'The International Tax Regime Complex: Understanding Change in Global Tax Governance,' ICTD Working Paper 212, Brighton: Institute of Development Studies, 2024.

3.4 Conclusion

The OECD's initiatives often clash with the interests of developing countries, undermining their tax sovereignty and reinforcing global tax inequalities. Lobbying has played a central role in shaping these biased frameworks, favoring developed nations and MNCs. While the OECD claims to promote fairness, its practices, including the revolving door phenomenon undermine its integrity. As a result, developing countries are slowly asserting their tax sovereignty through unilateral tax measures like DST and SEP. However, such measures have triggered retaliatory trade measures like trade sanctions from developed countries.



4.0 CHAPTER FOUR: THE TRADE-OFF BETWEEN TAX SOVEREIGNTY AND INTERNATIONAL TRADE OBLIGATIONS

4.1 Introduction

Tax sovereignty is a cornerstone of state sovereignty which allows countries to tailor tax policies to their needs.²⁷⁹ However, with the evolving digital economy, the exercise of tax sovereignty conflicts with international trade obligations. This chapter analyzes the trade-offs, particularly emphasizing unilateral tax measures adopted by countries to exercise their tax sovereignty, focusing on Kenya's DST and proposed SEP framework. It then examines international trade law frameworks' stance on retaliatory trade actions made against these measures while making a case for developing countries.²⁸⁰

4.2 Exercising Sovereignty: Unilateral Tax Measures

Unilateral tax measures are policies adopted by a country on its own without international agreement and have recently been adopted to address revenue gaps caused by BEPS and the under-taxation of digital economies. These measures stem from the concept of unilateralism which was initially understood as 'actions taken without the consent of the United States.' Of recent, the concept has been the most alarming development international tax system except in this case the U.S. and its MNCs are victims and other countries the perpetrators.²⁸¹ Some examples of unilateral measures are DST and SEP tax which target MNCs that derive significant economic value in source jurisdictions by exploiting loopholes in traditional tax rules to avoid tax liability.²⁸²

²⁷⁹ Wolfe, M., 'Jean Bodin on Taxes: The Sovereignty-Taxes Paradox,' 83(2), Political Science Quarterly, 1968, 268–284.

²⁸⁰ 'Retaliatory Measures on DST,' Steve Esselaar, 26th November 2021 <<https://researchichtsolutions.com/home/weekly-digest-for-26nov/>> 22nd September 2024,

²⁸¹ Cui, W., 'What is Unilateralism in International Taxation?' 114, Allard School of Law at the University of British Columbia, 2020, 260-261 <https://researchers.allard.ubc.ca/ws/portalfiles/portal/39709256/What%20Is%20Unilateralism%20in%20International%20Taxation_.pdf>.

²⁸² Jalan, N. and Misquith-Tigdi, E., 'What is the Road ahead for Unilateral Digital Tax Measures?' 27(4) Asia Pacific Tax Bulletin, 2021 <<https://www.ibfd.org/shop/journal/what-road-ahead-unilateral-digital-tax-measures>>.

4.2.1 DST to SEP in Kenya: A Withdrawn Transition

Kenya's adoption of unilateral tax measures represents a strategic use of tax sovereignty to address the challenges of taxing the digital economy. However, the system is still in its nascent stages, and significant refinements may be required to enhance its effectiveness and fairness. The Finance Act 2020 introduced DST and became effective on January 1, 2021, marking a significant milestone in capturing income generated through digital marketplaces.²⁸³ DST is levied at 1.5% of the gross transaction value²⁸⁴ and applies to both resident and non-resident digital service providers operating within Kenya²⁸⁵ who are required to file monthly DST returns and remit payments by the 20th of the following month.²⁸⁶ Notably, such payments are required to be made in Kenya shillings with foreign companies contesting that it adds administrative burdens in dealing with other currencies. For residents, DST is treated as an advance tax, which can be offset against their annual income tax liability.²⁸⁷ For non-residents without a PE in Kenya, it functions as a final tax²⁸⁸ and thus cannot offset the DST against their overall tax liability placing them at a disadvantage compared to their resident counterparts. The result of this unequal treatment could discourage foreign investments and create an unwelcoming business environment for international trade.

A broad definition is conferred to a 'digital marketplace' to mean any platform that facilitates interaction between buyers and sellers of goods and services through electronic means²⁸⁹ to ensure that a range of activities falls within the purview of DST, including but not limited to downloadable content, streaming services, and the sale or licensing of user

²⁸³ The Finance Act No. 8 of 2020.

²⁸⁴ Section 34 (1)(o), Income Tax Act (Cap 470) read along with Section 7 of the Finance Act No. 8 of 2020 and the Third Schedule – Head B Section 12 of the Income Tax Act (Cap 470).

²⁸⁵ Section 4, Finance Act No. 8 of 2020 which amended the Income Tax Act (Cap 470) by inserting a new provision, Section 12E, that provides for the Digital Service Tax.

²⁸⁶ Section 12E (2), Income Tax Act (Cap 470) read along with Section 7(b) of the Finance Act No. 8 of 2020.

²⁸⁷ Section 4, Finance Act No.8 of 2020 read along with Regulation 4 (2) of the Income Tax (Digital Service Regulations), 2020.

²⁸⁸ Regulation 4 (3), Income Tax (Digital Service Regulations), 2020 which provides for application of digital service tax.

²⁸⁹ Section 3 (3) (ba), Income Tax Act (Cap 470) read along with Regulation 2 of the Income Tax (Digital Service Regulations), 2020 which defines a digital marketplace as an online or electronic platform which enables users to sell or provide services, goods or other property to other users.

data.²⁹⁰ To ensure compliance, both resident and non-resident service providers must register for DST and file their returns through Kenya's iTax system. For non-residents without a physical presence in Kenya, a simplified registration process is available to them.²⁹¹ Alternatively, these providers can appoint a tax representative to fulfill their DST obligations.²⁹²

Kenya's 1.5% DST rate compared to other jurisdictions such as the EU's proposed 3% rate and other countries that have rates within 2-3% appears to be modest.²⁹³ This difference in tax rates might suggest that Kenya is adopting a cautious approach, perhaps mindful of the need to balance revenue generation with maintaining an attractive environment for digital businesses. However, there were plans in 2022 to double the DST to 3%.²⁹⁴ Nonetheless, concerns about double taxation persist, especially for non-resident companies already subject to tax obligations in their home jurisdictions. Additionally, DST measures could unintentionally act as trade barriers leading to potential retaliatory actions from affected countries creating a tit-for-tat dynamic that could harm Kenya's trade relations. Even more worrying, it may hinder technological advancement by making it difficult for digital service providers to operate in Kenya, limiting access to innovative digital solutions. The effects of this could outweigh the short-term revenue gains of DST in the long run.

The now-withdrawn Finance Bill 2024 aimed to refine Kenya's digital taxation by proposing the replacement of DST with SEP²⁹⁵ which provides that non-resident businesses earning income through digital marketplaces be taxed based on a deemed profit rather than the total value of transactions.²⁹⁶ It proposes taxing 30% of 20% of the deemed profit for

²⁹⁰ Regulation 3 (1), Income Tax (Digital Service Regulations), 2020 which provides for digital services for which digital service tax shall apply.

²⁹¹ Regulation 9(1), Income Tax (Digital Service Regulations), 2020.

²⁹² Regulation 8, Income Tax (Digital Service Regulations), 2020.

²⁹³ OECD, 'Tax Challenges Arising from the Digitalization of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two),' OECD Publishing, Paris, 2021. See, Kofler, G., Mayr, G. and Schlager, C., 'Taxation of the Digital Economy: Recent Policy Developments and the Question of Double Taxation,' *Intertax*, 48(2), 2020.

²⁹⁴ 'Tech Firms Face Higher Levies as Kenya Plans to Double Digital Service Tax,' TechCrunch, 13th April 2022 <<https://techcrunch.com/2022/04/13/tech-firms-face-higher-levies-as-kenya-plans-to-double-digital-service-tax/>> 22nd September 2024.

²⁹⁵ Clause 8, Finance Bill 2024 which seeks to amend the Income Tax Act (Cap 470) by repealing Section 12E and replacing it with the Significant Economic Presence Tax.

²⁹⁶ Clause 8, Finance Bill 2024 read along with the proposed Section 12E(1) of the Income Tax Act (Cap 470).

digital service providers.²⁹⁷ The proposed tax rate sparked debate with the Departmental Committee on Finance and National Planning arguing that while digital businesses benefit from lower operational costs, the 20% deemed profit rate was excessively high. The committee recommended reducing the rate of deemed profit to 10%, arguing that a lower tax burden would create a more competitive and conducive environment for digital businesses while ensuring they contribute reasonably to Kenya's tax system.²⁹⁸ The progression of the above tax policies showcases the balance between affirming tax sovereignty and conforming with international tax guidelines.

Although SEP shows promise, it faces significant challenges due to its thresholds which could create a significant administrative burden for developing countries. Moreover, countries like Nigeria²⁹⁹ and India³⁰⁰ which have implemented SEP are yet to make public the amount of revenue generated from it, raising questions about its practicality. SEP focuses on three thresholds: revenue-based, digital, and user-based.³⁰¹ These thresholds contain practical and legal challenges that could be insightful for Kenya's evolving digital tax landscape.³⁰² The revenue-based factor recognizes the economic value generated by

²⁹⁷ Clause 8, Finance Bill 2024 read along with the proposed Section 12E(3) of the Income Tax Act (Cap 470).

²⁹⁸ Report of the Departmental Committee on Finance and National Planning on its Consideration of the Finance Bill 2024 (National Assembly Bill No. 30 of 2024), 90, 2024, 473-474.

²⁹⁹ Companies Income Tax (Significant Economic Presence) Order 2020 <<https://pwcnigeria.typepad.com/files/companies-income-tax-significant-economic-presence-order-2020.pdf>>.

³⁰⁰ Income Tax Act 1961 (India), Explanation 2A to Section 9(1)(i) (as amended by the Finance Act 2018). It states that for the removal of doubts, it is hereby clarified that the significant economic presence of a non-resident in India shall constitute a "business connection" in India, and "significant economic presence" for this purpose shall mean— (a) a transaction in respect of any goods, services, or property carried out by a non-resident in India, including the provision of download of data or software in India, if the aggregate of payments arising from such transaction(s) during the previous year exceeds such amount as may be prescribed; or (b) systematic and continuous soliciting of business activities or engaging in interaction with such number of users as may be prescribed, in India through digital means: Provided that the transactions or activities shall constitute a significant economic presence in India, whether or not— (i) the agreement for such transactions or activities is entered in India; or (ii) the non-resident has a residence or place of business in India; or (iii) the non-resident renders services in India. Provided further that only so much of the income as is attributable to the transactions or activities referred to in clause (a) or clause (b) shall be deemed to accrue or arise in India.

³⁰¹ OECD, 'Digital Economy Policy Platform, Digital Economy Taxation Policy Platform,' OECD Publishing, 2024, Section 2.1 <<https://depp.oecd.org>>.

³⁰² 'Kenya to Transition from Digital Service Tax to Significant Economic Presence Tax,' KICTANet, 2024a, 4th June 2024 <<https://www.kictanet.or.ke/kenya-to-transition-from-digital-service-tax-to-significant-economic-presence-tax/>> 22nd September 2024 and 'Understanding Digital Taxation in Kenya: A Pathway to Fair and Inclusive Policy Reforms,' KICTANet, 2024b, 24th September 2024

MNCs without physical presence aligning with the current digital realities.³⁰³ It operates on the assumption that higher revenue reflects a greater substantial economic presence and thus offers a straightforward basis for assessing digital taxes.³⁰⁴ However, the revenue-based factor is vulnerable to exploitation. MNCs may misreport and restructure operations or channel revenues through low-tax jurisdictions to evade tax obligations.³⁰⁵ For instance, transactions may be attributed to intermediaries outside the taxing jurisdiction, despite substantial local engagement. Such practices allow companies to bypass thresholds, undermining the intent of equitable taxation.³⁰⁶ This approach aligns with the benefit theory of taxation, which posits that those benefiting from a country's infrastructure should share its tax burden.³⁰⁷

The use of a local domain name, a localized digital platform, and local payment options are metrics of digital-based factors used to identify digital MNCs that are sufficiently engaged with a market economy to justify tax obligations.³⁰⁸ The presence of a local domain name, such as “.ke” for Kenya enhances consumer trust signaling that the company is tailoring its services to meet the regulatory and cultural expectations of the region.³⁰⁹ This trust often leads local consumers to perceive the enterprise as part of the national digital landscape,

<<https://www.kictanet.or.ke/understanding-digital-taxation-in-kenya-a-pathway-to-fair-and-inclusive-policy-reforms/>> 30th September 2024.

³⁰³ OECD, 'Tax Challenges Arising from Digitalization – Interim Report 2018, OECD Publishing, Paris, 2018, 12. <https://www.oecd.org/en/publications/tax-challenges-arising-from-digitalisation-interim-report_9789264293083-en.html>.

³⁰⁴ Pinstone, P. and Hongler, P., 'Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy,' Journal Articles and Papers IBFD, 2015, 91-97 <https://www.ibfd.org/sites/default/files/2021-08/19_025_Taxing_the_Digital_Economy_final_web.pdf>.

³⁰⁵ OECD, 'Multinationals Enterprises Continue Reporting Low-Taxed Profit even in Jurisdictions with High Corporate Taxes Rates, Underlining Need for Global Reforms,' <<https://www.oecd.org/en/about/news/press-releases/2023/11/multinational-enterprises-report-low-taxed-profit-even-in-jurisdictions-with-high-corporate-tax-rates-underlining-need-for-global-tax-reform.html>>

21st November 2023. See, International Monetary Fund, 'International Corporate Tax Avoidance: A Review of the Channels, Effect Size and Blind Spots,' 2018 <<https://www.imf.org/~media/Files/Publications/WP/2018/wp18168.ashx>>.

³⁰⁶ Cobham, A. and Janský, P., 'International corporate tax avoidance' in Reuter P (ed), Estimating Illicit Financial Flows: A Critical Guide to the Data, Methodologies, and Findings, Oxford University Press, Oxford, 2020, <<https://doi.org/10.1093/oso/9780198854418.003.0005>>. See, Beer, S., De Mooij R., and Liu L., 'International Corporate Tax Avoidance: A Review of the Channels, Magnitudes, and Blind Spots' IMF Working Paper WP/18/168, International Monetary Fund, July 2018, 7.

³⁰⁷ Bailey, S. J., 'Public Sector Economics: Principles and Practice,' Oxford University Press, 2021, 145–150.

³⁰⁸ OECD, 'Addressing the Tax Challenges of the Digital Economy, BEPS Action 1: Final Report,' 2015.

³⁰⁹ Olayinka, T. and Williams M., 'Local Domains and Digital Taxation: Balancing Trust and Regulation,' 33(2), International Tax Review, 2023, 102-121. See, Nigeria's Companies Income Tax (Significant Income Tax) Order 2020 which establishes a Nigerian domain name as one of its elements to establish SEP.

supporting the assumption that such a company is actively engaging with the local economy. However, the reliance on local domains has its drawbacks. Many MNCs opt for global domains like “.com” instead of local ones which does not restrict their ability to reach customers from any region and allows them to bypass the legal requirements tied to local domains.³¹⁰ A localized digital platform such as a website or app that offers local language and local content is another factor used in determining SEP. When a company provides localized content, it is presumed that it is trying to adapt its services to increase engagement and market share in that country.³¹¹ Practically, this element can be exploited by MNCs through the use of automated language translation or provision of regional pricing without creating significant economic engagement or investments in the local economies.³¹² Additionally, digital MNCs remain centralized, with key operations like decision-making and data processing taking place outside the country where the content is accessed, allowing MNCs to appear locally engaged without having a substantial economic presence. When MNCs adopt local payment methods such as accepting the local currency or integrating with local banking systems, it showcases their efforts to align with the local financial system to enhance customer experience.³¹³ This factor is limited to the extent that MNCs can use third-party payment processors or international digital wallets that enable

³¹⁰ Svystunova, L., Muratova, Y., Fortwengel, J. and Tony E., ‘Multinationals Corporations’ Interactions with Host Institutions: Taking Stock and Moving Forward,’ 64, *Management International Review*, 2024, 3-33 <<https://link.springer.com/article/10.1007/s11575-023-00525-1>>. It mentions global domains as one of the ways MNCs employ to seamlessly navigate across regions. See, Zimmer, C., ‘Digital Market Indicators in Taxation: Local vs. Global Domains,’ 7(1), *Journal of Digital Tax Policy*, 2022, 45-62. Kenya’s Information and Communications (Electronic Certification and Domain Name Administration) Regulations Legal Notice 116 of 2010 sets out the requirements to registering a local domain in Kenya <<https://new.kenyalaw.org/akn/ke/act/in/2010/116/eng@2022-12-31>>.

³¹¹ Sharma, P. and Lee, J., ‘The Illusion of Local Engagement: Evaluating SEP Indicators in Digital Economies,’ 18(3), *Asia-Pacific Tax Journal*, 2022, 89-105.

³¹² Tenzer, H., Terjesen, S. and Harzing, A-W., ‘Language in International Business: A Review and Agenda for Future Research,’ 57, *Management International Review*, 2017, 815-854 <<https://link.springer.com/article/10.1007/s11575-017-0319-x>>. See, Luo, Y. and Shenkar, O., ‘The Multinational Corporation as a Multilingual Community: Language and Organization in a Global Context,’ 37, *Journal of International Business Studies*, 2006, 321-339 <<https://link.springer.com/article/10.1057/palgrave.jibs.8400197>>. These two articles reflect how MNCs leverage automated language translation to operate globally.

³¹³ OECD, ‘Tax Administration 2022: Comparative Information on OECD and Other Advanced and Emerging Economies,’ OECD Publishing, 2022.

customers to pay in their preferred currencies³¹⁴ without the MNC requiring direct engagement with local financial institutions.³¹⁵

User-based factors such as Monthly Active Users (MAU), online contract conclusion, and data collected are other criteria for establishing SEP.³¹⁶ MAU is the number of users actively engaged with a platform each month, with a high number indicating sustainable user engagement with the platform. The limitation of MAU is that it does not necessarily relate to revenue generation because users could engage with a platform without contributing to its revenue, especially in instances where they consume free content.³¹⁷ It is also prone to manipulation as MNCs can inflate user metrics to include inactive accounts or create incentives for artificial engagement, distorting the actual level of economic activity, and allowing MNCs to underreport their true user engagement.³¹⁸ Furthermore, the various definitions of “active users”³¹⁹ lead to inconsistent measures of MAU complicating enforcement and comparability for tax matters. The finalization of contracts digitally in market jurisdictions such as subscription-based services, e-commerce platforms, and digital marketplaces is another indicator of SEP. Its disadvantage is that MNCs structure their operations to finalize contracts in low-tax jurisdictions enabling them to avoid tax obligations.³²⁰ Additionally, the same MNCs structure their terms of service and user agreements in a way that makes it difficult to prove SEP and enforce tax obligations by local authorities. Data collected from users, especially personal data, is a substantial asset for digital businesses, often serving as the foundation for targeted advertising, content personalization, and user experience improvements. Data collection is

³¹⁴ Macro Global, ‘Third-Party Integrations: A catalyst for Cross Border Payments,’ <<https://www.macroglobal.co.uk/blog/financial-technology/third-party-integrations-in-cross-border-payments/>> 20th June 2024.

³¹⁵ Johnson, K., ‘Payment Systems and Their Role in Determining SEP,’ 15(4), *Global Taxation Perspectives* 2023, 66-81.

³¹⁶ Kumar, R., ‘User Engagement Metrics in SEP Policies: A Comparative Analysis,’ 48(3), *International Tax Journal*, 2022, 45-60.

³¹⁷ ‘Monthly Active User: A Comprehensive Exploration,’ *Marketingino*, 26th September 2024 <<https://marketingino.com/monthly-active-users-mau-a-comprehensive-exploration/>> 5th November 2024.

³¹⁸ Peroni, M. and Giovanetti, S., ‘Evaluating User-Based Taxation in the Digital Economy: Metrics and Challenges,’ 47(4), *International Tax Journal*, 2021, 29–45.

³¹⁹ Rodrigues Losada S., ‘A New Nexus Based on the Concept of Significant Economic Presence: The Digital Permanent Establishment.’ In: Hulkó, G. and Vybiral, R. eds., *European Financial Law in Times of Crisis of the European Union*. Budapest: Dialóg Campus, 2019, 380 <https://nkerepo.uni-nke.hu/xmlui/bitstream/handle/123456789/14704/Soraya_Rodriguez_Losada_A_New_Nexus_Based_on_the_Concept_377-390.pdf?sequence=37>.

³²⁰ Becker, J. and Englisch, J., ‘Contractual Nexus in a Digital Tax Landscape: Revisiting Jurisdictional Taxation Principles,’ 60(2), *European Taxation Review*, 2022, 89–104.

considered indicative of a company's integration with a market, especially when that data is monetized through advertising or product development. From a theoretical perspective, it is challenging to quantify the "value" of data collected, as raw data's economic value can vary widely depending on its use and the context in which it is applied.³²¹ This ambiguity makes it difficult to establish a consistent, objective measure for tax purposes. Furthermore, MNCs store data on central servers outside the jurisdiction where it is collected making it difficult to link the data to its local economy³²² through the anonymization and aggregation of user data, allowing MNCs to assert that the data collected is not tied to any one market.³²³

The ability of MNCs to exploit these factors highlights the impracticability of SEP especially for developing countries.³²⁴ As a result, Kenya ought to retain the DST framework as an interim measure until the SEP framework is proven to be operational then phase it out to avoid instances of double taxation. Once SEP has been implemented, the DST payments could be treated as credits against SEP taxes because getting rid of it would be detrimental to securing tax revenue. There also needs to be a clear transitional period within which both frameworks will co-exist.

In the international context, Kenya joined the Inclusive Framework in 2017 but has not signed onto the OECD Two-Pillar Solution because of the same concerns that other developing countries have raised.³²⁵ Instead, Kenya has suggested reforms that include allowing developing countries to retain taxing rights on DST for out-of-scope companies

³²¹ HM Treasury, 'The Economic Value of Data: Discussion Paper,' The UK Government, 2018 <https://assets.publishing.service.gov.uk/media/5b62c26aed915d4b4a12ae42/20180730_HMT_Discussion_Paper_-_The_Economic_Value_of_Data.pdf>. See, OECD, 'Measuring the Economic Value of Data and Cross-Border Data Flows,' OECD Publishing, 2019.

³²² Lanieri, R. and Martinez, P., 'Data Sovereignty and Digital Taxation: Defining Economic Value in Data-Driven Economies,' 14(1), World Tax Journal, 2022, 103–128.

³²³ '2024 Update: Risk of Anonymized and Aggregated Data,' Macmillan LLP, 21st February 2024 <<https://www.lexology.com/library/detail.aspx?g=6882a166-563c-4e54-a016-5784fc0763c8>> 20th September 2024.

³²⁴ Dharmapala, D., 'Future-Ready Tax Regimes for the Digital Economy: Bridging Policy and Practice,' 12(1), Harvard Journal of International Tax Policy, 2023, 33–49. See, Velayos, F. and Han, S., 'Navigating the Fluidity of Digital SEP Metrics: Towards Holistic Taxation Models,' 3(2), Journal of Digital Economy and Taxation, 2023, 150–169.

³²⁵ Kenya Revenue Authority, 'Navigating Complex Tax Resolution: An Assessment of Kenya's Engagement in the Inclusive Framework (IF),' 2021, 6 <<https://www.kra.go.ke/images/publications/Kenya-and-the-Inclusive-Framework---A-Case-Study-Report.docx.pdf>>.

and a non-binding arbitration process to resolve tax disputes.³²⁶ Notably, the implementation of DST by individual countries has led to trade retaliatory measures forcing them to trade off their tax sovereignty and halt the enforcement of unilateral tax measures. The threat of retaliatory trade measures especially by the U.S. is one of the major concerns. These measures tend to disrupt trade relations among countries. The U.S. Trade Representative (USTR) conducted investigations and found that DSTs are discriminatory against U.S. companies justifying the imposition of trade retaliatory actions by them. Earlier in 2024, there were concerns that Kenya's DST could complicate the conclusion of the U.S.-Kenya Strategic Trade and Investment Partnership (STIP). However, both countries confirmed their commitment to proceed with negotiations³²⁷ with many suspecting that the withdrawal of DST by the Finance Bill 2024 eased the tension between the countries.³²⁸

4.2.2 Retaliatory Trade Measures

This section explores the precedent of retaliatory measures stemming from economic power imbalance between countries to underscore their recurrence and likelihood more so with developing countries. The discussion is divided into two: direct retaliatory and indirect retaliatory actions. Direct involves trade-related actions such as sanctions, tariffs, and embargos, analyzed through the lens of Section 301 of the U.S. Trade Act³²⁹ that justifies such actions while indirect encompasses measures beyond trade, such as those tied to national security, labor mobility, and other strategic considerations.

4.2.2.1 Direct Retaliatory Measures

The primary focus will be on France's DST whose implementation in 2019 prompted the U.S. to invoke a Section 301 investigation, a notable example of the U.S. using this

³²⁶ Kenya Revenue Authority, 'Navigating Complex Tax Resolution: An Assessment of Kenya's Engagement in the Inclusive Framework (IF),' 2021, 6 <<https://www.kra.go.ke/images/publications/Kenya-and-the-Inclusive-Framework---A-Case-Study-Report.docx.pdf>>.

³²⁷ 'United States and Kenya Joint Statement after Fifth Round of U.S.-Kenya Strategic Trade and Investment Partnership Negotiations,' Office of the USTR, 17th May 2024<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/may/united-states-and-kenya-joint-statement-after-fifth-round-us-kenya-strategic-trade-and-investment?utm_source=chatgpt.com> 10th August 2024,

³²⁸ 'Kenya to Fall into Line with \$250 billion OECD Global Tax Reforms- Unlocks US Free Trade Deal,' Richard Asquith, 25th May 2024<https://www.vatcalc.com/kenya/kenya-to-scrap-1-5-digital-services-tax/?utm_source=chatgpt.com> 20th September 2024.

³²⁹ Trade Act of 1974, 19 U.S.C. § 2411.

mechanism to address perceived trade barriers. It imposed a 3% levy on revenue derived from certain digital services provided in France.³³⁰ These digital services are categorized into two: the digital interface services and the targeted advertising services. The former is based on platforms enabling user engagement to secure transactions thus covering online sale of goods and services³³¹ while the latter is based on advertisements targeting large MNCs through user data.³³² Notably, it applied retroactively to January 1, 2019, to companies earning a threshold of €750 million in global revenues and €25 million in France-specific revenues in a calendar year.³³³ The French DST is also known as the GAFA tax which stands for ‘Google, Apple, Facebook and Amazon’.³³⁴

The USTR initiated an investigation under Section 301 to determine whether the DST was actionable under it and implement authorized responses. The section mandates the USTR to investigate and respond to foreign trade practices, in this case, France’s DST, that are a violation of trade agreements, unjustifiable in a manner that breaches U.S. international legal rights and is unreasonable or discriminatory to burden U.S. trade.³³⁵ It goes ahead to define ‘discriminatory’ as an act, policy, or practice that denies national or most favored

³³⁰ Article 299, French General Tax Code (Code Général des Impôts), Law No. 2019-759 of 24, 2019. Article 299, II provides two instances when digital interface services are provided in France during a calendar year to include: if the service facilitates the delivery of goods/services between the users and is completed during that year by a user in France. For targeted services, if data sold during that year were generated or collected from a digital interface used by a user in France and an advertisement placed during that year on a digital interface that is based on data from a user who accessed the interface while in France.

³³¹ Article 299, I.3 and II.1, French General Tax Code (Code Général des Impôts), Law No. 2019-759 of 24, 2019. The former describes revenue from digital interface services as all amounts paid by users of the interface except for the provision of goods and services that are independent of the access and the use of the taxable services while the latter provides for exemptions to what constitutes ‘digital interface services’. This includes digital content, communication or payment services; interfaces specialized in financial systems (interbank settlements, negotiation platforms and crowdfunding intermediaries) and an interface in advertising-related platforms under specific conditions.

³³² Article 299, I.4 and II.2, French General Tax Code (Code Général des Impôts), Law No. 2019-759 of 24, 2019. The former defines revenue from targeted advertising as all amounts paid by advertisers or their agents for the insertion of an advertisement or any economic closely related operation while the latter provides for the scope of targeted advertising to include activities such as placement of targeted ads, monitoring their performance and the sale of user data linked to internet advertising.

³³³ Article 299, III, French General Tax Code (Code Général des Impôts), Law No. 2019-759 of 24, 2019. See, National Assembly, Committee on Finance, General Economy, and Budgetary Control, Report No. 64 , 2019, [3< https://www.assemblee-nationale.fr/dyn/15/comptes-rendus/cion_fin/115cion_fin1819064_compte-rendu.pdf >](https://www.assemblee-nationale.fr/dyn/15/comptes-rendus/cion_fin/115cion_fin1819064_compte-rendu.pdf).

³³⁴ National Assembly, Committee on Finance, General Economy, and Budgetary Control, Report No. 64 , 2019, [7< https://www.assemblee-nationale.fr/dyn/15/comptes-rendus/cion_fin/115cion_fin1819064_compte-rendu.pdf >](https://www.assemblee-nationale.fr/dyn/15/comptes-rendus/cion_fin/115cion_fin1819064_compte-rendu.pdf).

³³⁵ Trade Act of 1974, 19 U.S.C. § 2411(a)-(b).

nation treatment to U.S. goods or services³³⁶ and ‘unreasonable’ as an act, policy, or practice that is unfair and inequitable while not necessarily constituting legal violations of U.S. international legal rights.³³⁷ Additionally, in determining whether a foreign country’s policy is unreasonable, the availability of reciprocal opportunities for U.S. firms ought to be considered where relevant.³³⁸ Where there is a violation of a trade agreement that provides for formal dispute resolution mechanisms, the USTR ought to conduct investigations through consultations and the specified resolution mechanism under the trade agreement. In other instances where no formal dispute resolution mechanism is provided, the USTR may go ahead with its investigations without any recourse to any dispute resolution mechanism.³³⁹ If the USTR identifies any practice that is actionable under Section 301, meaning they are deemed unreasonable or discriminatory and restrict U.S. trade, then the USTR must take feasible actions as prescribed under Section 301(c) or as directed by the President to eliminate the issue.³⁴⁰ Section 301(c) provides for feasible actions to include altering trade agreement benefits, imposing import restrictions, securing agreements to end the practice of providing trade compensation, and limiting service sector permits in the U.S.³⁴¹

The investigation into France’s DST highlighted three concerns: discrimination, unreasonableness, and retroactivity. In regard to discrimination, the DST discriminated against the U.S. large digital MNCs while exempting smaller France-based companies. This is evident by some of the statements made by the French officials who referenced the DST as GAFA tax, an indication that the DST was primarily aimed at U.S. digital MNCs.³⁴² The services covered under the DST emphasize the bias, as the categorization of taxable services disproportionately impacts sectors that are dominated by the U.S. while leaving out sectors where the France economy thrives.³⁴³ Furthermore, the revenue thresholds

³³⁶ Trade Act of 1974, 19 U.S.C. § 2411 (d)(5).

³³⁷ Trade Act of 1974, 19 U.S.C. § 2411 (d)(3)(A).

³³⁸ Trade Act of 1974, 19 U.S.C. § 2411 (d)(3)(D).

³³⁹ United States Trade Representative, ‘Report on France’s Digital Service Tax Prepared in the Investigation under Section 301 of the Trade Act 1974,’ Office of the United States Trade Representative, 2019, 9.

³⁴⁰ Trade Act of 1974, 19 U.S.C. § 2411 (b).

³⁴¹ Trade Act of 1974, 19 U.S.C. § 2411 (c).

³⁴² United States Trade Representative, ‘Report on France’s Digital Service Tax Prepared in the Investigation under Section 301 of the Trade Act 1974,’ Office of the United States Trade Representative, 2019, 31-34. <https://ustr.gov/sites/default/files/Report_On_France%27s_Digital_Services_Tax.pdf>

³⁴³ United States Trade Representative, ‘Report on France’s Digital Service Tax Prepared in the Investigation under Section 301 of the Trade Act 1974,’ Office of the United States Trade Representative, 2019, 35-40.

largely excluded smaller non-U.S. companies.³⁴⁴ Lastly, the nexus between France's domestic system and its DST further disadvantages U.S. digital MNCs by allowing DST payments to be deducted from French corporate income tax, an available benefit to French firms with significant tax liabilities.³⁴⁵

The retroactive nature of the DST entailed that revenue generated before the law was enacted was subjected to DST. This forced affected companies to implement new reporting and accounting systems and calculate prior tax liabilities without adequate lead time³⁴⁶ to allow for preparations leading to significant administrative and financial burdens. Additionally, retroactivity creates uncertainty and goes against tax principles such as the principle of certainty and simplicity.³⁴⁷ U.S. courts have raised concerns about the application of new taxes retroactively. In *Blodgett v. Holden and Untermeyer v. Anderson*, the Supreme Court struck down the new gift tax provided under the Revenue Act of 1924 due to its retroactive nature,³⁴⁸ with the court emphasizing that retroactivity can only apply to existing taxes and not wholly new taxes like the DST.³⁴⁹

In the lens of unreasonableness, the U.S. argued that the extraterritorial nature of DSTs tax revenue is not necessarily connected to a physical presence in France which showcases a departure from the traditional territorial nexus.³⁵⁰ For example, a U.S.-based company with its operational imprint in France would still be subjected to DST simply because a French user interacted with its digital platform. Additionally, public rationales offered for France's DST are implausible with the U.S. arguing that user data for example does not always provide value for digital companies and that such an assumption is flawed because other industries such as healthcare derive significant value from user interaction yet they are not

³⁴⁴ United States Trade Representative, 'Report on France's Digital Service Tax Prepared in the Investigation under Section 301 of the Trade Act 1974,' Office of the United States Trade Representative, 2019, 41-46.

³⁴⁵ United States Trade Representative, 'Report on France's Digital Service Tax Prepared in the Investigation under Section 301 of the Trade Act 1974,' Office of the United States Trade Representative, 2019, 47-49.

³⁴⁶ OECD, 'Mechanisms for the Effective Collection of VAT/GST When the Supplier is not Located in the Jurisdiction of Taxation,' 2017, 51, <https://www.oecd.org/content/dam/oecd/en/publications/reports/2017/10/mechanisms-for-the-effective-collection-of-vat-gst-where-the-supplier-is-not-located-in-the-jurisdiction-of-taxation_4ba05a97/5269dc5a-en.pdf>

³⁴⁷ OECD, 'Addressing the Tax Challenges of the Digital Economy,' 2014, 30.

³⁴⁸ *Blodgett v. Holden*, 275 U.S. 142, 147 (1928); *Untermeyer v. Anderson*, 276 U.S. 440, 445-446 (1928).

³⁴⁹ *United States v. Carlton*, 512 U.S. 26, 34 (1994).

³⁵⁰ United States Trade Representative, 'Report on France's Digital Service Tax Prepared in the Investigation under Section 301 of the Trade Act 1974,' Office of the United States Trade Representative, 2019, 60.

taxed.³⁵¹ The U.S. went ahead and imposed a 25% tariff on \$1.3 billion of French goods as a result of the investigation³⁵² which was later suspended following a negotiation where France agreed to defer from its DST until a multilateral framework for the digital economy was formed by the OECD.³⁵³

4.2.2.2 Indirect Retaliatory Measures

Indirect retaliatory measures are less overt measures that extend beyond traditional trade retaliatory actions and can significantly affect economic and geographical relations between States. This section will focus on two kinds of such measures: national security concerns that are exemplified by the Huawei case³⁵⁴ and labor mobility with a focus on the 2019 U.S.-China trade tensions which showcases the restriction of movement of Chinese nationals through tighter visa policies and restrictions.

4.2.2.2.1 National Security Concerns

The U.S. ban on Huawei is based on national security concerns³⁵⁵ as China tries to dominate global cyber governance.³⁵⁶ This ban was backed by several U.S. laws. The National Defense Authorization Act prohibited the procurement of Huawei's telecommunication products by federal agencies due to infrastructure risks.³⁵⁷ The Export Control Reform Act restricted exports of emerging technologies to Huawei limiting its access to U.S. technology.³⁵⁸ The Federal Acquisition Supply Chain Security Act, on the other hand, allows for the exclusion of companies like Huawei from supply chains if they cause cyber

³⁵¹ United States Trade Representative, 'Report on France's Digital Service Tax Prepared in the Investigation under Section 301 of the Trade Act 1974,' Office of the United States Trade Representative, 2019, 74-75.

³⁵² 'Digital Taxes, Meet Handbag Tariffs,' Daniel Bunn, 10th July 2020 < <https://taxfoundation.org/blog/us-french-tariffs/>> 15th August 2024.

³⁵³ 'US Backs Down from Tariffs over French Tech Giant Taxes,' BBC, 7th January 2017 < <https://www.bbc.com/news/business-55578198>> 15th August 2024.

³⁵⁴ Permanent Select Committee on Intelligence, 'Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE,' 112th Congress, 2012, 11-34.

³⁵⁵ Bu, Qingxiu, 'Behind the Huawei Sanction: national security, ideological prejudices or something else?' 5, *International Cybersecurity Law Review*, 2024, 264.

³⁵⁶ Tim, S., Jinghan, Z. and Yaru, C., "China's Solution to Global Cyber Governance: Unpacking the Domestic Discourse of 'Internet Sovereignty'," 45(3), *Politics and Policy*, 2017, 432 and 46.

³⁵⁷ National Defense Authorization Act, Pub. L. No. 115-232, Section 889, 2019.

³⁵⁸ Export Control Form Act, Pub. L. No. 115-232, Section 1758, 2018. See also, Chad, B., 'Export Controls: America's Other National Security Threat,' 30(2), *Duke Journal of Comparative & International Law*, 2020, 283 and 308.

threats and espionage.³⁵⁹ The U.S. executive branch also plays a critical role in alleviating national security concerns as evident with President Trump's executive order which established a legal framework for prohibiting transactions comprising telecommunication equipment considered a national security risk,³⁶⁰ essentially banning Huawei.³⁶¹

The U.S. positioned the ban as a defense against cyber threats to assert its cyber sovereignty by protecting its critical information infrastructure (CII) from foreign involvement with some arguing that the ban is a paradoxical defense.³⁶² As it tried to protect U.S. cyber sovereignty it also interrupted the international supply chain and undermined trust in the global trade sphere.³⁶³ The U.S. accused Huawei of being a state proxy whose aim was to advocate for China's ideologies through its products³⁶⁴ and viewed it as a hegemonic competitor that aimed to undermine Western dominance in emerging technologies such as the 5G sector.³⁶⁵ Furthermore, Huawei's alleged ties with Chinese intelligence raised concerns about economic espionage with U.S. officials alleging Huawei embeds malicious codes in its products to enable spying.³⁶⁶ The dual use of Huawei's technology for commercial and military purposes exacerbated these concerns.³⁶⁷

The Kaspersky case sets a precedent for the justification of the Huawei ban.³⁶⁸ The Court of Appeal upheld a prohibition on Kaspersky software because of potential national

³⁵⁹ Federal Acquisition Supply Chain Security Act, Pub. L. No. 115-390, 2018. See also, Jonathan Wakely and Andrew Indorf, 'Managing National Security Risk in an Open Economy: Reforming the Committee on Foreign Investment in the United States,' 9(2), Harvard National Security Journal, 2018, 50.

³⁶⁰ <<https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-securing-information-communications-technology-services-supply-chain/>> 15th May 2019. See, Anthea, R., Henrique, C.M., and Victor, F., 'Toward a Geoeconomic Order in International Trade and Investment,' 22(4) Journal of International Economic Law, 2019, 655 and 676. The authors argue that the executive order extends from national security to economic spaces such as the digital economy.

³⁶¹ Kara, M. B., Cyril, T. B., et al., 'Latest U.S. Trade Restrictions Target Huawei' The National Law Review, 2019.

³⁶² Bu, Qingxiu, 'Behind the Huawei Sanction: national security, ideological prejudices or something else?' 5, International Cybersecurity Law Review, 2024, 289-291.

³⁶³ 'US Move to Isolate Huawei Sends Ripples Through Global Supply Chain,' Emily Feng, 16th May 2019 <<https://www.npr.org/2019/05/16/723983055/u-s-move-to-isolate-huawei-sends-ripples-through-global-supply-chain>> 5th November 2024.

³⁶⁴ Yuen, F.K., 'Primacy or World Order?' 38(3), International Security, 2014, 153 and 175.

³⁶⁵ Kurt, C. and Jake, S., 'Competition without Catastrophe: How America Can Both Challenge and Coexist with China,' 98(5), Foreign Affairs, 2019, 110.

³⁶⁶ William, C.B., 'Cyber Espionage and Electronic Surveillance: Beyond the Media Coverage,' 66(3), Emory Law Journal, 2017, 513 and 525.

³⁶⁷ 'China's Pursuit of Advanced Dual-Use Technologies,' Meia Nouwens, 18th December 2018 <<https://www.iiss.org/research-paper/2018/12/emerging-technology-dominance/>> 5th November 2024.

³⁶⁸ Kaspersky Lab, Inc. v. United States, Department of Homeland Security 909 F.3d 446 (D.C. Cir. 2018)

security threats by the Russian government even when there was no direct evidence of harm.³⁶⁹ The court took a prophylactic qualification approach which is also evident in the Huawei ban as a precautionary measure to U.S. CII.³⁷⁰ However, such an approach is considered punitive as it undermines due process without considering Huawei's market position.³⁷¹ One ought to note that the ban does not only try to curb U.S. national security but also tries to maintain its technological leadership by limiting China's influence in the international technology space. This showcases a blurred line between legitimate defense and protectionism that potentially undermines trust in the free market.³⁷²

4.2.2.2.1 Labor Mobility

The escalating U.S.-China trade tensions over intellectual property theft, economic espionage, and national security threats attributed to China's influence have led to claims that Chinese researchers and students are conduits for transferring sensitive data to the Chinese government. The U.S. invoked its Immigration and Nationality Act which allowed the government to deny visas to individuals deemed a threat to security.³⁷³ The Trump administration increased scrutiny of visa denials for Chinese nationals studying and working in STEM fields particularly those with affiliations to universities or organizations associated with the Chinese government and military which disrupted academic and research projects.³⁷⁴ In her work, Sheenah showcases the prophylactic nature of these measures that prevent potential risks instead of proven violations, reiterating the Kaspersky case that reflects a protectionist strategy by upholding national security measures without

³⁶⁹ Kaspersky Lab, Inc. v. United States, Department of Homeland Security 909 F.3d 446 (D.C. Cir. 2018)

³⁷⁰ Bu, Qingxiu, 'Behind the Huawei Sanction: national security, ideological prejudices or something else?' 5, International Cybersecurity Law Review, 2024, 282.

³⁷¹ Ingrid, W., 'The Due Process and Other Constitutional Rights of Foreign Nations,' 88(2), Fordham Law Review, 2019, 633 and 690.

³⁷² Lincicome, S., 'Doomed to Repeat it: The Long History of America's Protectionist Failures,' Cato Institute Policy Analysis No. 819, 2017, 2.

³⁷³ Immigration and Nationality Act, Section 212(a)(3)(A), 8 U.S.C. Section 1182(a)(3)(A), 1952. Title 8 of the United State Code deals with aliens and nationality while Section 1182 provides for inadmissibility grounds that include engagement in espionage, violation of U.S. export controls, threatens national security and planning unlawful activity.

³⁷⁴ Burke, E., 'Trump-Era Policies Toward Chinese STEM Talent: A Need for Better Balance,' Carnegie Endowment for International Peace, 2021, 3-9 <https://carnegie-production-assets.s3.amazonaws.com/static/files/files_Trump-Era_Policies_Toward_Chinese_STEM_Talent_Carnegie_v1_web_1.pdf>.

direct evidence of harm.³⁷⁵ Such measures enable U.S. universities and companies to lose top talent, weakening their competitive advantage and innovation.³⁷⁶

In conclusion, the implementation of unilateral tax measures by developing countries highlights the likeliness of any form of retaliatory measures by developed countries due to the imbalance in economic power, underscoring the challenges developing countries face in asserting fiscal sovereignty while navigating the complexities of international tax and trade relations that are shaped by asymmetrical power structures.

4.3 Unilateral Tax Measures v International Trade Obligations

The WTO and other international organizations advocate for fair trade and uphold principles of non-discrimination.³⁷⁷ However, unilateral measures have been viewed as conflicting with these principles as they seem to disproportionately target foreign MNCs.³⁷⁸ This section aims to examine the conflict between these measures and international trade obligations by focusing on how developing countries can defend their implementation under certain WTO provisions.

4.3.1 Impact of WTO Non-Discrimination Principles on Unilateral Tax Measures

Two key principles are of relevance under the WTO framework when discussing the impact of unilateral tax measures: the national treatment principle and the most-favored-nation (MFN) obligation. The former requires that imported goods and services should be treated no less favorably than domestic ones.³⁷⁹ It is often argued that unilateral tax measures violate this principle by targeting foreign digital MNCs while treating domestic businesses differently. The latter requires WTO members to extend equal treatment to all trading

³⁷⁵ Sheehan, M., 'Who Loses from Restricting Chinese Student Visas?' In: Ma, D. (eds) *China's Economic Arrival*. Palgrave Macmillan, 2020.

³⁷⁶ Burke, E., 'Trump-Era Policies Toward Chinese STEM Talent: A Need for Better Balance,' *Carnegie Endowment for International Peace*, 2021, 3-10.

³⁷⁷ Agbaragam, G.O. and Augustine, A.A., 'World Trade Organisation and Fair Trade Practices among Member States: Issues and Challenges,' 9(2), *European Journal of Research in Social Sciences*, 2021, 50-52 <<https://www.idpublications.org/wp-content/uploads/2021/10/Full-Paper-WORLD-TRADE-ORGANIZATION-WTO-AND-FAIR-TRADE-PRACTICES-AMONG-MEMBER-STATES-ISSUES-AND-CHALLENGES.pdf>>.

³⁷⁸ KICTANET, 'Digital Taxation in Kenya: Charting Pathways towards Fair, Inclusive and Sustainable Policy Reforms,' Paper No. 20, 2024, 7.

³⁷⁹ Article III:1 of the General Agreement on Tariffs and Trade — General principle 1994 <https://www.wto.org/english/tratop_e/dispu_e/repertory_e/n1_e.htm>.

partners.³⁸⁰ Unilateral tax measures may be viewed as discriminatory if they are selectively structured to apply to specific companies from specific jurisdictions. While these measures may seem to conflict with the above principles, developing countries can still justify them under the General Exceptions Clause, Article XIV of the General Agreement on Trade in Services (GATS)³⁸¹ which permits countries to adopt measures that violate trade obligations if they meet certain conditions.

Article XIV of GATS allows countries to enforce measures that are necessary to protect public morals and to maintain public order,³⁸² ensure compliance with domestic laws³⁸³ and guarantee government revenue.³⁸⁴ Developing countries can argue that unilateral tax measures are crucial for securing revenue from digital MNCs that generate significant profits within their markets in the digital economy but have minimal contributions to source jurisdiction. It allows exceptions for trade in services thus countries can validate DSTs and SEPs that target digital services and claim that they are essential for promoting equitable revenue collection in the digital economy and are vital in addressing systemic biases in taxation of cross-border digital transactions and global tax forums such as the OECD. Kenya's DST applies uniformly to all companies offering digital services within its jurisdictions unlike France's which targets specific U.S.-based companies and thus aligns better with Article XVII of GATS provides for national treatment as it does not discriminate between domestic and foreign companies.³⁸⁵ Notably, countries have leaned on the above articles to justify their domestic policies.³⁸⁶ Additionally, engaging with WTO's dispute resolution mechanism when invoking Article XIV can be strenuous since it requires

³⁸⁰ Article I of the General Agreement on Tariffs and Trade — General principle 1994 <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm>. The principle is also found in Article 4 and 2 of the Trade-related Aspects of IP Rights Agreement and General Agreement on Trade in Services respectively. Note that the principle has been discussed differently in both agreements.

³⁸¹ Article XIV of the General Agreement on Trade in Services, 1995.

³⁸² Article XIV(a) of the General Agreement on Trade in Services, 1995. <https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art14_jur.pdf>

³⁸³ Article XIV(c) of the General Agreement on Trade in Services, 1995. <https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art14_jur.pdf>

³⁸⁴ Article XIV(d) of the General Agreement on Trade in Services, 1995 <https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art14_jur.pdf>.

³⁸⁵ General Agreement on Trade in Services, art. XVII, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869, U.N.T.S. 183, 1994. Note that Kenya ratified GATS and GATT by becoming a founding member of WTO in 1995.

³⁸⁶ World Trade Organization, 'Brazil - Certain Measures Concerning Taxation and Charges,' Reports of the Panel, 17-4852, 2017 <https://www.wto.org/english/tratop_e/dispu_e/472_497abr_e.pdf>. Brazil defended its tax incentive by invoking Article XXIV(d) of the General Agreement on Tariffs and Trade, 1994.

resources and time thus it can be challenging for developing countries who have limited resources.

4.4 Understanding Trade-Offs

Trade-off refers to balancing conflicting priorities where achieving one goal requires compromising another.³⁸⁷ It means ‘to get one thing that we like, we have to give up another thing that we like.’ In the realm of tax sovereignty, one of the trade-offs for developing countries is seeking to enhance tax revenues through unilateral tax measures by exercising their tax sovereignty while also trying to honor international trade commitments to maintain economic stability and prevent retaliatory measures. The trade-off for developing countries is revenue generation through unilateral measures which would enable the provision of public goods and economic risks from retaliatory trade measures that could disrupt trade relations and tamper with foreign investments and the domestic economy.

4.5 Conclusion

Unilateral tax measures, although in conflict with WTO principles, can be justified under the General Exceptions Clauses of GATT and GATS to ensure the generation of revenue by developing countries and promote tax equity in the digital economy. Regarding the challenges discussed above, there is a need for international cooperation to limit trade conflicts and promote tax sovereignty.

³⁸⁷ Campbell, D. E. and Kelly, J. S., ‘Trade-off Theory,’ 84(2), *The American Economic Review*, 1994, 422–426.

5.0 Chapter Five: Findings, Recommendations, and Conclusion

5.1 Introduction

This chapter summarizes the main findings, recommendations, and conclusions. The summary of the main findings consolidates the examination of the OECD's framework shortcomings, the implications of unilateral tax measures by developing countries and their intersection with international trade law, the role of MNCs in shaping global tax law through lobbying, and the resulting challenges for developing countries. The chapter further provides recommendations that will address the inequities and ensure an inclusive and equitable global tax framework.

5.2 Summary of the Main Findings

Based on the outcomes of the study, the existing OECD framework fails to effectively address the needs of developing countries and ensure their impactful participation in decision-making. This is evident through its biased decision-making organs and its initiatives such as the Two Pillar solution which prioritizes residence-based taxation over source-based taxation that works in favor of developed countries thus undermining developing countries' taxing rights and base. The lack of mandatory cool-off periods and disclosures in lobbying activities such as revolving door practices conceal the extent of corporate influence in the OECD in shaping tax policies in favor of developed countries. Consequently, developing countries are asserting their tax sovereignty by slowly implementing unilateral tax measures and are likely to face intimidation by developed countries through retaliatory trade measures.

Even though provisions in GATT and GATS allow exceptions to trade principles that may justify such unilateral tax measures for developing countries, the costs of the WTO dispute mechanism could present significant hurdles for developing countries.

5.3 Recommendations

The following recommendations are informed by the study's findings to offer a more inclusive and equitable global tax framework. As discussed in Chapter Two on the biases of the OECD decision-making bodies and how its initiatives have consistently favored its member states who are mostly developed countries, there is a need to enhance the representation of developing countries. This can be achieved by diversifying the Secretariat to include representatives from developing countries in decision-making roles. The UN, WTO and relevant stakeholders in digital taxation debate ought to be granted observer status in the OECD so that they can act as a watchdog to ensure inclusivity, transparency and equitable representation in formulating global tax policies. Additionally, pre-plenary meetings exclusively for developing countries ought to be organized to promote collaboration and unify positions. Furthermore, reforms need to be made in the OECD Inclusive Framework to lower the thresholds of taxing rights and increase the global minimum tax rate under Pillar One and Pillar Two respectively. In regard, to thresholds, I advocate for the adoption of a Pay-As-You-Grow tax model for the digital economy. This is because flat tax thresholds can discourage growing smaller digital businesses from joining emerging markets. In such a model, digital taxpayer reputation scores could be introduced to incentivize voluntary compliance of tax liabilities to encourage tax conformance as a reputational advantage. Lastly, offer tax credits to digital MNCs that invest in vital digital infrastructure in developing countries which will ultimately promote sustainable and long-term development while ensuring a fair balance with their tax obligations. Notably, extensive research and investigation need to be done for such a model to be a success. Regarding binding arbitration, given that developing countries are pro-MAP even with its declining rates, I suggest that selective transparency be adopted in such arbitration agreements such as public disclosures of aggregated data on the outcomes and procedural improvements.

As explained in Chapter Three which highlights the role of corporate lobbying in the OECD in skewing its initiatives to favor developed countries is emphasized. Regarding the revolving door practices, the OECD must implement mandatory cooling-off periods for its officials. Additionally, the OECD's recommendations on lobbying should not only be applied to governments alone but also to the organization itself and periodic reports should

be provided to showcase the status of lobbying in the OECD. In addition, the implementation of a code of conduct to include limits on contributions made to international tax forums would help mitigate extreme corporate influence and encourage a fairer policymaking process. Regarding the OECD acting as a market-liberal think tank, it should support and increase targeted technical and financial support to developing countries to enhance their capacity for effective participation in negotiations. More importantly, the establishment of performance metrics by developing measurable indicators such as data-driven assessments are necessary to evaluate the inclusivity and effectiveness of the OECD policy. Lastly, for every initiative implemented, prior assessment reports should be made to investigate its impacts on developing countries.

As referenced in Chapter Four on the trade-off between tax sovereignty and international trade obligations, it is necessary to promote regional cooperation among developing countries by fostering alliances that go beyond fiscal unions to help these countries negotiate collectively and counter lobbying pressures in international tax forums. Additionally, it is imperative to stimulate the dialogue on digital trade reciprocity agreements between developed and developing countries to guarantee reciprocal benefits in cross-border taxation and trade practices in a bid to curb retaliatory trade measures. Lastly, there is a vital need for educational initiatives to enhance digital taxation literacy among policymakers, stakeholders, businesses, and educational institutions that need to be created to offer extensive support for equitable tax practices and foster informed decision-making.

5.4 Conclusion

The study highlights the shortcomings of the OECD decision-making organs and its initiatives by illustrating how it skews its policies to favor developed countries at the expense of developing countries. It then goes ahead to make a case for developing countries that are implementing unilateral tax measures to assert their tax sovereignty due to these inadequacies and emphasizes the challenges of such measures such as the potential risk of retaliatory trade measures by developed countries. Additionally, it stresses the role of lobbying by MNCs who are mostly based in developed countries in shaping the global tax framework in their favor and undermining developing countries' fiscal sovereignty. The study calls for reforms for an inclusive, accountable, and transparent international tax forum that supports developing nation's fiscal rights in the digital economy.

PRELIMINARY BIBLIOGRAPHY

Articles

Action Aid, 'The BEPS Process: Failing to Deliver for Developing Countries,' Action Aid Organization, 2014, 1-7.

Adinda, W., Myrthe B., Johanna, K. and Thijmen, R., 'Report on the BEPS Inclusive Framework of the OECD,' SOMO, 2021, 8-27.

Agbaragam, G.O. and Augustine, A.A., 'World Trade Organisation and Fair Trade Practices among Member States: Issues and Challenges,' 9(2), European Journal of Research in Social Sciences, 2021, 50-52.

Agrell, P. J., and Gautier, A., 'A theory of soft capture.' 119(3), Scandinavian Journal of Economics, 2017, 571-596.

Ali, S., 'Corporate Taxation and Intangible Assets: A Systematic Literature Review and Future Research Trends,' In: Bilgin, M.H., Danis, H., Demir, E. (eds) Eurasian Business and Economics Perspectives, Eurasian Studies in Business and Economics, Springer Cham, 24, 2022, 171-189.

Anthea, R., Henrique, C.M., and Victor, F., 'Toward a Goeconomic Order in International Trade and Investment,' 22(4), Journal of International Economic Law, 2019, 655 and 676.

Arginelli P. and Reboli F., 'Pillar Two and Tax Competition: What is the Future of Tax Incentives?' in Complexity and Sustainability in Megaprojects, 2024.

Arginelli, P. and Reboli, F., 'Tax Credits and Pillar Two: An Assessment in the Light of the Upcoming Implementation of the Global Minimum Tax,' in Complexity and Sustainability in Megaprojects, 2024, 69-88.

Armstrong, G.T., 'Physical Presence v Virtual Presence: The Cyberspace Challenge to Quill and the Streamlined Sales and Use Tax Act,' 9, The State and Local Tax Lawyer, 2004, 59-86.

Athanasίου, A., 'Unilateral Actions Continues to Plague BEPS, Saint-Amans Says', Tax Notes, 2016.

Avi-Yonah, R.S., Young Ran (Christine) Kim, and Karen S., 'A New Framework for Digital Taxation,' 63(2), Harvard International Law Journal, 2022, 338-341.

Avi-Yonah R.S., 'International Tax as International Law: An Analysis of the International Tax Regime,' University of Michigan Law School, 2007, 10-12.

Avi-Yonah R.S., 'The New International Tax Regime,' 19, Journal of International Economic Law, 125, 2021.

Avi-Yonah R.S., 'The International Tax Regime in the Twenty-First Century: The Rise of BEPS and the End of the Arm's Length Principle?' 1, *Florida Tax Review*, 2019, 1-17.

Ault, H.J., 'Some Reflections on the OECD and the Sources of International Tax Principles,' 70(12), Reprinted from *Tax Notes International*, Working Paper of the Max Planck Institute for Tax Law and Public Finance No. 2013-03, 2013, 1195.

Báez, A., and Brauner, Y., 'Taxing the Digital Economy Post BEPS ... Seriously' University of Florida Levin College of Law Research Paper No. 19-16, 2019, 43-46.

Bailey, S. J., 'Public Sector Economics: Principles and Practice,' Oxford University Press, 2021, 145–150.

Bantekas, I., 'The Contractualization of Fiscal and Parliamentary Sovereignty: Towards a Private International Finance Architecture?' 11(1), *Global Constitutionalism*, 2022, 139-159.

Bayne, N., 'Making Sense of Western Economic Policies: The Role of the OECD,' 43(2), *The World Today*, 1987, 27– 30.

Bazzoun, M., 'The Digital Economy,' 5(9)*International Journal of Social Science and Economics Invention*, 2019, 116-117.

Becker, J., and Englisch, J., 'Contractual Nexus in a Digital Tax Landscape: Revisiting Jurisdictional Taxation Principles,' 60(2), *European Taxation Review*, 2022, 89–104.

Beer, S., & Michielse, G., 'Chapter 11 Strengthening Source-Based Taxation,' In *Corporate Income Taxes under Pressure*. USA: International Monetary Fund, 2021.

Beer, S., De Mooij R., and Liu L., 'International Corporate Tax Avoidance: A Review of the Channels, Magnitudes, and Blind Spots' IMF Working Paper WP/18/168, International Monetary Fund, July 2018, 7.

Belli, S.S., and Stevens F., 'Revolving Doors in Europe: Does Hiring from the Public Sector Facilitate Access?' *Journal of Public Policy*, 2024, 1-18.

Blach-Ørsten, Mark, Ida Willig, and Leif Hemming Pederson., 'PR, lobbying and democracy: Mapping the revolving door in Denmark from 1981 to 2015.' 38(2), *Nordicom Review*, 2017, 19 - 31.

BÓ, E. D., 'REGULATORY CAPTURE: A REVIEW,' 22(2), *Oxford Review of Economic Policy*, 2006, 203–225.

Bohman, J., 'Theories, practices, and pluralism,' 29(4), *Philosophy of the Social Sciences*, 1999, 459–480.

Boutyline, A. and Soter, L. K., 'Cultural Schemas: What They Are, How to Find Them, and What to Do Once You've Caught One', 86, *American Sociological Review*, 2021, 728–758.

Boyce, G. and Cindy D., 'Conflict of interest in policing and the public sector,' 11(5), *Public Management Review*, 2009, 601-640.

Brady P., 'Reimagining Due Process: A New Approach to Regulating State Taxing Authority,' 28, *Cornell Journal of Law and Public Policy*, 2019.

Bradley, W.J., 'The Meaning of Fair Apportionment and the Prohibition on Extraterritorial State Taxation,' 71, *Fordham Law Review*, 2005, 149.

Brauner Y., 'Serenity Now! The (Not So) Inclusive Framework and the Multilateral Instrument,' University of Florida Levin College of Law, Legal Studies Research Paper No. 22-6, 2021, 21-30.

Brenner, B., 'Transformative Sustainable Business Models in the Light of the Digital Imperative—A Global Business Economics Perspective,' 10(12), *Sustainability*, 2018, 4-8.

Brooks, K., 'Taxation in a Global Economy: The Relationship between Income Taxation and International Trade and Investment,' Intersentia Publishing, 2009.

Brynjolfsson, E., and McAfee, A., 'The Second Machine Age: Work, Progress, and Prosperity in a Time of Brilliant Technologies,' W.W. Norton and Company, New York, 2014, 98.

Bu, Qingxiu, 'Behind the Huawei Sanction: national security, ideological prejudices or something else?' 5, *International Cybersecurity Law Review*, 2024, 264; 282; 289-291.

Burke, E., 'Trump-Era Policies Toward Chinese STEM Talent: A Need for Better Balance,' *Carnegie Endowment for International Peace*, 2021, 3-10.

Buzan, B., and Lawson, G., 'Capitalism and the emergent world order,' 90(1), *International Affairs*, 2014, 71– 91.

Cardenas Cardenas, G. and Tobes Portillo P., 'Taxation of Multinational Companies in the Digital Economy: Current Outlook,' *Handbook of International Business Policy*, Edward Elgar Publishing, 2024, 425-441.

Carpenter, D., and David M., 'Introduction.' In *Preventing Regulatory Capture: Special Interest Influence and How to Limit It*, edited by Daniel Carpenter and David A. Moss. Cambridge: Cambridge University Press, 2014, 13.

Chambers, S. A., 'The lessons of Rancière,' *Oxford University Press*, 2010, 147-148.

Chen, J. and Chow, W., 'Global Minimum Tax Reform and the Future of Tax Competition,' *Bulletin for International Taxation*, 2023. 314-318

Christiano, T., 'A Democratic Theory of Territory and Some Puzzles about Global Democracy', 37, *Journal of Social Philosophy*, 2006, 94.

Christians, A., 'The OECD's Influence on Global Tax Policy,' 34(3), *Brooklyn Journal of International Law*, 2010, 881-884.

Christians, A., 'Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20', 5(19), *Northwestern Journal of Law & Social Policy*, 2010.

Christians, A., 'Trust in the Tax System: The Problem of Lobbying,' *Building Trust in Taxation* 2017, 151.

Clausing, K.A. and Saez, E., and Zucman, G., 'Ending Corporate Tax Avoidance and Tax Competition: A Plan to Collect the Tax Deficit of Multinationals,' *UCLA School of Law, Law-Econ Research Paper No. 20-12*, 2021.

Cobham, A. and Janský, P., 'International corporate tax avoidance' in Reuter P (ed), *Estimating Illicit Financial Flows: A Critical Guide to the Data, Methodologies, and Findings*, Oxford University Press, Oxford, 2020.

Cockfield, A.J., 'Tax Wars: The Battle over Taxing Global Digital Commerce,' 161, *Tax Notes*, 2018, 1331.

Cockfield A.J., 'The Rise of the OECD as Informal 'World Tax Organization' through National Responses to E-commerce Tax Challenges,' 8, *Yale Journal of Law and Technology*, 2006, 144-145.

Coen, D., and Provost Collin, 'Revolving Doors,' In: Harris, P., Bitonti, A., Fleisher, C., Skorkjær Binderkrantz, A. (eds) *The Palgrave Encyclopedia of Interest Groups, Lobbying and Public Affairs*, 2020, 1-7.

Connor, L.S., 'Reflections from the Brink of Tax Warfare: Developing Countries, Digital Service Taxes and an Opportunity for More Just Global Governance with the OECD's Two-Pillar Solution,' 63(5), *Boston College Law Review*, 2022, 1797-1861.

Côté, A.C., 'Lobbying and the Public Interest,' *Canadian Parliament Review*, 2006, 29-31.

Crepaz, M., 'Why do we have Lobbying Rules? Investigating the Introduction of Lobbying Laws in EU and OECD Member States,' 6(3), *Interest Groups and Advocacy*, 2017, 231-235.

Cui, W., 'What is Unilateralism in International Taxation?' 114, *Allard School of Law at the University of British Columbia*, 2020, 260-261.

Daurer, V., and Krever, R., 'Choosing between the UN and OECD Tax Policy Models: An African Case Study,' *African Journal of International and Comparative Law* 1-21, WU International Taxation Research Paper Series No. 2014 - 16, 22, 1, 2014.

Davis, H., 'Corruption, Lobbying and Capture: A Comprehensive Review of Corruption in the United States,' 1(1), *Florida Pre-Law Review*, 2024.

De Long, J.B. and Eichengreen, B., 'The Marshall Plan: History's Most Successful Structural Adjustment Program,' in *Postwar Economic Reconstruction and Lessons for the East Today*, MIT Press, 1993, 192-210.

Dharmapala, D., 'Future-Ready Tax Regimes for the Digital Economy: Bridging Policy and Practice,' 12(1), *Harvard Journal of International Tax Policy*, 2023, 33-49.

Diestch, P., 'Rethinking Sovereignty in International Fiscal Policy,' 37(5), *Review of International Studies*, 2011, 2107-2120.

Dietz, J. L., 'Dependency Theory: A Review Article,' [in *Review of Dependency and Development in Latin America; Mexican Agriculture 1521-1630: Transformation of the Mode of Production*, by F. H. Cardoso, E. Faletto, & A. G. Frank], 14(3), *Journal of Economic Issues*, 1980, 751-758.

Dodge, J.M., 'Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles,' *Florida State University, College of Law*, 2005.

Dryzek, J. S., 'Deliberative democracy and beyond: Liberals, critics, contestations,' 2, *Oxford University Press*, 2000, 20-23.

Dryzek, J. S., 'Discursive designs: Critical theory and political institutions,' 31(3) *American Journal of Political Science*, 1987, 661.

Duclos, JY., 'Horizontal and Vertical Equity. In: *The New Palgrave Dictionary of Economics*,' Palgrave Macmillan, 2008, 1-6.

Dür, A., and Mateo G., 'Lobbying in the Face of Politicization: Interest Group Strategies in Trade Policy,' 31(1) *Journal of European Public Policy*, 212-238.

Eden, L., 'Pillar One Amount B: Simplifying the Arm's Length Principle for Baseline Distribution Activities (Submission to the OECD/Inclusive Framework on 1 September 2023 in Response to the 12 July 2023 Public Consultation Document on Pillar One Amount B),' 2023, 2-8.

Egerod, B.C., Rasmussen, K.A., and Jens van der Ploeg, 'Revolving Door Benefits? The Consequences of the Revolving Door for Political Access,' 13, *Interests Groups and Advocacy*, 2023, 311-332.

Elijah, C., Pamela, A., and Jonathan F., 'Understanding the Interplay between Boundary Resources and Government Practices in Influencing Ecosystem Value Co-creation for Digital Platforms: A Case from the Global South,' 30(2), *Journal of Strategic Information Systems*, 2021, 10.

Essers, P., 'International Tax Justice between Machiavelli and Habermas', 54, *Bulletin for International Taxation*, 2014, 57.

Essers, P.H.J., 'International Tax Justice between Machiavelli and Habermas,' 68(2), *Bulletin for International Taxation*, 2014, 57.

European Parliament, 'Challenges for Competition Policy in a Digitalised Economy,' 2015, 29.

European Parliament, 'Tax Challenges in the Digital Economy,' 2016, 14.

Eyitayo-Oyesode, Oladiwura Ayeyemi, 'Source-Based Taxing Rights from the OECD to the UN Model Conventions: Unavailing Efforts and an Argument for Reform,' 13(1), *Law and Development Review*, 2020, 193-227.

Farah, H., 'Mandatory Arbitration of International Tax Disputes: A Solution in Search of a Problem,' 9(8), *Florida Tax Review*, 2009, 713-715; 739-740; 748.

FBR-GIZ, 'Cross Border Transactions and Tax Treaties,' Tax Reform Component Governance Programme.

Forst, R., 'The right to justification: Elements of a constructivist theory of justice,' Columbia University Press, 2012.

Fraser, N., 'Rethinking the public sphere: A contribution to the critique of actually existing democracy,' *Social Text*, 25(25-26), 64-67.

Fung, S., 'The Questionable Legitimacy of the OECD/G20 Beps Project,' 2, *Erasmus Law Review*, 2017, 76.

G20, 'G20 - Background Brief,' 2023, 2.

Garcia-Bernado, J. and Jansky, P., 'Profit Shifting of Multinational Corporations Worldwide,' 2023.

Garcia-Bernado, J., Jansky, P. and Thomas T., 'Multinational Corporations and Tax Havens: Evidence from Country-by-Country Reporting,' 28, *International Tax and Public Finance*, 2021, 1519-1561.

Gelepithis, M., and Hearson, M., 'The politics of taxing multinational firms in a digital age,' 29(5), *Journal of European Public Policy*, 2021, 708-727.

German Cooperation, 'Implementing OECD/G20 BEPS Package in Developing Countries,' IBFD, 2018, 3-17.

Ghassim, F., Koenig-Archibugi, M., Cabrera, L., 'Public Opinion on Institutional Designs for the United Nations: An International Survey Experiment,' 66(3), *International Studies Quarterly*, 2022, 6-10.

Grahame J., 'Understanding the Beps and Other OECD Tax Initiatives Including the Inclusive Framework in the Context of Treaties and State Inequality,' *Journal of Tax Administration*, Forthcoming, 2023, 47-51.

Gravelle, J.G., 'The OECD/G20 Pillar 1 and Digital Services Taxes: A Comparison,' *Congressional Research Service*, 2024, 12-13.

Habermas, J., 'Between facts and norms: Contributions to a discourse theory of law and democracy,' Cambridge, MA: MIT Press, 1996, 104.

Habermas, J., 'Theory and Practice,' London: Heinemann, 1974, 196.

Habermas, J., 'The structural transformation of the public sphere: An inquiry into a category of bourgeois society,' Cambridge: Polity, 1992.

Halliday, T. C., and Carruthers, B. G., 'The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes', 112, *American Journal of Sociology*, 2007, 1135–1202.

Hammond, M., 'Deliberative democracy as a critical theory,' 22(7), *Critical Review of International Social and Political Philosophy*, 2019, 788.

Harpaz, A., 'Taxation of the Digital Economy: Adapting a Twentieth-Century Tax System to a Twenty-First-Century Economy,' 46(57), *Yale Journal, International Laq*, 2021, 95-99.

Hearson, M., and Tucker, T.N., 'An Unacceptable Surrender of Fiscal Sovereignty: The Neoliberal Turn to International Tax Arbitration,' 21(1), *Cambridge University Press*, 2023, 225-228 and 232-236.

Henri, B. and Guy, T., "Le droit du public de savoir qui cherche à influencer le gouvernement: un droit fondamental" in *Les développements récents en matière de lobbyisme*, report of the mini conference by the Barreau du Québec, Service de la formation permanente, Montreal, February 4, 2005, 3.

HM Treasury, 'The Economic Value of Data: Discussion Paper,' The UK Government, 2018.

Hong Y., and Harwit, E., 'China's Globalizing Internet: History, Power and Governance,' 13(1) *Chinese Journal of Communication*, 2020, 15.

Hong, S., and Jeehun L., 'Capture and the bureaucratic mafia: does the revolving door erode bureaucratic integrity?' 166(½), *Public Choice*, 2016, 69-86.

Hongler P., and Pistone, P., 'Blueprints for a New PE Nexus to Tax Business Income in the Era of the Digital Economy' Vienna University of Economics and Business, 2015, 3-4; 91-97.

Honneth, A., 'Disrespect: The normative foundations of critical theory,' Cambridge: Polity, 2007, 69.

Hout, W., 'Dependency Theory,' In M. Clarke, & X. Zhao (Eds.), *Elgar Encyclopedia of Development*, Edward Elgar Publishing, 2023, 162-166.

Hugger, F., 'The Impact of Country-by-Country Reporting on Corporate Tax Avoidance,' Ifo Working Paper 304, Leibniz Institute for Economic Research, University of Munich, 2020, 8-9.

Hugo, T.G., 'A UN Tax Convention? Exploring the Merits and Feasibility of a New International Convention on Tax and Financial Transparency,' Norwegian Academy of International Law, 2022.

Hutchison, T., 'Adam Smith and the Wealth of Nations,' 19(3), *The Journal of Law and Economics*, 1976, 507-528.

Ingrid, W., 'The Due Process and Other Constitutional Rights of Foreign Nations,' 88(2) *Fordham Law Review*, 2019, 633 and 690.

International Monetary Fund, 'Revenue Mobilization in Developing Countries,' IMF Working Paper, 2011, 33-37.

International Monetary Fund, 'International Corporate Tax Avoidance: A Review of the Channels, Effect Size and Blind Spots,' 2018

Jalan, N. and Misquith-Tigdi, E., 'What is the Road ahead for Unilateral Digital Tax Measures?' 27(4), *Asia Pacific Tax Bulletin*, 2021.

Jens, B., 'The Concept of Sovereignty Revisited,' 17(2), *European Journal of International Law*, 463-474, 2006.

John A.S., 'State Income Tax Jurisdiction: Reflections on the Past and the Future,' 45, *Tax Law Review*, 537, 2003.

Johnson, K., 'Payment Systems and Their Role in Determining SEP,' 15(4), *Global Taxation Perspectives*, 2023, 66-81.

Julie R.L., 'The Evolution and Future of Substantial Nexus in State Taxation of Corporate Income,' 46(5), *Boston College Law Review*, 2005, 1387-1420.

Junk, W. M., 'Two logics of NGO advocacy: Understanding inside and outside lobbying on EU environmental policies,' 23(2), *Journal of European Public Policy*, 2016, 236–254.

Kalra, A. and Afzal, M.N.I, “ ‘Transfer Pricing Practices and their Effects on Developing Countries’ Tax Revenue: A Systemic Literature Review,” 7(3), *International Trade, Politics, and Development*, 2023, 172-190.

Kara, M. B., Cyril, T. B., et al., 'Latest U.S. Trade Restrictions Target Huawei' *The National Law Review*, 2019.

Kenya Revenue Authority, 'Navigating Complex Tax Resolution: An Assessment of Kenya's Engagement in the Inclusive Framework (IF),' 2021, 6.

KICTANET, 'Digital Taxation in Kenya: Charting Pathways towards Fair, Inclusive and Sustainable Policy Reforms,' Paper No. 20, 2024, 7.

Kingma, S., 'Inclusive Global Tax Governance in the Post-BEPS Era,' IBFD, 2019, 206-207.

Klausen, G., 'The OECD Model Tax Convention: Explaining the OECD's Legitimation Strategies and Why States Adhere to the Principle of Exclusive Rights to Tax Royalties in the State of Residence,' University of Oslo, 2014, 24 and 25.

Knoll, M., 'Tax Nexus in a Digital Economy: Wayfair and the Future,' 132(4), *Harvard Law Review*, 2019, 1123-1152.

Knoll M.S., and Ruth M., 'The Dormant Commerce Clause and State Tax Discrimination,' 32, *Virginia Tax Review*, 2013, 318-326.

Kofler, G., Mayr, G. and Schlager, C., 'Taxation of the Digital Economy: Recent Policy Developments and the Question of Double Taxation,' 48(2), *Intertax*, 2020.

Kolarik W.J., 'Untangling Substantial Nexus,' 64(4), *The Tax Lawyer*, 2011, 851-900.

Kollman, K., 'Outside Lobbying: Public Opinion and Interest Group Strategies,' Princeton University Press, 1998.

Kompridis, N., 'Critique and Disclosure: Critical theory between past and future,' Cambridge, MA: MIT Press, 2006, 20.

Kuhn, K., Cadzow, L., Heitmüller, F., Hearson, M. and Randriamanalina, T., 'The International Tax Regime Complex: Understanding Change in Global Tax Governance,' ICTD Working Paper 212, Brighton: Institute of Development Studies, 2024.

Kumar, R., 'User Engagement Metrics in SEP Policies: A Comparative Analysis,' 48(3), *International Tax Journal*, 2022, 45-60.

Kurt, C. and Jake, S., 'Competition without Catastrophe: How America Can Both Challenge and Coexist with China,' 98(5), *Foreign Affairs*, 2019, 110.

Laboutková, Š., Šimral, V., Vymětal, P., 'Democracy and Lobbying.' In: *Transparent Lobbying and Democracy*. Palgrave Macmillan, Cham, 2020, 31-49.

Lackner J.R., 'The Evolution and Future of Substantial Nexus in State Taxation for Corporate Income,' 46, *Boston College Law Review*, 2005, 1387.

Lanieri, R. and Martinez, P., 'Data Sovereignty and Digital Taxation: Defining Economic Value in Data-Driven Economies,' 14(1), *World Tax Journal*, 2022, 103–128.

Leimgruber, M., and Schmelzer, M., 'From the Marshall Plan to Global Governance: Historical Transformations of the OEEC/OECD, 1948 to Present,' in *The OECD and the International Political Economy since 1948*, Palgrave Macmillan, 2017, 23-61.

Leopoldo, P., 'The OECD Global Tax Deal and Developing Countries: Where Do We Stand?' *Caribbean Tax Law Journal*, Forthcoming, 2023, 1-6.

Li, H., 'The Nexus Standard and its Implications for International Tax Competition and Soft Law,' 8(11), *Osgoode Hall Law School of York University*, 2020, 48.

Lincicome, S., 'Doomed to Repeat it: The Long History of America's Protectionist Failures,' *Cato Institute Policy Analysis No. 819*, 2017, 2.

Li, W.Y., 'Regulatory Capture's Third Face of Power,' 21(2), *Oxford University Press and the Society for the Advancement for Socio-Economic*, 2023, 1220-1223; 1230; 1235.

Luo, Y. and Shenkar, O., 'The Multinational Corporation as a Multilingual Community: Language and Organization in a Global Context,' 37, *Journal of International Business Studies*, 2006, 321-339.

Mahoney, J. and Diana Rodríguez-Franco, 'Dependency Theory', in Carol Lancaster, and Nicolas van de Walle (eds), *The Oxford Handbook of the Politics of Development*, Oxford Handbooks, 2018.

Marceau, N., and Smart, M., 'Corporate Lobbying and Commitment Failure in Capital Taxation,' 93(1), *The American Economic Review*, 2003, 241–251.

Marcin, S., 'Digital Taxation: State of Play and Way Forward,' *European Parliamentary Research Service*, 2020, 2-8.

Matheson, T., Beer, S., Coelho, M. D., Liu, L., and Luca, O., 'Chapter 14 Formulary Apportionment in Theory and Practice'. In *Corporate Income Taxes under Pressure. USA: International Monetary Fund*, 2021, 283-305.

Michael, K., 'International Taxation of Permanent Establishments,' Cambridge University Press, Cambridge, 2011, 56.

Middlebrook, P., 'Building a "fragile consensus": Liberalisation and State Fragility,' OECD Development Co-operation Working Paper. 7, 2012, 10.

Mihail, B., 'Digital Economy and New Value Creation: 15th International Conference on Business Excellence,' ICBE 202, Springer Proceedings in Business and Economics, 2022, 45.

Mihir, A.D. and Dhamika, D., 'Revisiting the Uneasy Case for Corporate Taxation in an Unseamy World,' 6, Journal of the British Academy, 2018, 247-284.

Milward, A.S., 'The Reconstruction of Western Europe,' University of California Press, 1945-1951, 123-155.

Morris, W.H., 'Comments on Klaus Vogel Lecture 2021: Unbundled Tax Sovereignty: Refining the Challenges,' 76(7), Bulletin for International Taxation, 2022, 329-332.

Mpofu, F.S., Eukeria, M. and Samantha, C.S., 'An Exposition of Transfer Pricing Motives, Strategies and their Implementation in Tax Avoidance by MNEs in Developing Countries,' 8(1), Cogent Business and Management, 2021.

Muldoon, J., 'International Organization and Bureaucracy,' Oxford Research Encyclopedia of International Studies, 2018.

Murphy L., and Thomas N., 'Traditional Criteria of Tax Equity', in the Myth of Ownership: Taxes and Justice, Oxford Academic, 2002, 12-39.

Musgrave, R.A., 'Horizontal Equity Once More,' 43(2), National Tax Journal, 1990, 113-122.

Nazur, F.J., 'Corporate Influence: Exploring the Relationship between Lobbying and Corporate Power,' 1, Systemic Justice Journal: Critical Corporate Theory Collection, 2021, 1-2.

OECD, 'Action Plan on Base Erosion and Profit Shifting,' OECD Publishing, 2013, 13-14.

OECD, 'Action 15: A Mandate for the Development of Multilateral Instrument on Tax Treaty Measures to Tackle BEPS,' OECD BEPS PROJECT, Final Report, 2015.

OECD, 'Actions 5, 6, 13 and 14: Countering Harmful Tax Practices, Treaty Abuse. Transfer Pricing Documentation, and Dispute Resolution Mechanisms,' OECD BEPS PROJECT FRAMEWORK, Final Report, 2015.

OECD, 'Article 10: Anti-Abuse Rules of Permanent Establishments Situated in Third Jurisdictions, Multilateral Convention to Implement Tax Treaty Related Measures to BEPS MLI,' OECD Secretariat, 2016.

OECD, 'Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project,' OECD Publishing, 2015, 107-117, 142.

OECD, 'Article 5 Permanent Establishment' in Model Tax Convention on Income and on Capital,' (Full Version), OECD Publishing, 2017.

OECD, 'Background Brief: inclusive framework on BEPS,' OECD Publishing, 2017, 12.

OECD, 'Commentary on Article 23A and 23B Methods for elimination of double taxation,' in Model Tax Convention on Income and Capital 2010, OECD Publishing, Paris, 2012.

OECD, 'Commentary on Article 25: Concerning the Mutual Agreement Procedure', in Model Tax Convention on Income and Capital 2017 (Full Version), OECD Publishing, Paris, 2019, 68-70.

OECD, 'Commentary on Article 5: Concerning the definition of Permanent Establishment,' in Model Tax Convention on Income and on Capital, (Full Version) OECD Publishing, 2014, 1-2.

OECD, 'Developing Countries and the OECD/G20 Inclusive Framework on BEPS,' OECD REPORT FOR THE G20 FINANCE MINISTERS AND CENTRAL BANK GOVERNORS, 2021, 4.

OECD, 'Digital Economy Policy Platform, Digital Economy Taxation Policy Platform,' OECD Publishing, 2024, Section 2.1.

OECD, 'Lobbying in the 21st Century: Transparency, Integrity and Access,' OECD Publishing, 2021.

OECD., 'Managing Conflict of Interest in the Public Service. OECD Guidelines and Country Experiences,' OECD Publishing, 2003.

OECD, 'Mandatory Disclosure Rules, Action 12 – 2015 Final Report,' OECD Publishing, 2015, 3.

OECD, 'Measuring the Economic Value of Data and Cross-Border Data Flows,' OECD Publishing, 2019.

OECD, 'Mechanisms for the Effective Collection of VAT/GST When the Supplier is not Located in the Jurisdiction of Taxation,' 2017, 51.

OECD, 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022, OECD Publishing, Paris, 2022, 29-34.

OECD, 'OECD/G20 Base Erosion and Profit Shifting Project: Information Brief, 2014 Deliverables,' 2014.

OECD, 'Preventing the Artificial Avoidance of Permanent Establishment Status, Action 7,' Final Report, OECD Publishing, 2015.

OECD, 'Progress Report on the Administration and Tax Certainty Aspects of Amount A of Pillar One: Two-Pillar Solution to the Tax Challenges of the Digitalization of the Economy, OECD Publishing, Paris, 2022.

OECD, Recommendation of the Council on Transparency and Integrity in Lobbying and Influence, OECD/LEGAL/0379.

OECD, 'Recommendation of the Council on Principles for Transparency and Integrity in Lobbying,' OECD Publishing, 2010.

OECD, 'Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy,' OECD Publishing, 2021, 1-8.

OECD, 'Tax Administration 2022: Comparative Information on OECD and Other Advanced and Emerging Economies,' OECD Publishing, 2022.

OECD, 'Tax Challenges Arising from Digital Taxation - Report on Pillar One Blueprint,' OECD Publishing, 2020.

OECD, 'Tax Challenges Arising from Digitalization of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris,' 2021.

OECD, 'Tax Challenges Arising from the Digitalization of the Economy – Subject to Tax Rule (Pillar Two): Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, 2023.

OECD, 'The Multilateral Convention to Implement Amount A of Pillar One,' OECD Publishing, 2023.

Oguttu A., 'A Critique from a Developing Country Perspective of the Proposals to Tax the Digital Economy,' 12(4), World Tax Journal, 2020, 799-828.

Oguttu, A.W., 'Preventing International Tax Competition and the Race to the Bottom: A Critique of the OECD Pillar Two Model Rules for Taxing the Digital Economy – A Developing Country Perspective,' 76(11), Bulletin for International Taxation, 2022.

Oguttu, A., 'Curtailling BEPS Through Enforcing Corporate Transparency: The Challenges of Implementing Country-by-Country Reporting in Developing Countries and the Case for Making Public Country-by-Country Reporting Mandatory.' In: *World Tax Journal*, 12(4), 2020, 799-828.

Olayinka, T. and Williams M., 'Local Domains and Digital Taxation: Balancing Trust and Regulation,' 33(2), *International Tax Review*, 33, 2, 2023, 102-121.

Pandey, K., Yadav, S.S. and Sharma, S., 'Drivers of Tax Avoidance by MNEs in the Developing Countries under the Digital Economy: A Modified-TISM Approach,' 20(5), *Journal of Advances in Management Research*, 2023, 896-919.

Permanent Select Committee on Intelligence, 'Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE,' 112th Congress, 2012, 11-34.

Peroni, M. and Giovanetti, S., 'Evaluating User-Based Taxation in the Digital Economy: Metrics and Challenges,' 47(4), *International Tax Journal*, 2021, 29–45.

Perry, V. J., 'Chapter 7 Residence-Based Taxation: A History and Current Issues.' In *Corporate Income Taxes under Pressure, USA*, International Monetary Fund, 2021.

Pierre, I., and Lemieux D., *L'action gouvernementale: Précis du droit des institutions administratives*, (2e éd.), Éditions Yvon Blais, Montreal, 2002, 67.

Pons-Hernandez, M., 'Power(ful) Connections: Exploring the Revolving Doors Phenomenon as a Form of State Corporate Crime,' 30, *Critical Criminology*, 2022, 305-320.

Pressman, M., 'The Ability to Pay in Tax Law: Clarifying the Concepts Egalitarian and Utilitarian Justifications and the Interactions between the Two,' 141, *New York University Journal of Legislation and Public Policy*, 2018.

PwC, 'OECD releases Multilateral Convention to implement Amount A of Pillar One,' 2022, 2.

Riedel, N., 'Quantifying International Tax Avoidance: A Review of the Academic Literature,' 69(2), *Review of Economics*, 2018, 169-18.

Rilinger, G., 'Who Captures Whom? Regulatory Misperceptions and the Timing of Cognitive Capture', 17, *Regulation & Governance*, 2023, 43–60.

Rixen, T., 'Tax Competition and Inequality: The Case for Global Tax Governance,' 17(4), *Global Governance*, 2011, 447–467.

Rodrigues Losada S., 'A New Nexus Based on the Concept of Significant Economic Presence: The Digital Permanent Establishment.' In: Hulkó, G. and Vybíral, R. eds.,

European Financial Law in Times of Crisis of the European Union. Budapest: Dialóg Campus, 2019, 380.

Rostbøll, C. F., 'Dissent, criticism, and transformative political action in deliberative Democracy,' 12(1), *Critical Review of International Social and Political Philosophy*, 2009, 21-22.

Rostbøll, C. F., 'Emancipation or Accommodation?' 34(7), *Philosophy and Social Criticism*, 2008, 707–736.

Roth Brad, R., 'The International Law of Sovereign Equality,' *Sovereign Equality and Moral Disagreements*, Oxford Academic, 2012, 53-92.

Schön, W., 'Ten Questions About Why and How to Tax the Digitalised Economy,' 11, *Working Paper of the Max Planck Institute for Tax Law and Public Finance*, 11, 2017, 3.

Schmelzer, M., 'The Hegemony of Growth: The OECD and the Making of Economic Growth Paradigm,' Cambridge University Press, 2016, 326 and 355.

Sebastian B., Ruud de Mooij and Li Liu, 'International Corporate Tax Avoidance: A Review of the Channels, Magnitudes, and Blind Spots,' *International Monetary Fund Working Paper 18/168*, 2018, 11-25.

Sharma, P. and Lee, J., 'The Illusion of Local Engagement: Evaluating SEP Indicators in Digital Economies,' 18(3), *Asia-Pacific Tax Journal*, 2022, 89-105.

Sheehan, M., 'Who Loses from Restricting Chinese Student Visas?' In: Ma, D. (eds) *China's Economic Arrival*. Palgrave Macmillan, 2020.

Skidmore, M. J., 'Ethics and public service,' 537, *The Annals of the American Academy of Political and Social Science*, 1995, 25-36.

Sven, H., 'The Taxation of Permanent Establishments: A Critical Analysis of the Authorised OECD Approach and its Implementation in German Tax Law,' Springer Gabler, Wiesbaden, 2021, 78.

Svystunova, L., Muratova, Y., Fortwengel, J. and Tony E., 'Multinationals Corporations' Interactions with Host Institutions: Taking Stock and Moving Forward,' 64, *Management International Review*, 2024, 3-33.

Tai, L., 'Regulatory capture and quality,' 37(3), *Journal of Public Policy*, 2017, 261-286.

Táíwò, O.O., 'Elite Capture: How the Powerful Took Over Identity Politics (And Everything Else),' Haymarket Books, 2021, 85-114.

Tapscott, D., 'The digital economy: promise and peril in the age of networked intelligence,' 1997.

Tax Justice Network Africa, 'The Multilateral Instrument and Domestic Resource Mobilization in East Africa,' 2019, 4.

Tenzer, H., Terjesen, S. and Harzing, A-W., 'Language in International Business: A Review and Agenda for Future Research,' 57, *Management International Review*, 2017, 815-854.

Tim, S., Jinghan, Z. and Yaru, C., "China's Solution to Global Cyber Governance: Unpacking the Domestic Discourse of 'Internet Sovereignty'," 45(3), *Politics and Policy*, 2017, 432 and 46.

Tsilly, D., 'Klaus Vogel Lecture 2021: Unbundled Tax Sovereignty: Refining the Challenges,' *Bulletin for International Taxation*, 2022, 318-328.

Tsilly, D., 'Substantive Tax Sovereignty Under Globalization,' 29(3), *Tilburg Law Review*, 2024, 1-9.

United Nations, 'United Nations Double Taxation Convention between Developed and Developing Countries,' Department of Economic and Social Affairs, 2017.

Tucker, A., 'Pre-emptive democracy: Oligarchic tendencies in deliberative Democracy,' 56(1), *Political Studies*, 2008, 127-147.

Vann, R.J., 'Taxing International Business Income: Dividing the Spoils,' Oxford University Press in *Tax Law Design and Drafting*, 2, 2010.

Van Alperdoon, L., 'BEPS, Tax Sovereignty and Global Justice,' 21(4), *Critical Review of International Social and Political Philosophy*, 2016, 478-499.

Velayos, F. and Han, S., 'Navigating the Fluidity of Digital SEP Metrics: Towards Holistic Taxation Models,' 3(2), *Journal of Digital Economy and Taxation*, 2023, 150-169.

Verina, N. and Titko, J., 'Digital Transformation: Conceptual Framework,' *Proceedings of the 6th International Scientific Conference in Business, Management and Economics Engineering*, 2017, 723-725.

Vestergaard J., 'The G20 and Beyond: Towards Effective Global Economic Governance', DIIS Report 4, 2011, 6.

Vijver, A., 'Morality of Lobbying for Tax Benefits: A Kantian Perspective,' 181(1), *Journal of Business Ethics*, Springer, 2022 57-68.

Weber, M., 'Emmanuel Saez and Gabriel Zucman: The Triumph of Injustice: How the Rich Dodge Taxes and How to Make Them Pay,' School of Finance, University of St.Gallen, 2020, 2-4.

Weinzeirl, M., 'Revisiting the Classical View of Benefit-Based Taxation,' 612(128), *The Economic Journal*, 2018, F37-F64.

West, C., 'Emerging Treaty Policies in Africa: Evidence from the African Tax Administration Forum Models,' 75(1), *Bulletin for International Taxation*, 2021.

West, C., 'The Relevance of the BEPS Recommendations on Developing Countries,' Final Report, Ministry of Foreign Affairs, Netherlands Policy and Operations Evaluation Department, 2021, 17.

Wiese, R., Jalles, J.T., Jakob de Haan, 'Structural reforms and income distribution: new evidence for OECD countries,' 76(4), *Oxford Economic Papers*, 2024, 1071–1088.

William, C.B., 'Cyber Espionage and Electronic Surveillance: Beyond the Media Coverage,' 66(3), *Emory Law Journal*, 66, 3, 2017, 513 and 525.

Wolfe, M., 'Jean Bodin on Taxes: The Sovereignty-Taxes Paradox,' 83(2), *Political Science Quarterly*, 1968, 268–284.

World Economic Forum, 'Expanding participation and boosting growth: The infrastructure needs of the digital economy,' 2015.

Yackee, S.W., 'Reconsidering Agency Capture During Regulatory Policymaking,' In *Preventing Regulatory Capture: Special Interest Influence and How to Limit It*, edited by Daniel Carpenter and David A. Moss. Cambridge: Cambridge University Press, 2014, 292-325.

Yoshioka, T., 'Lobbying,' In: Anheier, H.K., Toepler, S. (eds) *International Encyclopedia of Civil Society*. Springer, 2010, 950-955.

Ypi, L., 'Global Justice and avant-garde political agency. Oxford: Oxford University Press, 2012, 40-44.

Yuen, F.K., 'Primacy or World Order?' 38(3), *International Security*, 2014, 153 and 175.

Zeamari, I. and Laurier, W., 'Defining Digital Platforms: A Systematic Literature Review,' in Bach Tobji, M.A., Jallouli, R., Sadok, H., Lajfari, K., Mafamane, D., Mahboub, H. (eds) *Digital Economy, Emerging Technologies and Business Innovation*, Springer, Cham, 2024, 59-72.

Zgaga, T., 'The Coexistence of Fiscal Sovereignities: The Post-Pandemic European Union in Comparative Perspective,' 11(4), *Politics and Governance*, 2023, 102-111.

Zhang, Q. and She, J., 'Digital Transformation and Corporate Tax Avoidance: An Analysis Based on Multiple Perspectives and Mechanisms,' 9(19), *Plos One*, 2024.

Zimmer, C., 'Digital Market Indicators in Taxation: Local vs. Global Domains,' 7(1), Journal of Digital Tax Policy, 2022, 45-62.

Zucman, G., 'The Hidden Wealth of Nations: The Scourge of Tax Havens,' UC Berkley, 2015.

Zürn, M., 'A Theory of Global Governance: Authority, Legitimacy, and Contestation,' Oxford Academic, 2018.

Online Sources

'Amazon, Apple Thriving on Lockdown', BBC News, 31st July 2022 <<https://www.bbc.com/news/business-53602596>>

'Many Companies won't survive the pandemic, Amazon Will Emerge Stronger than Ever, Alana Semuels, 28th July 2020 < <https://time.com/5870826/amazon-coronavirus-jeff-bezos-congress/>>

'How Covid-19 Triggered the Digital and E-commerce Turning Point,' Andrey Popov, 15th March 2021 < <https://unctad.org/news/how-covid-19-triggered-digital-and-e-commerce-turning-point> >

'Reforms are Needed to Stem a Slow-down in Kenya's Economic Growth,' World Bank Group, 10th December 2024 <<https://www.worldbank.org/en/news/press-release/2024/12/10/reforms-are-needed-to-stem-a-slow-down-in-kenya-s-economic-growth> >

'Unlocking the Development Potential of Public Debt in Sub-Saharan Africa,' World Bank Group, 15th December 2023 <<https://www.worldbank.org/en/results/2023/12/15/unlocking-the-development-potential-of-public-debt-in-sub-saharan-africa>>

'The Global Economy on Track Strong but Uneven Growth as Covid-19 Still Weighs,' The World Bank Group, 8th June 2021 <<https://www.worldbank.org/en/news/feature/2021/06/08/the-global-economy-on-track-for-strong-but-uneven-growth-as-covid-19-still-weighs#:~:text=A%20year%20and%20a%20half,as%20many%20developing%20economies%20lag.>>

'OECD Breaks Silence on Lobbying – Tax Justice Network Response, 9th July 2023, <<https://taxjustice.net/press/oecd-breaks-silence-on-lobbying-tax-justice-network-response/> >

OECD/G20 Inclusive Framework Releases Additional Administrative Guidance on Pillar Two GloBE Rules and Update on Pillar,’ EY Global, 22nd December 2023, <https://www.ey.com/en_gl/technical/tax-alerts/oced-g20-inclusive-framework-releases-additional-administrative-0#:~:text=It%20also%20addressed%20the%20existing,implemented%20DSTs%20or%20similar%20measures>

‘United States Requests USMCA Dispute Settlement Consultations on Canada’s Digital Services Tax,’ The Office of the USTR, 30th August 2024, <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/august/united-states-requests-usmca-dispute-settlement-consultations-canadas-digital-services-tax#:~:text=%E2%80%9CThe%20United%20States%20opposes%20unilateral,that%20discriminate%20against%20U.S.%20companies.>>

‘Suspension of Tariff Action in France Digital Services Tax Investigation,’ The Office of the USTR, 7th January 2021, <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/january/suspension-tariff-action-france-digital-services-tax-investigation>>
‘Italy’s Digital Tax Gambit—Will US Trade Retaliation Follow?’ 9th October 2024, <<https://www.forbes.com/sites/andrewleahy/2024/10/09/italys-digital-tax-gambit-will-us-trade-retaliation-follow/>>

‘The OECD Interim Report on Tax Challenges Arising from Digitalization: An Overview,’ EY Global, 21st March 2018<<https://globaltaxnews.ey.com/news/2018-5441-the-oecd-interim-report-on-tax-challenges-arising-from-digitalisation-an-overview>>

‘Amazon Business Model—The Ecommerce Giants Revenue Stream,’ Anurag Jain, 20th September 2024<<https://oyelabs.com/amazon-business-model/>>

‘The 100 Largest Companies in the World by Market Capitalization in 2023,’ Statista, 4th July 2024<<https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-capitalization/>>

‘Africa Steps Up to Reshape International Tax Rules,’ Kudzai Mataba, 20th October 2023<https://www.iisd.org/articles/insight/africa-steps-reshape-international-tax-rules?utm_source=chatgpt.com>

‘Organizational Structure,’ OECD, 18th August 2024, <<https://www.oecd.org/en/about/organisational-structure.html?t>>

‘Inclusive International Tax Systems Crucial in Strengthening Developing Countries’ Fiscal Policies, Green Transition, Speakers Tell Economic and Social Council,’ The United Nations, 13th March 2023<<https://press.un.org/en/2023/ecosoc7116.doc.htm#:~:text=Fair%20and%20inclusive%20tax%20systems,International%20Cooperation%20in%20Tax%20Matters.>>

‘Developing Countries, Global Financial Governance and the Group of ,’Gerry Helleiner,
1st November 2001,
<https://fpif.org/developing_countries_global_financial_governance_and_the_group_of_twenty/>

‘Analyzing Mandatory Binding Arbitration and the MAP,’ Isaac Gonzallo and Anarella Calderoni,7th September, 2021 <<https://www.ciat.org/ciatblog-analyzing-mandatory-binding-arbitration-and-the-map/?lang=en>>

‘OECD Releases Information on MAP and Advance Pricing Arrangements,’ the OECD,15th November 2024<
<https://www.oecd.org/en/about/news/announcements/2024/11/oecd-releases-information-and-statistics-on-mutual-agreement-procedures-and-advance-pricing-arrangements.html>>

‘OECD Releases Report on Interaction of Tax Incentives and Pillar Two,’ EY Global, 13th October 2022 <<https://taxnews.ey.com/news/2022-1543-oecd-releases-report-on-interaction-of-tax-incentives-and-pillar-two>>

‘Members of the OECD/G20 Inclusive Framework on BEPS,’ The OECD, 28th May 2024
<<https://www.oecd.org/content/dam/oecd/en/topics/policy-issues/beps/inclusive-framework-on-beps-composition.pdf>>

‘Tech Lobby: Internet Giants Spend Record Amounts, Electronics Firms Trim Budgets,’ Deborah D’souza, 25th June 2019 <https://www.investopedia.com/tech/what-are-tech-giants-lobbying-trump-era/#toc-who-spent-what>

‘Amazon to Joe Biden: We Pay All the Taxes We Owe,’ Lydia DePillis, 13th June 2019
<<https://edition.cnn.com/2019/06/13/business/biden-amazon/index.html>>

‘OECD Breaks Silence on Lobbying – Tax Justice Network Reports,’ Mark Bou Mansour, 9th July 2023<<https://taxjustice.net/press/oecd-breaks-silence-on-lobbying-tax-justice-network-response/>>

‘Global Tax Rulemaker Under Fire Australia Pressured to Delay Global Tax Transparency Breakthrough,’ Mark Bou Mansour, 23rd June 2023<<https://taxjustice.net/press/global-tax-rulemaker-under-fire-after-australia-pressured-to-delay-global-tax-transparency-breakthrough/>>

‘Pascal Saint-Amans Joins Brunswick Group as a Partner,’ Brunswick, 19th September 2022 <<https://www.brunswickgroup.com/pascal-saint-amans-joins-brunswick-group-as-a-partner-i22150/>>

‘OECD Must End Dangerous Revolving Door with Private Sector,’ Financial Transparency Coalition, 26th October 2022 <https://financialtransparency.org/oeecd-must-end-dangerous-revolving-door-private-sector/>>

‘Retaliatory Measures on DST,’ Steve Esselaar, 26th November 2021<<https://researchictolutions.com/home/weekly-digest-for-26nov/>>

‘Tech Firms Face Higher Levies as Kenya Plans to Double Digital Service Tax,’ TechCrunch, 13th April 2022<<https://techcrunch.com/2022/04/13/tech-firms-face-higher-levies-as-kenya-plans-to-double-digital-service-tax/>>

‘Kenya to Transition from Digital Service Tax to Significant Economic Presence Tax,’ KICTANet, 2024a, 4th June 2024 <<https://www.kictanet.or.ke/kenya-to-transition-from-digital-service-tax-to-significant-economic-presence-tax/>>

‘Understanding Digital Taxation in Kenya: A Pathway to Fair and Inclusive Policy Reforms,’ KICTANet, 2024b, 24th September 2024 <<https://www.kictanet.or.ke/understanding-digital-taxation-in-kenya-a-pathway-to-fair-and-inclusive-policy-reforms/>>

‘Monthly Active User: A Comprehensive Exploration,’ Marketingino, 26th September 2024<
<https://marketingino.com/monthly-active-users-mau-a-comprehensive-exploration/>>

‘2024 Update: Risk of Anonymized and Aggregated Data,’ Macmillan LLP, 21st February 2024 <<https://www.lexology.com/library/detail.aspx?g=6882a166-563c-4e54-a016-5784fc0763c8>>

‘United States and Kenya Joint Statement after Fifth Round of U.S.-Kenya Strategic Trade and Investment Partnership Negotiations,’ Office of the USTR, 17th May 2024<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/may/united-states-and-kenya-joint-statement-after-fifth-round-us-kenya-strategic-trade-and-investment?utm_source=chatgpt.com>

‘Kenya to Fall into Line with \$250 billion OECD Global Tax Reforms- Unlocks US Free Trade Deal,’ Richard Asquith, 25th May 2024<https://www.vatcalc.com/kenya/kenya-to-scrap-1-5-digital-services-tax/?utm_source=chatgpt.com>

‘Digital Taxes, Meet Handbag Tariffs,’ Daniel Bunn, 10th July 2020<
<https://taxfoundation.org/blog/us-french-tariffs/>>

‘US Backs Down from Tariffs over French Tech Giant Taxes,’ BBC, 7th January 2017 <
<https://www.bbc.com/news/business-55578198>>

‘US Move to Isolate Huawei Sends Ripples Through Global Supply Chain,’ Emily Feng, 16th May 2019 <<https://www.npr.org/2019/05/16/723983055/u-s-move-to-isolate-huawei-sends-ripples-through-global-supply-chain> >

‘China’s Pursuit of Advanced Dual-Use Technologies,’ Meia Nouwens, 18th December 2018 <<https://www.iiss.org/research-paper/2018/12/emerging-technology-dominance/>>

Reports

League of Nations, Report on Double Taxation Submitted to the Financial Committee by Professors Bruins, Einaudi, Seligman, and Sir Josiah Stamp (League of Nations Publications, 1923).

National Assembly, Committee on Finance, General Economy, and Budgetary Control, Report No. 64,2019, 3 and 7.

OECD, ‘Tax Challenges Arising from Digitalization – Interim Report 2018, OECD Publishing, Paris, 2018, 12.

Report of the Departmental Committee on Finance and National Planning on its Consideration of the Finance Bill 2024 (National Assembly Bill No. 30 of 2024), 90, 2024, 473-474.

The World Bank Group, ‘Poverty, Prosperity and Planet Report: Pathways Out of the Polycrisis,’ 2024, 85-92.

United States Trade Representative, ‘Report on France’s Digital Service Tax Prepared in the Investigation under Section 301 of the Trade Act 1974,’ Office of the United States Trade Representative, 2019, 9; 31-49; 51; 60; 74-75.

World Trade Organization, ‘Brazil - Certain Measures Concerning Taxation and Charges,’ Reports of the Panel, 17-4852, 2017.