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I. Introduction

This paper will address the impact of economic digitalization on the international tax structure and the imminent need to respond to these challenges to avoid global financial turmoil. Despite the world's two largest economies, the United States and China, resolving a drawn-out trade war in relation to disagreements over tariffs at the tail-end of 2019, the possibility of a global trade war still looms large as the world enters the new decade. International financial tensions are particularly high due to an increasing number of countries threatening to impose Digital Service Taxes (DSTs) on Multinational Enterprises that provide services to their markets without having a physical presence in that given market.

Historically, multinational companies were subjected to the tax laws of the countries in which they had a physical presence.[1] Today, because of the proliferation of the digital economy, companies often have a significant presence—by connecting with customers and conducting general business via online forums—in various markets without having any physical infrastructure in that jurisdiction. As a result, multinational enterprises are able to conduct business operations in virtually every global market through online channels, while avoiding local taxes because they lack a physical presence in the jurisdiction.

Countries are growing frustrated by their inability to tax the revenue that they deem to be generated as a result of intangible business operations in their markets under the existing tax structure and are considering drastic measures, like DSTs, to ensure they receive their fair-share of the tax base.[2] The growing threat of countries taking unilateral action has led to the

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1. *See* Itai Grinberg, *The Looming Tax War: A Decaying International Tax Regime Threatens the Globale Economy*, FOREIGN AFFS. (Jan. 17, 2020), https://www.foreignaffairs.com/articles/united-states/2020-01-17/looming-tax-war.

2. *See* Elke Asen, *What European OECD Countries Are Doing About Digital Services Taxes*, TAX FOUND. (June 22, 2020), https://taxfoundation.org/digital-tax-europe-2020/.

formation of a 135-member coalition of nations from the OECD/G20 and other countries, known as the Inclusive Framework on Base Erosion and Profit Shifting (BEPS), to work together to devise a global understanding to address the challenges to international taxation brought about by the digitalization of the economy.[3] The Inclusive Framework was established at the beginning of 2013 to develop a consensus solution to modernize the international tax structure.[4] Nevertheless, after the most recent round of deliberations to advance the efforts to reform the international tax structure, the OECD head of tax policy—Pascal Saint-Amans—told reporters, "what is at stake is a massive trade war."[5] This underscores the importance of formulating a solution to the problem as soon as possible.

The position this comment takes is that the current approach to resolving the international tax crisis needs to be systematically overhauled with a binding, top-down approach, driven by an impartial, international dispute settlement body, potentially modeled after the World Trade Organization's Dispute Settlement Understanding. The need for such a monumental modification to the current tax structure is necessitated by the complexity of the details to be negotiated and the varying political interests of the hundreds of individual countries implicated by the negotiations, rendering compromise and consensus unrealistic under the Inclusive Framework's current deliberation process.

This comment will build up to its conclusion by setting forth the historical development of the international tax structure and how the development of the increasingly international and digitally-driven economy has led to the need for systematic and multilateral reform. Second, it will discuss how various countries threatened to respond to the implications associated with digitalization. Next, the paper addresses the development of the proposal set forth by the OECD/G20 Inclusive Framework on January 30, 2020. Finally, the paper will address the shortcomings associated with the latest proposal, discuss the likelihood of a consensus being reached by the international community, and suggest that fundamental change is required to avert a "massive trade war."

II. Development Of The International Tax Structure

Since the 1920's, the international community has understood that the growth of the international economy would be hindered in the absence of clear international tax rules.[6] For example, the League of Nations recognized the possibility of double taxation—the same corporate income

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3. *See Action Plan on Base Erosion and Profit Shifting*, ORG. FOR ECON. CO-OPERATION & DEV. [OECD], 14 (2013), http://dx.doi.org/10.1787/9789264202719-en.

4. *See id.* at 13.

5. Leigh Thomas, *Global Tax Rules Set for Overhaul as States Seek to Avoid New Trade War*, REUTERS (Jan. 31, 2020), https://www.reuters.com/article/us-oecd-tax/global-tax-rules-set-for-overhaul-as-states-seek-to-avoid-new-trade-war-idUSKBN1ZU10F.

6. *Action Plan on Base Erosion and Profit Shifting*, *supra* note 3, at 7.

being taxed by multiple nations based on domestic tax laws—and its potential to restrict the growth of the international economy.[7] As a result, the international tax structure developed over the past one hundred years into a creature consisting of over 4,000 bilateral treaties, supplemented by complex and individualized domestic tax laws.[8] These treaties and domestic tax laws were enacted on an as needed basis and still adequately govern the taxation of traditional, tangible international trade.[9] But the manner in which the world conducts international business is changing, and the structure is ill-equipped to respond to these new developments.

The basis of the international tax system divides the world into resident and source countries.[10] The resident country refers to the jurisdiction in which the investor is located and is indicated by the entity's country of incorporation or its place of management.[11] The source country is the jurisdiction where the investment occurs.[12] An underlying principle to international taxation is that "all income should be subject to tax," and the total profits should be allocated amongst the countries based on where value was added.[13] But the income is not to be taxed more than once, and countries adhere to bilateral treaties to address the possibility of double-taxation.[14]

Jurisdiction to tax income generated abroad by a foreign investor is distributed between source and resident countries in accordance with the aforementioned bilateral treaties.[15] According to most treaties, a source country can only "withhold tax"—a mechanism used to allocate the taxable income to a certain jurisdiction to keep both countries from taxing the same corporate profits—on the income when it is paid to the investor in the resident country if the investor has a permanent establishment (PE) in the source country.[16] In simpler terms, "a company must have a PE in a country before it becomes subject to [its Corporate Income Tax]."[17] Under the traditional understanding, a PE is established if either

> a fixed place through which the business of the enterprise is wholly or partly carried on; or, [sic] where no place of business can be found, a person acting on behalf of the foreign enterprise and habitually

7. *Id.*

8. Grinberg, *supra* note 1.

9. *Id.*

10. Lilian V. Faulhaber, *Taxing Tech: The Future of Digital Taxation*, 39 VA. TAX REV. 145, 179 (2019).

11. *Id.* at 179-80.

12. *Id.* at 180.

13. Joe Kennedy, *Digital Service Taxes: A Bad Idea Whose Time Should Never Come*, INFO. TECH. & INNOVATION FOUND., 5 (May 13, 2019), https://itif.org/publications/2019/05/13/digital-services-taxes-bad-idea-whose-time-should-never-come.

14. *Id.* at 4.

15. Faulhaber, *supra* note 10, at 180.

16. *Id.*

17. Kennedy, *supra* note 13, at 5.

exercising an authority to conclude contracts in the name of the foreign enterprise.[18]

Under either threshold, some form of physical presence in a locality is required for a company to have a PE.[19] Once the PE is established, the source country has the right to tax the corresponding revenue, due to the existence of a tax nexus.[20]

If a company derives value solely as a result of its "digital presence" in a market, that corresponding country will be unable to tax the value generated according to the rules as they are currently constructed.[21] Potential examples of a "digital presence" include advertising efforts on social media platforms, the use of search engines, or digital downloads of a product.[22] In response to the changing manner in which goods and services are consumed, countries like China and India proposed that the country in which the customers reside—referred to as the "market jurisdiction"—should factor more heavily into the determination of a relevant tax nexus than traditional factors, based on physical presence, in the digital services sector.[23] Because the United States is the resident country to major technology companies—referred to by the international business community as GAFA and FAANG[24]—the Trump administration understandably pushed back on the notion that the developing tax reform should specifically target multinational technology giants.[25] Such reform would disproportionately harm American companies, so the United States proposed that reform should apply to a broad range of businesses to disperse the negative effects.[26]

Through careful tax-planning—or cheating the tax system, depending on point of view—multinational enterprises providing digital services were able to establish their physical presence in low-tax jurisdictions and serve consumers in high-tax jurisdictions without being subjected to the higher tax rates. For example, Netflix International, based in the low-tax jurisdiction of the Netherlands, collected £860 million (approximately $1.1 billion) in annual revenue from subscribers in the United Kingdom; nevertheless,

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18. OECD/ G20 Base Erosion and Profit Sharing Project, *Tax Challenges Arising from Digitalisation – Interim Report 2018: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project*, 159, ORG. FOR ECON. CO-OPERATION & DEV. [OECD] (2018), https://www.oecd-ilibrary.org/docserver/9789264293083-en.pdf?expires=1583471203&id=id&accname=guest&checksum=C5DF9685DECD25A159DD4344F8A85188.

19. *Id.*; Blake Vickers, *Proposed Nexus Rules Could Change Global Taxation*, FIN. MGMT. MAG. (Apr. 30, 2019), https://www.fm-magazine.com/news/2019/apr/oecd-nexus-rules-global-taxation-201921102.html.

20. *See* Vickers, *supra* note 19.

21. *Id.* at 2.

22. *Id.*

23. *See* Grinberg, *supra* note 1.

24. GAFA and FAANG are acronyms referring to Google, Amazon, Facebook, and Apple and Facebook, Amazon, Apple, Netflix, and Google respectively. *See* Faulhaber, *supra* note 10, at 150.

25. *See* Grinberg, *supra* note 1.

26. *See id.*

Netflix's U.K. subsidiary only reported revenue of £48 million in the United Kingdom.[27] These are the types of problems that the OECD set out to address through the "Action Plan on BEPS" in 2013.[28] While the BEPS measures have been implemented around the world and are progressing,[29] as evident by Netflix's ability to shift profits into the low-tax Netherlands, gaps remain in the system that allow multinational enterprises to minimize their tax burdens in the countries where revenue is really being generated.

The establishment of the BEPS is an international recognition that the current tax structure is deeply flawed and needs to be restructured. The overarching issue brought about by digitalization and globalization, as summarized by one international tax scholar, is that "multinational corporations are able to earn income in jurisdictions where they have no physical presence while allocating that income to low-tax jurisdictions where they do allegedly have a physical presence."[30] The BEPS Action Plan recognizes that this issue harms (1) governments, (2) individual taxpayers, and (3) the multinational enterprises themselves.[31] The governments suffer from decreased tax revenue, increased compliance, and policing costs.[32] Individual taxpayers are left bearing a greater share of the tax burden, despite corporate activities taking place within their jurisdictions.[33] Finally, the multinational enterprises are adversely impacted because they have to balance reputational risks associated with essentially cheating the tax system and the need to structure their tax strategies in a manner that does not put them at a competitive disadvantage.[34]

Despite countries agreeing on the need for change, the matter is extremely complex and as a result, the timeline for adopting a solution continues to be pushed back. The initial BEPS Action Plan set forth a deadline of December 2015 to develop "a multinational instrument designed to provide an innovative approach to international tax matters, reflecting the rapidly evolving nature of the global economy and the need to adapt quickly to this evolution."[35] Nevertheless, on January 30, 2020, the OECD/G20 Inclusive Framework on BEPS released a statement conceding a 2020 year-end target date to release a final report for a consensus-based solution to the

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27. Jane Kanter, *Netflix Accused of Funneling $430M of International Profits into Tax Havens*, DEADLINE (Jan. 15, 2020), https://deadline.com/2020/01/netflix-accused-funnelling-international-profits-into-tax-havens-1202831130/.

28. *See generally*, *Action Plan on Base Erosion and Profit Shifting*, *supra* note 3, at 15.

29. *See Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*, ORG. FOR ECON. CO-OPERATION & DEV. [OECD], 27 (Jan. 2020), https://www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework-on-beps-january-2020.pdf.

30. Faulhaber, *supra* note 10, at 184.

31. *Action Plan on Base Erosion and Profit Shifting*, *supra* note 3, at 8.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 40.

tax challenges arising from the digitalization of the economy.[36] The Inclusive Framework recognized in its May 2019 Programme of Work that if they cannot deliver a consensus-based solution by the end of 2020, there is an increased risk that more countries will continue to impose unilateral tax measures.[37] Furthermore, these unilateral actions would be likely to adversely impact global investment and growth by undermining the international tax structure.[38]

To make the target date even less likely to be met, the first page of the January 2020 statement begins with the new development that Steven Mnuchin—the United States' Treasury Secretary—indicated that the United States prefers the new tax rules regarding the allocation of income to be implemented on a "safe-harbour" basis.[39] Other member countries believe that the implementation of the new rules on a "safe-harbour" basis would result in a total failure of eight-year process and an unworkable international tax system.[40] The OECD head of tax policy told journalists that this U.S. proposal was "met with virtually no backing from other countries."[41] Amid these recent developments, it is becoming increasingly unlikely that a consensus will be reached. A former official in the U.S. Treasury Department's Office of International Tax Counsel in the Bush and Obama administrations predicts the following snowball effect if the international community fails to reach a consensus by the end of 2020:

> In the absence of clarity and consensus, cross-border income could become subject to double or multiple taxation. Multinational corporations would then pull back from trade and investment. The effect of those diminished transactions would spread well beyond big companies and their shareholders, because the activity of multinationals is the backbone of the success of globalization. In the short term, the global economy could slow down and in some places slump toward stagnation or recession. And in the longer term, global economic activity could be hit hard.[42]

These effects would be set in motion by the widespread imposition of unilateral measures by countries looking to ensure taxes are levied on profits

36. *See Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*, *supra* note 29, at 28.

37. *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy*, ORG. FOR ECON. CO-OPERATION & DEV. [OECD], 7 (May 2019), https://www.oecd.org/tax/beps/programme-of-work-to-develop-a-consensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.pdf.

38. *Id.*

39. *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*, *supra* note 29, at 4.

40. *Id.*

41. Thomas, *supra* note 5.

42. Grinberg, *supra* note 1.

where they believe economic value to be created.[43] As of January 2020, nations that have enacted, announced, or proposed unilateral tax measures aimed at the digital international economy include: Austria, Belgium, Czech Republic, France, Hungary, Italy, Poland, Slovenia, Spain, and the United Kingdom.[44] In addition to these measures directly disrupting growth—by the increasing the costs of conducting international businesses—these measures will surely lead to retaliatory tariffs, which have already been threatened by the United States against countries that impose digital service taxes, indirectly hindering free-trade.[45]

In summary, the modern international tax regime is the product of a complex network of bilateral treaties and domestic tax laws that emerged in response to problems associated with an era of international trade in which the League of Nations was the guiding international economic body.[46] Through an analysis of the recent work completed by the OECD/G20 Inclusive Framework on BEPS, it appears that most countries currently agree on the following: (1) the current international tax system is out of touch with the modern realities of the global economy, (2) the understanding of tax nexus needs to be revised and expanded to address the situations in which a company has no physical presence in a jurisdiction, but nevertheless derives profit in the jurisdiction through its intangible presence, and (3) the need to impose a minimum tax rate to ensure low-tax jurisdictions do not provide tax havens for massive multinational enterprises.[47]

The inability of members to agree on the details by which these problems will be addressed leads to the increased likelihood that countries will impose unilateral measures to ensure they do not fail to capitalize on potential tax revenue. In fact, at the recent World Bank Group/IMF Tax Conference, Stephen Shay—the former Deputy Assistant Secretary for International Tax Affairs in the U.S. Department of the Treasury—said that he finds it unlikely that a consensus regarding the fundamental details underlying the international tax restructuring is realistic by the end of 2020.[48] The following section will address the manner in which various powerful countries have already gone forward with legislation to tax multinational enterprises conducting digital business in their markets.

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43. *See e.g.*, Grinberg, *supra* note 1; Simon Gough, *Digital Services Tax: European Union, Global*, BIRD & BIRD LLP (Jan. 16, 2020), https://www.twobirds.com/en/in-focus/digital-services-tax.

44. Gough, *supra*, note 43.

45. *See* Thomas, *supra* note 5.

46. *Action Plan on Base Erosion and Profit Shifting*, *supra* note 3.

47. *See Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*, *supra* note 29; OECD, *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy*, *supra* note 37; Faulhaber, *supra* note 10, at 191–92.

48. David E. Spencer, *The OECD Work Program: Tax Challenges of The Digitalization of The Economy (Part 3)*, 31 J. INT'L TAX'N 25, 37 (2020).

III. Unilateral Measures

A subset of the Inclusive Framework on BEPS, the Task Force on the Digital Economy (TFDE), identified three main commonalities amongst the unilateral measures undertaken in relation to the tax challenges associated with digitalization.[49] The identified commonalities are that they: (1) seek to expand the tax base in the country where consumers are located, (2) implement elements for the determination of the tax base, such as sales revenue or place of use or consumption, and (3) stem from the displeasure of the current tax system.[50] Above all else, the measures respond to the overarching issue that "multinational corporations are able to earn income in jurisdictions where they have no physical presence while allocating that income to low-tax jurisdictions where they do allegedly have a physical presence."[51]

Before the OECD/G20 Inclusive Framework on BEPS adopted its "Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy" in May, 2019,[52] the European Commission developed Directives for taxing the digital economy to "ensure that profits are taxed where economic value is created."[53] The legislative proposals aimed to establish the "rules for establishing a taxable nexus for digital business operating across border in case of a non-physical commercial presence."[54] This serves as the basis for the European Commission's devising a definition for "significant digital presence."[55] Potential criteria, under the Directive, for determining whether a business has established a sufficient digital footprint to establish a nexus should reflect indicators of economic activity, such as "the reliance of digital business on a large user base, user engagement and user's contributions as well as the value created by users for these businesses."[56]

In the short-term, the Directive aimed to immediately implement a three percent digital service tax on gross revenues, only levied against companies with (1) annual global revenues in excess of €750 million and (2) revenues attributed to the European Union above €50 million.[57] In the long-term, the Directive would expand the Permanent Establishment tax nexus to include

49. OECD/ G20 Base Erosion and Profit Sharing Project, *supra* note 18, at 134.

50. *Id.*

51. Faulhaber, *supra* note 10, at 184.

52. *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy*, *supra* note 37.

53. Simon Gough, et al., *Digital Services Tax: Overview of the Progress of Implementation by EU Member States'*, BIRD & BIRD LLP, 1 (Oct. 2019), https://www.twobirds.com/en/news/articles/2019/global/digital-services-tax-overview-of-the-progress-of-implementation-by-eu-member-states.

54. *Proposal for a Council Directive Laying Down Rules Relating to the Corporate Taxation of a Significant Digital Presence*, COM (2018) 147 final, 2 (Mar. 21, 2018).

55. *Id.*

56. *Id.* at 7–8.

57. Faulhaber, *supra* note 10, at 161.

all companies with significant economic presence in a jurisdiction.[58] Ultimately, when the member states agreed upon final a definition and proper method of determining "significant digital presence," the long-term proposal would be substituted for the short-term digital service tax.[59] This long-term solution proposes that for a company to establish a "significant digital presence," business would need to be carried on through a digital interface and at least one of the following conditions would be met: (1) the corporation's revenue exceeds €7 million in the jurisdiction, (2) the corporation has over 100,000 users of its digital services in the jurisdiction, or (3) the corporation entered 3,000 business contracts to supply digital services within the jurisdiction within the year.[60]

In March 2019, the EU's Economic and Financial Affairs Council was unable to achieve the required unanimous approval from the Member States with regard to the digital service tax short-term proposal or the long-term proposal.[61] Compromise and unanimous approval was ultimately blocked by smaller countries, like Ireland and Luxembourg, that serve as the regional home to American digital service companies, who derive significant economic benefits from the current tax system.[62]

As a result, the European Commission has deferred to the OECD/G20 Inclusive Framework to develop a multinational strategy to address the issue by the end of 2020.[63] Nevertheless, many EU Member States have used the basis of the European Commission's proposals as the foundation by which they have developed and imposed their own unilateral measures.[64] The TFDE grouped these unilateral actions into four non-exclusive categories, based on the mechanisms implemented to accomplish their desired objectives: (1) alternative applications of the Permanent Establishment threshold, (2) imposition of withholding taxes in excess of those agreed upon in the bilateral treaties, (3) use of turnover taxes to tax revenues derived from efforts like online advertising, and (4) explicit regimes aimed at large multinational enterprises that abuse digitalization by shifting profits into tax-havens.[65]

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58. Gough et al., *supra* note 53.

59. *Id.*

60. *Proposal for a Council Directive Laying Down Rules Relating to the Corporate Taxation of a Significant Digital Presence*, *supra* note 54, at 8.

61. Faulhaber, *supra* note 10, at 161; Gough, *supra*, note 43.

62. Bojan Pancevski & Sam Schechner, *France's Macron Pauses Tech Tax After U.S. Pressure*, WALL ST. J. (Jan. 20, 2020), https://www.wsj.com/articles/frances-macron-pauses-tech-tax-after-u-s-pressure-11579564974.

63. Gough, *supra*, note 43.

64. *Id.*

65. OECD/ G20 Base Erosion and Profit Sharing Project, *supra* note 18, at 135.

A. Turnover Taxes

A turnover tax is levied on gross revenue generated in a jurisdiction, and is calculated at the point in time by which the service is provided.[66] These taxes are used by countries to target revenue generated in the market jurisdiction by "foreign-based suppliers of digital products and services."[67] An often cited justification for implementing these measures is to protect brick and mortar suppliers from being subjected to harsher tax treatment than digital service providers that can take advantage of foreign tax advantages.[68] DSTs have grown in popularity since the EU Commission proposed a DST for its short-term tax reform.[69] DSTs fit under the "Turnover Tax" category because they seek to tax gross revenue derived from digital activities in a jurisdiction, irrespective of the company's physical location.[70]

The legislation that garnered the most publicity was the French adoption of a Digital Service Tax in July 2019.[71] This bill was set to levy a three percent tax on gross revenues upon companies that brought in at least €750 million in annual revenues from digital services worldwide and €25 million on revenues generated in France.[72] The tax would apply to any revenues brought about from the "sale of user data, the provision of a platform for online sales of goods and services, and the targeting of advertising based on user data."[73] Scholars predict that this tax would be harmful in the long-term to France because the most successful digital firms will be incentivized to relocate and stop providing services to French customers.[74]

This tax was labeled the "GAFA tax" because American technology conglomerates were its suspected targets. The French tax administration acknowledged that the legislation would only impact around thirty international groups based on the high revenue thresholds.[75] Adding to the harmful implications on the targeted businesses, when the legislation was implemented in July 2019, France announced that it would be entered retroactively, thereby applying to gross revenue earned six months before the tax was even announced.[76]

66. *Turnover Tax*, Bus. Dictionary, http://www.businessdictionary.com/definition/turnover-tax.html.

67. OECD/ G20 Base Erosion and Profit Sharing Project, *supra* note 18, at 140–41.

68. *Id.* at 141.

69. *Proposal for a Council Directive Laying Down Rules Relating to the Corporate Taxation of a Significant Digital Presence*, *supra* note 54, at 7–8.

70. *See generally*, Faulhaber, *supra* note 10, at 165–66.

71. *Id.*

72. Sophi Dorin, *Digital Service Tax in France*, Bird & Bird LLP (Oct. 2019), https://www.twobirds.com/en/news/articles/2019/global/digital-services-tax-in-france.

73. Faulhaber, *supra* note 10, at 164.

74. Daniel Bunn, *France's Digital Services Tax: Facts and Analysis*, Tax Found. (Jul. 12, 2019), https://taxfoundation.org/france-digital-services-tax/.

75. Dorin, *supra*, note 72.

76. *Id.*

In response to the French tax, the office of the U.S. Trade Representative investigated the fairness of the "GAFA tax."[77] The United States derives its trade sanction authority from the Trade Act of 1974 and determined that the tax "discriminates against U.S. companies, is inconsistent with prevailing principles of international tax policy, and is unusually burdensome for affected U.S. companies."[78] Consequently, the President of the United States would be justified under domestic law to levy retaliatory tariffs on any French good or service.[79]

Traditionally, this role of determining appropriate retaliatory sanctions through the imposition of tariffs would fall under the concurrent jurisdiction of the World Trade Organization's Dispute Settlement Understanding (DSU).[80] But the Dispute Settlement Understanding has been severely crippled by the United States' refusal to appoint new appellate judges to the body, in response to DSU's handling of the recent U.S.-China trade war, and as a result, the DSU not have enough judges to render a binding ruling, even though it would likely be in favor of the United States.[81] Receiving the blessing of an international, impartial body—like the Dispute Settlement Understanding—to impose retaliatory tariffs against France would be a far more powerful, long-term deterrent from French discriminatory taxes than the unilateral threat of tariffs on French wine.

The United States responded to the tax by threatening "to place tariffs of up to 100 [percent] on $2.4 billion on French imports including wine."[82] The threat of tariffs against France proved effective, and on January 22, 2020, France and the United States reached a temporary agreement in regards to the increased tensions associated with the French Digital Service Tax legislation.[83] In exchange for the French agreement to postpone its taxation of American technology companies, President Trump suspended the imposition of the retaliatory tariffs on French goods.[84] Nevertheless, the

77. Press Release, Off. U.S. Trade Rep., United States Trade Representative Moves Forward on its Investigation under Section 301 into France's Digital Services Tax (Nov. 27, 2019), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/november/united-states-trade-representative.

78. Grinberg, *supra* note 1.

79. *Id.*

80. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

81. Jacob M. Schlesinge, *Will the U.S. Bring Down the WTO?*, WALL ST. J. (Nov. 28, 2019), https://www.wsj.com/articles/will-the-u-s-bring-down-the-wto-11574953201; Asjadul Kibria, *Keeping the WTO Dispute Settlement System Functional*, FIN. EXPRESS (Dec. 26, 2019), https://thefinancialexpress.com.bd/views/views/keeping-the-wto-dispute-settlement-system-functional-1577371845.

82. Pancevski & Schechner, *supra* note 62.

83. Liz Alderman, et al., *U.S. and France Suspend Hostilities on Tariffs and Taxes*, N.Y. TIMES (Jan. 21, 2020), https://www.nytimes.com/2020/01/21/business/france-US-digital-tax.html.

84. *Id.*

United Kingdom, Spain, Austria, and Italy are proposing similar measures to impose Digital Service Taxes.[85]

B. Alternatives to the PE Threshold

Many countries agree that the PE definition should be altered to better address the digital economy.[86] But as indicated by the failure of the EU Commission to agree upon a definition of "significant digital presence"[87] because of the competing interests of the member states, it is difficult to reach a multilateral agreement as to what constitutes an adequate digital presence to justify taxation in the source jurisdiction.

Individual countries have acted unilaterally to amend their approach to determining PE to "[dilute] the requirement for permanence and physical presence at a specific geographical location to establish a nexus for net-basis taxation."[88] For example, Israel will attribute profits generated through online services by foreign enterprises if they have a significant economic presence in Israel.[89] To establish whether there is a significant economic presence, it considers the following factors: (1) the amount of contracts concluded online between the foreign enterprise and Israeli consumers; (2) the extent to which Israeli customers use the foreign enterprise's digital products and services; (3) the amount of revenue generated by Israeli users; and (4) the degree to which the online platform is targeting an Israeli audience.[90]

An international tax scholar analogizes the Israeli practice to recently adopted U.S. state laws, in which some states passed legislation to subject out-of-state companies conducting online business in the state, to local taxes based on the companies having a "significant economic presence."[91] Historically, the Supreme Court interpreted the Commerce Clause to obligate an out-of-state seller "to collect and remit the [sales] tax to the consumer's State depended on whether the seller had a physical presence in the State."[92] In 2018, the Court acknowledged that "[m]odern e-commerce does not align analytically with a test that relies on . . . physical presence. . . [I]t is not clear why a single employee or a single warehouse should create a substantial nexus while 'physical' aspects of pervasive modern technology should not."[93]

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85. Faulhaber, *supra* note 10, at 166 (2019).

86. OECD, *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy*, *supra* note 37, at 18; Faulhaber, *supra* note 10, at 191–92.

87. *See* Pancevski & Schechner, *supra* note 62.

88. OECD/ G20 Base Erosion and Profit Sharing Project, *supra* note 18, at 135.

89. *Id.* at 137.

90. *Id.*

91. Faulhaber, *supra* note 10, at 172–73.

92. S. Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2087–88 (2018) (citing Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753 (1967)).

93. *Wayfair*, 138 S. Ct. at 2095.

Given that the digital economy is not confined to the borders of the United States, there is no justification for arguing that the principles articulated by the Supreme Court are inapplicable to how the United States should view digital taxation rights throughout the world. As a result, the United States should apply these principles when negotiating for a new system on international taxation.

While the "significant economic presence" approach may be manageable for the U.S. states that are subject to the jurisdiction of a uniform federal body of law, or when implemented by countries unilaterally (Israel), this type of system would be difficult to implement multilaterally. Even if the international community agreed upon the appropriate factors to be considered when determining if the threshold for a non-physical PE is met, the application of subjective factors to real-world scenarios would lead to constant disagreement over when there exists a "significant economic presence."

But the Inclusive Framework did acknowledge the need to establish an "effective and binding dispute prevention and resolution mechanisms" in its January 2020 Statement.[94] It is possible that an international dispute settlement body could serve as a tribunal to resolve disputes regarding the evaluation of the "significant economic presence" factors, rendering this approach workable under the right conditions. The comment will address the importance of establishing an independent dispute settlement body below.

Studying these unilateral measures provides valuable insight into how to best construct an international tax agreement. Although the crisis of a trade war escalating from the French tax seems to have been averted, heightened international tax tensions are still present and the constant threats of other countries to impose DSTs emphasizes the importance of reaching an agreeable solution soon.[95] A significant economic presence test has the potential to be a workable solution to the complications in determining a PE arising out of digitalization, but it would be ineffective if it is not enacted uniformly.

Nevertheless, a new method for defining a PE based on the totality of relevant factors—opposed to relying solely on physical presence—makes for a good starting place to develop a solution that is globally agreeable. Unilateral measures are not the long-term solution to the international tax structure, but if a solution is not reached soon, they will be invoked around the world. The following section will discuss how the Inclusive Framework's effort to combat the growing reliance on unilateral measures led to the adoption of the Unified Approach in the January 2020 "Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar

94. *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*, *supra* note 29, at 4.

95. Gough et al., *supra* note 53.

Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy."[96]

IV. Evolution of the Proposal into the Unified Approach

As the OECD/G20 Inclusive Framework continued to strive to meet its goal of reaching a consensus solution to address the tax challenges arising out of globalization, on January 23, 2019, the members approved a policy note that divided the proposal into two distinct, yet related, pillars.[97] While they address different challenges, the goals of the two Pillars can have a mutually reinforcing effect.[98] Pillar Two focuses on solidifying the establishment of a global minimum tax, through Base Erosion and Profit Sharing.[99] These expand upon the types of laws that the United States and the United Kingdom passed in response to low-tax jurisdictions operating as tax-havens for multinational enterprises.

For the purposes of this comment, the most relevant aspect of Pillar Two to note is that it is finalizing rules to ensure that multinational enterprises are subjected to a minimum tax rate, "thereby reducing the incentive to allocate income for tax reasons to low taxed entities."[100] Because the basis of Pillar Two is to shift taxing power away from smaller countries that operate as tax havens,[101] the large economies' interests are more aligned on this matter than in Pillar One. This comment will not focus much on Pillar Two because it is in the more technical stage of negotiations, aiming to simplify its language to reduce compliance costs to businesses,[102] and because of the reality that the larger economies will probably be able to force the smaller countries into accepting the terms based on their unified positions in these negotiations.

Pillar One focuses on the international allocation of taxing authority through the development of new profit allocation and taxing rules.[103] This essentially means developing a multilateral plan to expand the understanding of Permanent Establishment. As noted above, the Member States of the European Commission were unable to reach an agreement regarding the proper test for defining "significant digital presence,"[104] but Israel and the

96. *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*, *supra* note 29, at 4.

97. *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy*, *supra* note 37, at 6.

98. *Id.*

99. *Id.*

100. *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*, *supra* note 29.

101. *Id.*

102. *Id.*

103. *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy*, *supra* note 37, at 6.

104. Faulhaber, *supra* note 10, at 161; Gough, *supra*, note 43.

United States successfully devised domestic systems to determine whether a taxable nexus is established through digital activity.[105]

Due to the difficulty of reaching a multilateral agreement under Pillar One, the Inclusive Framework released a public consultation document on February 13, 2019, seeking input on the adequacy of the following three proposals.[106] While the proposals vary in scope of the new taxing right, they all grant more taxing rights to the market jurisdiction "in situations where value is created by a business activity through (possibly remote) participation in that jurisdiction that is not recognized in the current framework of allocating profits."[107]

A. User-Participation Proposal

This approach expands the nexus understanding to allow jurisdictions where users contribute significant value to a company's income to allocate a portion of the company's income to their local tax base.[108] The user-participation proposal focuses on highly digitalized businesses, like social media platforms, search engines, and online marketplaces, because a substantial portion of the value inherent in these companies stems from their ability to capitalize on sustained user engagement and active participation on the digital platform.[109] This proposal would be narrowly applied to businesses that derive a "significant contribution to value creation" from an active user base and would allow the jurisdiction of these users to tax value creating activities occurring in their jurisdiction.[110] Under this approach, a proportion of residual profits—"any income over the routine return"[111]—are taxable by the market jurisdiction where the value was created by the activities of the user.[112]

Today, many companies benefit to some extent from digitalization, such as being discovered via crowd-sourced online review forums, like Yelp. Therefore, a substantial concern with this proposal is defining what qualifies as "highly digitalized" and whether it is fair to treat these companies differently than others, simply because they are using digitalization to a greater extent.[113] The February public consultation document suggests that this user-participation proposal could be tailored to only apply to businesses

105. *Id.* at 172–73; OECD/ G20 Base Erosion and Profit Sharing Project, *supra* note 18, at 137.

106. *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy*, *supra* note 37, at 6.

107. *Id.* at 11.

108. Faulhaber, *supra* note 10, at 171.

109. Base Erosion and Profit Shifting Project, *Addressing the Tax Challenges of the Digitalisation of the Economy: Public Consultation Document*, ORG. FOR ECON. CO-OPERATION & DEV. [OECD], 9–10 (2019), https://www.oecd.org/tax/beps/public-consultation-document-addressing-the-tax-challenges-of-the-digitalisation-of-the-economy.pdf.

110. *Id.* at 11.

111. Faulhaber, *supra* note 10, at 171.

112. Base Erosion and Profit Shifting Project, *supra* note 109, at 10–11.

113. Vickers, *supra* note 19.

of a certain size, to alleviate some of the administrative costs.[114] Adding a size threshold to the proposal would mirror the GAFA and FAANG taxes that the United States has previously criticized due to their unfairness to U.S. technology companies.

B. Marketing Intangibles Proposal

Similar to the user participation approach, the marketing intangibles approach expands the taxable nexus to companies that do not have a physical presence in a jurisdiction.[115] But it is broader in scope "to respond to the broader impact of digitalization on the economy" by applying to more than just highly digitalized businesses.[116] The OECD considers a marketing intangible to be something "that relates to marketing activities, aids in the commercial exploitation of a product or service and/or has an important promotional value for the product concerned."[117] Examples include, "trademarks, trade names, customer lists, customer relationships, and proprietary market and customer data that is used or aids in marketing and selling goods or services to customers."[118] The proposal would essentially operate by allocating residual income generated by marketing intangibles to the market jurisdiction.[119]

The marketing intangibles proposal would allow countries to tax a multinational enterprise for spending money to develop a local presence in a market jurisdiction through efforts like building a brand or trade name and developing customer lists, customer relationships, and customer lists.[120] The broad scope of the marketing intangibles approach applies the new rules to more business models than those deemed highly digitalized and is probably viewed more favorably by major technology firms. As a result, it is no surprise that the United States has publicly endorsed this proposal from the outset.[121]

C. Significant Economic Presence Proposal

The final proposal would completely overhaul the Permanent Establishment and nexus rules as currently constructed and apportion taxable revenue to countries in which a company is deemed to have a significant economic presence.[122] This approach operates under the view that "technological advances have rendered the existing nexus and profit

114. Base Erosion and Profit Shifting Project, *supra* note 109, at 11.
115. *Id.*
116. *Id.*
117. OECD, OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 27 (2017).
118. *Id.*
119. Base Erosion and Profit Shifting Project, *supra* note 109, at 14.
120. Faulhaber, *supra* note 10, at 171–72.
121. *Id.* at 172.
122. Vickers, *supra* note 19.

allocation rules ineffective."[123] On the other hand, the previous two proposals retain the current structure for the allocation of routine profits and only alter the treatment of a company's residual income.[124] Similar to the Israeli Significant Economic Presence approach,[125] this proposal looks at the following factors in determining whether a purposeful and sustained interaction with the jurisdiction exists:

> (1) the existence of a user base and the associated data input; (2) the volume of digital content derived from the jurisdiction; (3) billing and collection in local currency or with a local form of payment; (4) the maintenance of a website in a local language; (5) responsibility for the final delivery of goods to customers or the provision by the enterprise of other support services such as after-sales service or repairs and maintenance; or (6) sustained marketing and sales promotion activities, either online or otherwise, to attract customers.[126]

This proposal seems to recognize that it is more difficult to multilaterally enact a subjective, factor-based approach.[127] Rather than leaving determinations of tax base size and tax cuts to individual countries with companies exhibiting significant economic presence, it suggests apportioning profits between the impacted jurisdictions through a three-step fractional apportionment process.[128] First, the entire tax base will be calculated; then, allocation keys will be determined to allocate that tax base; and finally, the allocation keys will be weighted.[129]

In summary, the tax base would be calculated independent of nexus, and then it would be divided to jurisdictions to be taxed at their individual tax rates based on their individual corporate tax codes. While many international tax scholars favor this type of formulaic approach to apportionment,[130] the complexity of this approach indicates that it may not be practical on a global scale.[131]

D. Unified Approach

After receiving guidance from public comments addressing the three proposals,[132] in its May 2019 Programme of Work, the Inclusive Framework

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123. Base Erosion and Profit Shifting Project, *supra* note 109, at 16.

124. *See id.* at 9–14.

125. OECD/ G20 Base Erosion and Profit Sharing Project, *supra* note 18, at 137.

126. Base Erosion and Profit Shifting Project, *supra* note 109, at 16.

127. Compare the Israeli implementation with the failure of the European Commission. *Compare*, OECD/ G20 Base Erosion and Profit Sharing Project, *supra* note 18, at 137; *with* Pancevski & Schechner, *supra* note 62.

128. Base Erosion and Profit Shifting Project, *supra* note 109, at 16.

129. *Id.*

130. *See e.g.*, Faulhaber, *supra* note 10, at 173.

131. Vickers, *supra* note 19.

132. *See Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*, *supra* note 29, at 7.

identified three areas of conflict requiring consideration before it developed a unified approach.[133] The first area called for identifying a method to determine the taxable profits subject to the new taxing right and how to allocate it among the impacted jurisdictions.[134] The second area addresses how to tailor a new nexus rule to the digitalized economy in the absence of physical presence.[135] The final area of consideration is how to efficiently implement the new rules and ensure compliance.[136]

Taking the commonalties of the three proposals, the aforementioned areas requiring consideration, and concerns articulated by the public into account, on October 1, 2019, the Secretariat presented a Unified Approach under Pillar One to the international community.[137] The guiding principles of the Unified Approach included: (1) ensuring simplicity, (2) changing only the rules that are not functioning well, (3) eliminating double taxation, and (4) stabilizing the tax system through "effective and binding dispute prevention and resolution mechanisms."[138] At this stage, the approach focuses on higher-level concepts opposed to details, in order to provide the groundwork for reaching an international consensus at a later date.[139]

The biggest change to the current international tax system proposed by the Unified Approach is to add an overlay to the current system, referred to as the "New Taxing Right" or Amount A.[140] The digital economy rendered the practice of allocating taxes based solely on physical presence ineffective because companies can have a "sustained and significant engagement" in a jurisdiction without having a physical presence there.[141] Rather than completely overhauling the current system, the Unified Approach builds off of the user-contribution proposal and treats routine profits differently than residual profits.[142] But the Unified Approach does not only apply to highly digitalized companies, but it applies to companies that perform Automated Digital Services and Consumer Facing Businesses.[143]

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133. *Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy*, *supra* note 37, at 11.

134. *Id.*

135. *Id.*

136. *Id.*

137. *OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors*, ORG. FOR ECON. CO-OPERATION & DEV. [OECD], 6 (Oct. 2019), https://www.oecd.org/tax/oecd-secretary-general-tax-report-g20-finance-ministers-october-2019.pdf.

138. *Id.*

139. *See* John Harrington & David Mayhall, *OECD Updates Game Plan for Taxation of the Digital Economy*, DENTONS (Oct. 10, 2019), https://www.dentons.com/en/insights/alerts/2019/october/10/oecd-updates-game-plan-for-taxation-of-the-digital-economy.

140. *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*, *supra* note 29, at 9.

141. *Id.*

142. Faulhaber, *supra* note 10, at 174.

143. *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*, *supra* note 29, at 10-11.

Amount A aims to tax "highly digitalized businesses that interact remotely with users . . . as well as other businesses that market their products to consumers and may use digital technology to develop a consumer base."[144] Consumer-facing businesses are defined as "businesses that generate revenue from the sale of goods and services of a type commonly sold to consumers."[145] This definition explicitly excludes extractive industries, providers of financial services, and sellers of commodities and raw materials from its scope.[146] Going forward, the Unified Approach will consider the following carve-outs for businesses that would otherwise fall under the scope of Amount A: (1) multinational enterprises with gross revenue below a certain amount, (2) multinational enterprises with in-scope revenue below a certain amount, and (3) situations where the total tax derived from Amount A will not reach a certain *de minimis* level.[147]

Amount A is only levied on businesses that (1) are within the scope—consumer-facing businesses or providers of automated digital service categories—and (2) meet the new nexus requirements.[148] The new nexus requirement builds off of the significant economic presence proposal's allocation to market jurisdictions based on sales.[149] Nexus will be established "based on indicators of a significant and sustained engagement with market jurisdictions."[150] The Unified Approach says that the principle factor in this determination will be in-scope revenue generated in a market jurisdiction over time.[151] This is a very broad definition and will be unworkable if it is not defined by a concrete number that must be reached.

The impact of this proposal, as currently constructed, clearly benefits extractive industries, sellers of generic goods, providers of financial services, and ships and aircrafts used in international traffic.[152] The proposal adversely impacts businesses performing automated digital services and consumer-facing businesses.[153]

The other taxable sources of income that the Unified Approach recognizes are referred to as Amount B and Amount C. Amount B is "a fixed renumeration for baseline marketing and distribution functions that

144. Harrington & Mayhall, *supra* note 139.

145. *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*, *supra* note 29, at 11.

146. *Id.*

147. *Id.* at 12.

148. *Id.* at 9–10.

149. *See* Faulhaber, *supra* note 10, at 174.

150. *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*, *supra* note 29, at 12.

151. *Id.* at 12–13.

152. John Harrington & Kimberly Nolte, *A Global Plan for Taxing the Digital Economy - 11 Work Streams Into a Sea of Change*, JDSUPRA (Feb. 4, 2020), https://www.jdsupra.com/legalnews/a-global-plan-for-taxing-the-digital-38720/.

153. *Id.*

take place in the market jurisdiction."[154] This is based on elements of the marketing intangibles proposal because it provides the market jurisdiction with the ability to derive tax revenue from intangible revenue generating activities.[155] Amount C provides that additional profits may be allocated to a market jurisdiction, "where in-country functions exceed the baseline activity compensated under Amount B."[156] The existence and determination of this amount would be subject to "binding and effective dispute prevention and resolution mechanisms" under the Unified approach.[157]

Again, the Uniform Approach "focuses on concepts rather than details."[158] In fact, the proposal articulated eleven work streams requiring more work and delegated these tasks to various specialized technical bodies within the Inclusive Framework to finalize a consensus by November 2020.[159] The technical details requiring more work are significant and include things such as: (1) defining the terms governing the scope of Amount A; (2) calculating Amount A; (3) determining significant and sustained engagement with a market jurisdiction through a set of factors; (4) detecting how the interactions between Amounts A, B, and C might affect double-taxation; and (5) identifying how to develop a dispute prevention and resolution procedure to govern the contestable aspects of the tax agreement.[160] The Uniform Approach represents great progress regarding the agreement of concepts, but in the coming months, a daunting amount of technical and policy issues must be addressed before the Uniform Approach can become a reality.[161]

V. Moving Forward

This section does not aim to criticize the progress made by the Inclusive Framework through its Unified Approach. In fact, the amount of preliminary support and agreement to underlying aspects of the proposed solution is remarkable. Nevertheless, even if the Inclusive Framework comes to terms on a finalized version of the Unified Approach to present to the G20 and OECD, significant players are unlikely to ratify an international tax treaty domestically due to internal political pressures—such as lobbying and partisan roadblocks. The recent U.S. insistence on any implementation being done on a safe harbor basis and the aforementioned Ireland and Luxemburg debacle in the European Union negotiations embody this reality. This section recognizes that the Inclusive Framework

154. *OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors*, *supra* note 137, at 15.
155. *See* Faulhaber, *supra* note 10, at 174.
156. *OECD Secretary-General Tax Report to G20 Finance Ministers and Central Bank Governors*, *supra* note 137, at 15–16.
157. *Id.* at 15.
158. Harrington & Mayhall, *supra* note 139.
159. *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*, *supra* note 29, at 25.
160. *Id.* at 22–24.
161. Harrington & Nolte, *supra* note 152.

will be unable to reach a consensus—let alone ensure every necessary country ratifies its terms to ensure its effectiveness. What the Inclusive Framework should do is, instead, change course and allow a more suitable decision-making entity to build upon its progress before it all unravels and financial turmoil ensues.

The Inclusive Framework's January 2020 Statement acknowledges the establishment of "effective and binding dispute prevention and resolution mechanisms" as one of the necessary aspects to be agreed upon in the Unified Approach to improve tax certainty.[162] Rather than devising these mechanisms as part of the proposal, the Inclusive Framework should shift its focus to developing an impartial international regulatory body that can handle future international tax disputes and be tasked with finalizing the intricacies of the agreement that the Inclusive Framework will be unable to accomplish.

It may seem naïve in an era dominated by political isolationism to believe that the leaders of the world's major economies would sanction the establishment of an institution that diminishes their sovereign power over the collection of major sources of tax revenue. Yet, the culmination of factors with wide-ranging implications renders the acceptance of this over-optimistic proposal possible.

First, the representatives at the negotiations table understand the gravity of this situation. Failure to come to an agreement will lead to the prevalence of countries imposing unilateral measures—like digital service taxes—that have adverse implications on the global economy.[163] Second, because the Unified Approach has already garnered a significant level of agreement in specific provisions, the countries could consent to be bound by the previously agreed upon areas of the proposal and restrict the impartial body to finalizing the eleven "work streams" set forth in Annex A of the January Statement.[164] This would provide some level of assurance to countries that are hesitant to acquiesce their power over unilateral tax authority to an impartial international institution that the agreement will not be radically different from what they have already come to terms on. Finally, establishing a dispute settlement body for a technical sector of the international economy is not unprecedented. Shortly after World War II, the United States led negotiations to establish the General Agreement on Tariffs and Trade (GATT) to provide an international set of rules to manage trade conflicts, like tariffs.[165] The GATT effectively lowered barriers to

162. *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*, *supra* note 29, at 4.

163. *See* Grinberg, *supra* note 1.

164. *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*, *supra* note 29, at 22–24.

165. Chad P. Brown & Douglas A. Irwin, *Trump's Assault on the Global Trading System: And Why Decoupling from China Will Change Everything*, FOREIGN AFFAIRS, 131 (Sep. 2019), https://www.foreignaffairs.com/articles/asia/2019-08-12/trumps-assault-global-trading-system.

trade[166] and, most importantly and for purposes of this comment, led to the creation of the World Trade Organization (WTO) in 1995.[167] The WTO established the Dispute Settlement Body to facilitate negotiations and act as an impartial tribunal for disagreements regarding a country's trade policy, which keeps the countries from taking unilateral retaliatory measures that hinder international economic growth.[168] A similar dispute settlement organization would be optimal in the arena of international taxation.

Establishing a dispute settle body for international taxation serves critical short-term and long-term needs. In the short-term, this entity would serve as an arbitrator for settling disputes between countries arising out of unilateral measures, like imposing digital service taxes. Concurrently in the short-term, it will finalize and facilitate the adoption of the terms of a final agreement regarding the modern international tax structure. Because a dispute settlement mechanism will need to be in place to resolve disputes arising out of discrepancies in tax calculations—such as one similar to the "Amount A" calculation in the Secretariat's Unified Approach,[169] this dispute settlement body will be necessary for years to come, serving long-term needs as well.

Considering it has been working on devising a solution to the problem since 2013,[170] the Inclusive Framework is in the best position to structure an effective dispute settlement organization that will be agreeable to the G20 and OECD. To ensure that this component of the plan is accepted, this dispute settlement body should correspond to the negotiating power of the parties involved to ensure their approval but still have mechanisms in place to respect the interests of the smaller countries. The dispute settlement institution should be made up of tax experts that are appointed by the countries involved and ensure that they are insulated from the political pressures of their home countries. Although acquiescing the ability to dictate international tax authority is not ideal, a solution must be reached to avoid a financial crisis. An impartial body of experts that is constrained by only having the authority to amend the technical aspects of the Unified Approach is in the best position to produce a fair treaty that will be binding upon on the world.

VI. Conclusion

The international tax body has remarkably evolved over the past one hundred years to address the changing circumstances of the global economy.

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166. *Id.*
167. *See History of the Multilateral Trading System*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/history_e/history_e.htm (last visited July 20, 2020).
168. *A Unique Contribution*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited July 20, 2020); *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra* note 80.
169. *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy*, *supra* note 29, at 23.
170. *See generally Action Plan on Base Erosion and Profit Shifting*, *supra* note 3.

The international tax structure is made up of bilateral treaties and domestic tax laws that were adopted on an as-needed basis. Historically, the system was based on an understanding that businesses would be subject to taxes in jurisdictions in which they were deemed to have a "Permanent Establishment." A Permanent Establishment existed if a company had a physical presence in a jurisdiction, and without a physical presence, the country was unable to tax that income.

This system worked sufficiently until the development of the digital economy. The digital economy allowed businesses to conduct operations and interact with consumers in places where they had no such physical presence and were unable to be taxed. Because of the longstanding principle that revenue should be taxed in the jurisdiction where value is created, many countries believe that they should be allocated tax revenue when companies were providing digital services to their jurisdiction.

In response to their inability to tax revenue that was generated within their borders, albeit through intangible operations, countries began looking for ways to tax these operations. The first widespread multi-lateral approach was attempted by the European Union, in which they proposed the implementation of a Digital Service Tax in the short-term. These efforts were unsuccessful because of an inability to agree upon the definition of what constitutes a "significant digital presence."

As a result, countries began enacting unilateral measures to capture some of the missing tax revenue. The most widely publicized unilateral measure was the French Digital Service Tax that was seemingly aimed at American technology companies. While this measure did not end up being implemented, the risk of a digital service tax being enacted by the French, or other European states, remains strong.

Unilateral tax measures adversely impact international economic growth directly and indirectly, by raising the cost of doing international business and by setting in motion a reinforcing cycle of governments enacting retaliatory measures to protect their domestic industry. In an effort to curb the implementation of unilateral measures, the OECD and G20 created an international task force known as the Inclusive Framework on Base Erosion and Profit Shifting to work towards reaching a multilateral consensus on the best path forward to revise the international tax system to account for the digitalization of the economy.

The Inclusive Framework has worked through various proposals to develop modern profit allocation and taxing rules. Currently, the Unified Approach is undergoing revisions to attempt to finalize a proposal for the G20 and OECD Finance Ministers by the end of 2020. The difficulty with reaching a multilateral agreement is that (1) the subject matter is extremely technical and (2) each of the countries involved are driven by individual interests to do what is best for their home country and are subjected domestic political pressures to get the best deal. As a result, any final proposal articulated by the Inclusive Framework will be unable to generate a consensus and a trade war carried out through unilateral tax measures will likely ensue. To avoid this, the Inclusive Framework should model a dispute settlement mechanism after the WTO's Dispute Settlement Body and task this institution with finalizing the international tax treaty that by which every nation in the cooperative body will be bound.