

# International

## What Is the Road Ahead for Unilateral Digital Tax Measures?

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In the past couple of years, countries across the globe have implemented several unilateral measures for digital economy taxation to tackle the tax challenges arising from taxation of the digital economy. On the global front, the Organisation for Economic Co-operation and Development (OECD) hosted negotiations with countries that are part of the Inclusive Framework on Base Erosion and Profit Shifting for more than half a decade and came up with a Two-Pillar Solution. The United Nations proposed a new article 12B, which aims to allow market jurisdictions to withhold tax on payments made for digital services. However, many open questions still need to be resolved, probably the most relevant of all – *is there a certainty that multinationals covered in Pillar One or Pillar Two would not be doubly taxed on the same digital income?* Considering this background, the paper starts with the discussion on the current state of affairs, then it moves on to the debate surrounding the taxation of the digital economy. It also discusses the various unilateral digital tax measures currently in existence across the globe and the macro and micro impact of these measures on the economy and businesses. It concludes with a discussion on what lies ahead for the countries adopting the OECD-proposed Two-Pillar Solution and the fate of the unilateral digital tax measures.

### 1. A Discussion on the Current State of Affairs

#### 1.1. The rise of digitization and digital business models

Businesses today are turning digital for a myriad of reasons – the need to innovate new product/service offerings, cost-reduction, staying ahead of competition etc. Needless to mention that the fourth industrial revolution has taken the digital and technological revolution a step further, and an increasing number of businesses are exploring new means of service offerings via digital means. The sheer business profitability, consumer reach and market growth that multinational enterprises (MNEs) like FAANG<sup>[1]</sup> have experienced from the successful implementation of digital transformation and novel platform-based business models have also led to the realization that companies who do not digitally transform will be left behind.

The COVID-19 crisis further accentuated reliance on digital operations. It is pertinent to mention that though companies lost out to COVID-19 induced low consumer demand, many companies were also able to leverage digitalization and digital transformation to emerge as a prominent business serving the needs of the people in the pandemic.

#### 1.2. Why countries adopted unilateral measures to address the challenges of taxation of the digital economy

Over recent years, concerns have been raised that the existing international tax system does not appropriately capture the effects of the digitalization of the economy. Resultantly, it is observed that digital business models have been subject to targeted tax policies.<sup>[2]</sup> For instance, taking the often-cited example of Google, tax authorities have alleged that the corporation pays negligible taxes compared to the revenues it earns; some countries (like Australia and the United Kingdom) have introduced anti-avoidance tax provisions to tackle the practice of profits being diverted to low tax rate jurisdictions. Another

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1. Facebook, Amazon, Apple, Netflix and Google. The name of Facebook has been changed to Meta.

2. D. Bunn et al., *Digital Taxation Around the World* (27 May 2020), available at [https://taxfoundation.org/digital-tax/#\\_ftn3](https://taxfoundation.org/digital-tax/#_ftn3) (accessed 30 Nov. 2021).

instance could be the ongoing “antitrust” investigations that the United States (US) government is conducting against major technology players like Amazon, Facebook, Apple, etc., to analyse if these “big players” hold excessive sway in the market and are indulging in anti-competitive behaviour. Also, in February 2021, the News Media and Digital Platforms Bargaining Act was introduced in Australia that obliges big tech giants to negotiate and agree to commercial terms with local publishers and broadcasters for the use of their content,<sup>[3]</sup> as big tech giants were seen to be profiting from news media content produced locally without paying for its usability. This shows that the business practices of such corporations are minutely scrutinized and are also used as a basis to draft specific tax legislation.

Under current international tax rules, MNEs are generally taxed where production occurs. However, countries argue that MNEs operating in the digital economy derive income from users in that country but, without a physical presence, are not subject to corporate tax on the income derived from that foreign country.<sup>[4]</sup> Further, some countries want an increased share of tax on the revenues/profits that MNEs generate from users based in their respective countries. As digital businesses are performing better than others in these testing COVID-19 times, a large target has been placed on their back and given many governments reasons to impose an additional tax on them.<sup>[5]</sup>

### 1.3. How countries have reacted

In the digital economy, the main concern and potential source of disagreement between countries is the question of where value is created. While countries agree that MNE profits should be taxed in the jurisdictions in which it creates value, some countries argue that value for companies in the digital economy is derived from factors such as user participation or user location. Another question that arises while debating digital taxes is the manner in which it can appropriately capture value and tax businesses characterized by a heavy reliance on intangible assets, no or insignificant physical presence in the tax jurisdictions where commercial activities are carried out, and a considerable user role in value creation. Existing rules are struggling to cope with the emerging realities of these new economic models.<sup>[6]</sup> Accordingly, in the absence of a (then) mutually agreeable solution, countries were asserting their sovereign rights and implementing unilateral measures to prevent tax leakages and/or widen the tax net to include MNEs that were hitherto untaxed on digitally derived or digitally enabled incomes emanating from a tax base that can be effectively attributed to their respective consumer base and/or market jurisdictions.

Unwilling to lose their tax base any further, several countries introduced varied unilateral measures as an attempt to capture and tax the profits attributable to digital businesses arising from the respective customer base and/or market jurisdiction. Unclear laws coupled with a lack of (or no) clear guidelines have drawn widespread criticism (discussed in detail in the next section). However, several countries have not implemented any unilateral digital tax levies for broadly two reasons: they are waiting for a global consensus, or they are awaiting respective legislative approval for their proposed measures. This shows that governments are united in their intent to tax digital operations and digitalized MNEs; what requires fine-tuning is the legislative process through which the task has to be carried out. In the interim, governments argue that they are losing taxes that are (arguably) rightly due to their jurisdictions.<sup>[7]</sup>

### 1.4. The path forged by Global Economic Organizations

On the global front, OECD hosted negotiations with more than 139 countries that are part of the Inclusive Framework (IF) on its Base Erosion and Profit Shifting (BEPS) Project for more than half a decade. The OECD, through the efforts of the G20/OECD IF on BEPS, aimed to develop a uniform, multilateral and consensus-based solution for taxing the digital economy.<sup>[8]</sup> However, the OECD agreed-upon solution, highly dependent on global consensus, was turning out to be a long-drawn and

3. D. Geary, *Digital taxes are key to the Caribbean digital recovery* (20 Sept. 2021), available at [https://www.jamaicaobserver.com/opinion/digital-taxes-are-key-to-the-caribbean-digital-recovery\\_231626](https://www.jamaicaobserver.com/opinion/digital-taxes-are-key-to-the-caribbean-digital-recovery_231626) (accessed 30 Nov. 2021).

4. GSR15 Discussion Paper – *The Impact of Taxation on the Digital Economy* states:  
In order to reduce tax liabilities, global players tend to segregate taxable income from the activities that generate it. Three approaches to reduce taxation have been identified:  
(1) Avoid a taxable presence in certain markets by shifting gross profits from the market where the good is being offered to subsidiaries located in tax havens or low tax environments.  
(2) Keep withholding tax low or nil at the source, by shifting profits in the form of royalties or interest to a lower tax jurisdiction.  
(3) Avoid taxation of low-tax profits at the level of the parent by searching for preferential domestic tax regimes.

5. M. Bhutani & V. Gupta, *De-Escalating the Digital Tax Debate*, Bloomberg Quint (21 June 2020), available at <https://www.bloombergquint.com/law-and-policy/de-escalating-the-digital-tax-debate> (accessed 30 Nov. 2021).

6. M. Szczepanski, *Digital Taxation: State of Play and Way Forward*, European Parliamentary Research Service, PE 649.340, (Mar. 2020), available at [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) (accessed 30 Nov. 2021).

7. As per a report by ActionAid International, “G20 countries are facing a potential gap of US\$32bn in annual tax revenue from just five of the world’s largest tech companies ... Amazon, Apple, Facebook, Microsoft and Alphabet Inc”, available at [https://actionaid.org/news/2021/worlds-largest-economies-losing-32-billion-annual-tax-revenue-silicon-valleys-top-five#\\_ftn1](https://actionaid.org/news/2021/worlds-largest-economies-losing-32-billion-annual-tax-revenue-silicon-valleys-top-five#_ftn1) (accessed 30 Nov. 2021).

8. J. Osborn et al., *Unilateral Taxation of the Digital Economy*, Tax Executive (12 May 2020), available at <https://taxexecutive.org/unilateral-taxation-of-the-digital-economy> (accessed 30 Nov. 2021).

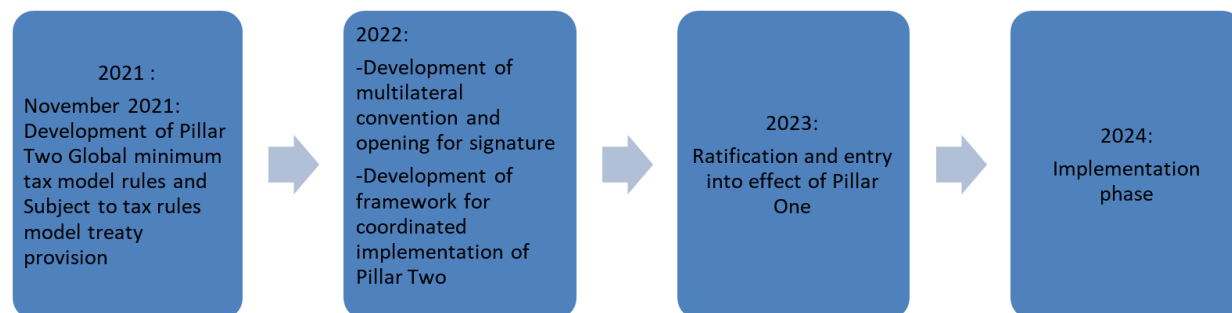
time-consuming process. Flowing from the above, countries are going ahead with passing their own laws taking recourse to the fact that the OECD is yet to arrive at a global solution.<sup>[9]</sup>

Further, after numerous deliberations (and following the release of several documents/public consultation documents), a set of “Proposals” commonly known as Pillar One and Pillar Two were proposed in 2019 to solve the tax challenges arising from the digitalization of the economy and to address the concerns of the market jurisdictions. Pillar One sets a new nexus and profit allocation by providing new taxing rights to market jurisdictions,<sup>[10]</sup> while Pillar Two addresses remaining BEPS concerns of shifting profits to low-tax jurisdictions to secure a minimum level of taxation (in a way also trying to minimize the tax competition).<sup>[11]</sup>

As per the final proposal dated 8 October 2021, the two-pillar agreement would ensure that market countries have (new) taxing rights (under Pillar One) on over at least 25% of profit, exceeding a 10% margin for the 100 largest and most profitable MNEs, and it would guarantee a global minimum effective tax rate of at least 15% (under Pillar Two). The Pillar Two proposals are not about digital taxes, but in simple words, about ensuring a minimum tax liability to MNEs (thereby curtailing corporate tax-rate competition to an extent). The two proposals were from their inception viewed and implemented as a package deal for countries to adopt these pillar solutions. This reinforces the earlier agreement that was reached on 1 July 2021 and indicates that yet long road still lies ahead on various issues of technical design and implementation in the coming months.

One hundred and thirty-seven countries (out of 141 IF members except Kenya, Nigeria, Pakistan and Sri Lanka) have committed to this reform proposal.<sup>[12]</sup> The expected timelines for the implementation of the Pillar One and Pillar Two proposals are diagrammatically represented in the [Figure](#).

**Figure – Timelines of implementation Pillar One and Pillar Two proposals**



Additionally, the United Nations has also actively worked on a proposal that accommodates digital taxes concerns for developing countries. The United Nations has proposed the insertion of article 12B – Income from Automated Digital Services of the UN Model Double Taxation Convention (UN MC) in bilateral treaties, which would allow market jurisdictions to withhold tax (at a modest rate of 3%-4%) on payments made for automated digital services. The source country is given the taxing right on the basis that the income arises in that country and without the need to have a permanent establishment to establish such a taxing right. The fate of the UN proposal hangs in the balance as most of the countries (as 136<sup>[13]</sup> countries – representing more than 94% of global GDP)<sup>[14]</sup> have provided consensus for the OECD Two-Pillar Solution and will be moving with it. Needless to say, that the United Nations has comparatively an open mandate and it is possible that if developing countries later find that they are not gaining sufficient revenue from the Two-Pillar Solution, the United Nations will come up with some policy framework to cover the deficit borne by the developing countries.

9. B. Edet Jr, *Digital Tax: Significant Economic Presence in Nigeria and the 'Ahmed Order'* (2020), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3630299](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3630299) (accessed 30 Nov. 2021).
10. OECD, *Secretariat Proposal for a Unified Approach under Pillar One*, Public consultation document (2020), available at <https://www.oecd.org/tax/beps/public-consultation-document-secretariat-proposal-unified-approach-pillar-one.pdf> (accessed 30 Nov. 2021).
11. J. Becker & J. Englisch, *International effective minimum taxation – the GLOBE proposal*, available at [https://www.researchgate.net/publication/333049578\\_International\\_Effective\\_Minimum\\_Taxation\\_-\\_The\\_GLOBE\\_Proposal](https://www.researchgate.net/publication/333049578_International_Effective_Minimum_Taxation_-_The_GLOBE_Proposal) (accessed 30 Nov. 2021).
12. OECD, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (8 Oct. 2021), available at <https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-members-joining-statement-on-two-pillar-solution-to-address-tax-challenges-arising-from-digitalisation-october-2021.pdf> (accessed 30 Nov. 2021).
13. The revised number of countries which agreed to proceed with the Two-Pillar Solution now stands at 137.
14. M. Arora, *How global corporate tax deal was struck, OECD official Grace Perez-Navarro recounts*, India Times (14 Oct. 2021), available at <https://cfo.economictimes-indiatimes.com/cdn.ampproject.org/c/s/cfo.economictimes.indiatimes.com/amp/news/how-global-corporate-tax-deal-was-struck-oecd-official-grace-perez-navarro-recounts/87010778> (accessed 30 Nov. 2021).

## 1.5. Initial reactions to the unilateral measures

These unilateral measures proposed by countries have faced their share of roadblocks and have brought certain repercussions on bilateral trade relations. Most notable are the trade investigations by the United States of the digital services tax (DST) regimes adopted by nine countries, including India, Italy and Turkey, terming the measure as discriminating against US companies and proposing retaliatory measures (in the form of increased tariffs). However, for now the retaliatory measures (i.e. imposition of tariffs) in lieu of these unilateral measures of countries have been kept on hold by the Biden administration. Also recently, India and the United States have agreed that India will continue to levy equalisation levy (EL) until the implementation of the Pillar One Solution or 31 March 2024, whichever is earlier.<sup>[15]</sup>

Pertinent to mention that the latest 8 October 2021 Statement by the OECD, clearly states that the Multilateral Convention would require all countries to remove DSTs and other relevant similar measures with respect to all companies, and to commit to not introduce similar unilateral measures in the future.

It is yet to be seen though how such measures will impact country policies on digital taxes – how governments will go about revoking unilateral measures and whether all unilateral measures will be revoked once the OECD Two-Pillar Solution takes effect.

## 2. A Deep Dive into the Unilateral Measures Prevailing across Continents

### 2.1. Variants of diverse unilateral measures

As mentioned earlier, countries have levied different variants of unilateral tax measures, some of the prominent ones being value added taxes (VAT)/goods and services tax (GST), DST, withholding taxes (WHT) and digital permanent establishment (PE).

#### VAT

If we were to talk about VAT, this is not a new form of tax. Historically, countries have been adopting VAT to tax the production of goods and rendering of services. However, several countries have also adopted VAT as a solution to tax the digital economy over the past few years. The modalities of these rules may vary. In the context of digital transactions, specific VAT rules are usually made to cover B2B and B2C transactions because they differ substantially in nature, volume, characteristics, and the appropriate degree of enforcement. When non-residents supply goods or services to consumers or unregistered businesses, many VAT systems require the non-resident to register for and dispose of the VAT liability in that jurisdiction. If imposed correctly, a destination-based tax mechanism can be a good approach that avoids affecting the existing system.

Unlike other digital taxes, VAT is not free from criticism (some being enforceability, characterization issues, determining in-scope supplies of services and intangibles, early communication and guidance, prioritizing simplicity and focus on net revenues, incentivizing compliance by digital platforms and rewarding a strong track record of compliance, etc.). Under VAT, the tax is not borne by the goods or services provider but shifted down to the final consumer, who ultimately bears the burden, and the tax is assessed as a different and visible entry in each invoice. In that situation, business operators merely act as collection agents on behalf of the state.

Consistently applying VAT on all digital services also levels the playing field between domestic and foreign suppliers and goods and services, thus enhancing efficiency. Efforts should be directed towards building a simplified compliance system (e.g. creating the operational and IT systems and software for simplified VAT registration and collection region, like the Australian system) or some solution at a regional level like the EU VAT “Mini One-Stop-Shop” system. The recent VAT Digital Toolkit for Latin America<sup>[16]</sup> and the Caribbean released in June 2021 provides guidance to assist Latin American and Caribbean tax authorities in designing and implementing robust policies for the application of VAT to digital trade.

#### Digital PE

Significant economic presence (SEP)/digital PE represents a taxable presence of a non-resident based on revenue, digital and/or user-based factors (like local user interaction, number of active users consuming the digital services, etc.) that demonstrate sustained interaction with a jurisdiction. An appropriate definition of SEP would combine revenue factors with digital or user-based factors to establish a meaningful and sustained connection that triggers taxation. Though treaty benefits may be possible

15. India, US reach settlement on 2% equalisation levy, Economic Times (25 Nov. 2021), available at [https://economictimes.indiatimes.com/news/economy/finance/india-us-reach-settlement-on-2-equalisation-levy/articleshow/87900297.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/news/economy/finance/india-us-reach-settlement-on-2-equalisation-levy/articleshow/87900297.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst) (accessed 30 Nov. 2021).

16. OECD, VAT Digital Toolkit for Latin America and the Caribbean (2021), available at <https://www.oecd.org/tax/consumption/vat-digital-toolkit-for-latin-america-and-the-caribbean.pdf> (accessed 30 Nov. 2021).

under SEP rules, these rules also have their complexities in creating a provisional profit and loss account and allocation of income and expenses. There is an added layer of complexity as each country follows their own system of determining SEP applicability and discharging the relevant tax obligations. For instance, in Israel, the foreign supplier may be deemed by the Israeli Tax Authority to have a “significant digital presence” in Israel based on the number of contracts with Israeli customers, high use of services by Israeli customers, website adaptations to Israeli customers (language, currency), high volume of web traffic from Israel, etc.<sup>[17]</sup> In Indonesia, foreign sellers and operators of e-commerce platforms are required to appoint a local representative in the country to pay and report taxes, including corporate income tax on the basis of a significant economic presence and an electronic transaction tax (not in effect) on sales where the significant economic presence concept cannot be applied because of a tax treaty.<sup>[18]</sup> The Indian government introduced tax provisions related to the SEP in 2018 to create a “business connection” for non-residents in the country, though the applicability is deferred to Financial Year 2022/23.<sup>[19]</sup>

## WHT

Under WHT, the scope of transactions covered should be clearly defined to ensure clarity to taxpayers to discharge their obligations. For instance, in B2C transactions, it may not be ideal for making individuals/retail consumers responsible for withholding taxes since they cannot be expected to have experience in such matters, and it would be difficult to enforce compliance from such consumers. Also, WHT would not be able to align entirely with the value creation principle. Many countries are using financial intermediaries (especially some of the LATAM countries) to ensure compliance with WHT.

## DST

The purpose of a DST is to allow a market jurisdiction to compensate for the revenue foregone or not captured via the traditional income tax system. Accordingly, market countries are introducing DSTs on a firm’s gross revenue generated from the market country. From an MNE’s perspective, it now faces two different taxes in two different countries – it will have to pay corporate taxes in its home country in addition to the DST on the same income in the market country.<sup>[20]</sup> However, not all DSTs are designed in the same manner. The levy varies in terms of in-scope activities, the modes of computation, etc. For instance, Austria only tax revenues from online advertising. Conversely, the French and Italian tax bases are much broader and include revenues from providing digital intermediation services, digital advertising services, or the transmission of users’ data.

Not all countries across the globe are at the same level of development, and accordingly, neither are the categories of levies implemented uniformly. Table 1 in section 2.2. is testimony to the fact the countries will adopt measures that best suit their fiscal policies and requirements (like the maturity level of local tax laws, enforceability and administration, ease of implementation, availability or need of resources, etc.) and since the fiscal requirements differ, there cannot be a one-size-fits-all.

Even though the ultimate purpose of these levies remains the same, i.e. to make up for the revenue forgone or not captured via the traditional income tax system in the market jurisdiction, ensuring that digital companies are paying their fair share of taxes commensurate to the profits that they derive, etc. However, needless to say, the effect of these levies (like impact on global and regional competition and competitiveness; impact on FDI, contribution to tax revenues, etc.) varies.

## 2.2. A continental perspective of the diverse unilateral measures

Table 1 broadly classifies the types of unilateral levies prevailing across continents, trying to capture some form or the other of digital transactions.

**Table 1 – Unilateral levies<sup>[1]</sup>**

Continent	VAT/GST	DST	WHT	SEP/Digital PE	EL
Asia	Yes	No	Yes	Yes	Yes
Africa	Yes	Yes	Yes	Yes	No
LATAM	Yes	No <sup>[2]</sup>	Yes	No	No
Europe	Yes	Yes	No	No	No

17. Israeli Tax Authority, *Online Activities of Foreign Corporations in Israel*, Circular 4/2016 (11 Apr. 2016); Orbitax, *Israel Adopts Virtual PE Concept Based on a Significant Digital Presence* (19 Apr. 2016), available at <https://www.orbitax.com/news/archive.php/Israel-Adopts-Virtual-PE-Conce-19025> (accessed 30 Nov. 2021).

18. KPMG, *Taxation of the digitalized economy: Developments summary* p. 40 (22 July 2021), available at <https://tax.kpmg.us/content/dam/tax/en/pdfs/2021/digitalized-economy-taxation-developments-summary.pdf> (accessed 30 Nov. 2021).

19. EY, *India issues thresholds for triggering “significant economic presence” in India* (10 May 2021), available at [https://www.ey.com/en\\_gl/tax-alerts/india-issues-thresholds-for-triggering-significant-economic-presence-in-india](https://www.ey.com/en_gl/tax-alerts/india-issues-thresholds-for-triggering-significant-economic-presence-in-india) (accessed 30 Nov. 2021).

20. Y.R. Kim, *Digital Services Tax: A Cross-Border Variation of the Consumption Tax Debate*, 72(1) Ala. L. Rev. 131 (2020).

Continent	VAT/GST	DST	WHT	SEP/Digital PE	EL
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1 There are certain unique country-specific digital levies which have not been included in this table like a non-resident tax in Paraguay, exhibition levy/annual levy in Portugal, advertisement tax in Hungary, electronic transaction tax in Indonesia.

2 Only Argentina has come up with revenue-based taxation mechanism, which is also called turnover tax.

Against the context of unilateral levies mentioned in Table 1, we now analyse them briefly from a continental perspective. For the sake of brevity, we have not delved into the scope and threshold of these levies' country-wise in detail.

## Africa

Several African countries have implemented VAT on the non-resident supply of digital services, and these measures have been largely undisputed. However, some of the continent's dominant economies, i.e. Kenya, Nigeria, Tunisia and Zimbabwe, have also implemented additional tax measures to secure their tax base. The Nigerian government has adopted the SEP principle in their legislation which is applicable on non-resident companies with a gross turnover of above NGN 25 million, providing prescribed services. However, Kenya and Tunisia adopted a DST, with the former imposing a lesser tax rate with a broader ambit. Kenya is banking on its DST, which went into effect January 2021, to aid the country's COVID-19 recovery and as one of the conditions of increasing its tax revenue in relation to the USD 2.4 billion financing package it has received from the International Monetary Fund. The 1.5% DST is expected to raise about USD 45.8 million in the first half of 2021.<sup>[21]</sup> Finally, as per the legislation enacted by Zimbabwe, any revenue above USD 500,000 received by non-resident platform/broadcasting service providers would be considered as income accruing within the jurisdiction, hence, liable to abide by the general income tax law.

In September 2020, ATAF released draft legislation, "Suggested Approach to Drafting Digital Services Tax Legislation", which provided guidelines for the implementation of DST and suggested a 1%-3% tax on gross annual digital services revenue on income accrued or attributable to the country. Though the motive of the ATAF draft legislation was to ensure uniformity in the unilateral measures of its countries, the continent witnessed diverse unilateral measures being implemented.

## Europe

In March 2018, the European Commission proposed to introduce a directive on a common digital services tax on certain digital services. Pursuant to that, many European countries have taken the DST route as a measure to tax the digital economy.

France first introduced DSTs in 2019. This was followed by multiple countries imposing DSTs like Austria, Italy, Spain.

Also, the European Commission released its draft proposal for an EU-wide digital levy to address the issue of fair and competitive taxation of the digital economy, which would include either a corporate income tax top-up on all companies with digital activities in the European Union or a tax on revenues from certain digital activities in the European Union or a tax on business-to-business digital transactions in the European Union.<sup>[22]</sup> Though the European Commission committed to releasing a new digital levy proposal by June 2021, the European Commission went on hold because on the ongoing OECD negotiations.

## LATAM

In LATAM, VAT is the largest source of tax revenue on average in Latin American and Caribbean (LAC) countries, at 27.7% of total tax revenues in 2019.<sup>[23]</sup> As the LAC region is one of the fastest-growing e-commerce regions in the world, it isn't surprising that even for taxing the digital economy, most of the countries of LATAM have relied on VAT measures as a solution, like Colombia, Panama, Paraguay and Peru. Although the OECD recommendations regarding B2C transactions are that the foreign supplier company must register as a VAT taxpayer, through a simplified process, in the buyer's jurisdiction and is responsible for collecting, declaring and paying the tax, countries with smaller markets may face difficulties in forcing foreign companies to register and penalizing them for non-compliance. Faced with this difficulty, some Latin American countries have chosen to collect VAT on digital services purchased abroad through withholding systems in the means of payment, an approach that also has problems and limitations.<sup>[24]</sup>

However, some countries have adopted other measures, like turnover tax in Argentina, WHT in Mexico, Costa Rica introduced general income tax on digital tourist rental service income, and Paraguay and Uruguay require foreign companies providing digital services to pay income tax and VAT over digital activities under a system of non-resident taxation. Despite the same,

21. N. Sarfo, *Digital Services Taxes may be difficult to remove*, Forbes (22 May 2021), available at <https://www.forbes.com/sites/taxnotes/2021/03/22/digital-services-taxes-may-be-difficult-to-remove/?sh=787530556e12> (accessed 30 Nov. 2021).

22. European Commission, *Fair Taxation of the Digital Economy*, available at [https://ec.europa.eu/taxation\\_customs/fair-taxation-digital-economy\\_en](https://ec.europa.eu/taxation_customs/fair-taxation-digital-economy_en) (accessed 30 Nov. 2021).

23. OECD, *VAT Digital Toolkit for Latin America and the Caribbean* (2021), *supra* n. 16.

24. J.P. Jiménez & A. Podestá, *Indirect taxation of the digital economy and its potential revenue in Latin America: Leveling the playing field in times of crisis*, WP-02-2021, CIAT (2021).

VAT still remains a predominant source of digital tax in the LATAM region and doesn't seem that this will change in the foreseeable future as well.

## Asia

About 15% of the countries represented in the OECD/G20 IF are countries from the Asia-Pacific region (OECD/G20 Inclusive Framework on BEPS, June 2019). Over the years, several Asian countries have enacted unilateral methods of taxing digital transactions to protect their tax base.<sup>[25]</sup> The design of various unilateral levies varies (some of which are uncoordinated and overlapping), and the main variant of measures found in the continent can be classified into VAT, GST, consumption tax, WHT, digital PE/SEP, EL and electronic transaction tax.

## Middle East

Some countries in this region have introduced a VAT regime for digital services over the past few years. It is yet to be seen how Middle Eastern countries where an income tax system compared to the rest of the world is still at a nascent stage would get impacted by minimum taxes and how such rules will evolve in the territorial/hybrid tax system. With the pillar proposals, tax authorities in Gulf countries need to decide if they are going to impose or increase the rate of corporate income tax or introduce an "income inclusion rule". If no action is taken, profits generated within the GCC countries could be taxed outside the region, and tax authorities of these countries would lose out on potential tax revenue.<sup>[26]</sup>

Apart from the above, it is pertinent to mention that even some states in the United States like Connecticut, Maryland, Texas and West Virginia had also introduced digital taxes during the first half of 2021.<sup>[27]</sup>

## 2.3. Impact of unilateral measures on micro and macro factors

Governments worldwide have recognized the need for a globally coordinated response; such a response will maximize compliance levels at minimal cost, support effective international cooperation in tax administration and enforcement and minimize risks of trade distortion. In this aspect, an attempt has been made by the authors in [Tables 2 and 3](#) to present the key impacts of various unilateral tax measures on certain parameters.

**Table 2 – Analysis of unilateral measures based on the micro factors**

Micro factors	DST	SEP/Digital PE	WHT	VAT
Supply chain/Value chain	It may have an immediate and lasting impact on how and where business operations/ value creation functions are carried out. It could also impact MNE's choice of jurisdiction to expand in a particular country or not	It may have an impact on the supply chain/value chain, but where double/foreign tax credits are available, the impact may be neutralized. Sometimes these also impact the choice of the MNE to expand in a particular country or not, where MNEs think that the administrative burden of complying with these are more than the return that they can expect from the market	It may have an impact on the supply chain/value chain, but where double/foreign tax credits are available, the impact may be neutralized. Sometimes these also impact the choice of the MNE to expand in a particular country or not, where MNEs think that the administrative burden of complying with these are more than the return that they can expect from the market	It may not have a substantial impact. In a B2B scenario, businesses should be able to claim input tax credits. However, in a B2C situation, the cost is passed on to the ultimate customers
Computation complexity	Complex and varied computations mechanism for various countries. Problems in collecting the data points and ensuring the accuracy of data points for the computation	Difficulties arise regarding the interpretation of the legal provisions and are compounded with the need to maintain/prepare additional documentation/computation. Computations are complex, and it can be challenging to get data points and ensure that data points are completely accurate	Relatively simple computations. However, where such taxes are levied in B2C situations, such taxes may create more challenges. Many countries are taking the help of financial institutions to be the withholding agents	Relatively simple computations

25. J. Paine, *Asia's digital economy needs a clear global tax framework: Jakarta Post columnist*, The Straits Times, The Asian Voice (30 Sept. 2020), available at <https://www.straitstimes.com/asia/asias-digital-economy-needs-a-clear-global-tax-framework-jakarta-post-columnist> (accessed 30 Nov. 2021).
26. R. Ohri, *Gulf Cooperation Council countries and businesses prepare for global minimum tax*, MNE Tax (16 Sept. 2021), available at <https://mnntax.com/gulf-cooperation-council-countries-and-businesses-prepare-for-global-minimum-tax-45422> (accessed 30 Nov. 2021).
27. D. Geary, *Digital taxes are key to the Caribbean digital recovery*, Jamaica Observer (20 Sept. 2021), available at [https://www.jamaicaobserver.com/opinion/digital-taxes-are-key-to-the-caribbean-digital-recovery\\_231626](https://www.jamaicaobserver.com/opinion/digital-taxes-are-key-to-the-caribbean-digital-recovery_231626) (accessed 30 Nov. 2021).

Micro factors	DST	SEP/Digital PE	WHT	VAT
Impact on prices	Increases the price of digital products and services for both businesses and consumers, either directly or indirectly <sup>[1]</sup>	May not affect prices considerably, more so considering that the option for non-resident MNEs to avail the benefits of DTAs or unilateral tax relief is available	May affect prices in cases where prices are to be grossed up <sup>[2]</sup> or where WHTs are non-creditable for the seller/service provider	High impact on prices for end consumers because the tax burden is passed through the supply chain and borne by ultimate consumers. However, the impact in case of B2B situations would be limited; where businesses can claim input credit for VAT paid
Investment in technology and other infrastructure	It may require investment in technology to streamline implementation (that is, how MNEs can get data for computational purposes)	It may require investment in technology to streamline implementation (that is, how MNEs can get data for computational purposes)	It requires low investment on the technology side because the process of complying with the levy may not be that complex	It requires moderate investment because a lot of tax technology solutions for VAT are already available in market

- 1 For example, Google and Amazon have started levying an additional amount in the name of DST/regular fees on their invoices. Other companies may indirectly factor this in the price determination of goods/services since many companies are treating this in operating expenses vis-a-vis below the line profit and loss items.
- 2 For example, India EL, the working mechanics of which are somewhat similar to WHT, i.e. the EL amount is deducted from the invoice amount of the non-residents.

**Table 3 – Analysis of unilateral measures based in macro factors**

Macro factors	DST	SEP/Digital PE	WHT	VAT
Foreign direct investment (FDI) impact	It may significantly affect the flow of FDI	Moderate impact when there is an option for non-residents to benefit from DTAs or unilateral tax relief	Moderate impact when there is an option for non-residents to benefit from DTAs or unilateral tax relief	Moderate impact because the tax burden is passed through the supply chain
Impact on business sentiment/ economic climate	Businesses are working around coping with these unilateral measures and undertaking the necessary compliances (in the hope of global and mutually beneficial resolution to the MNEs and revenue authorities in coming times) as there seems to be no other solution (at least currently) if businesses want to operate in a global sphere currently. However, even with these measures in place, organizations will become more innovative and adaptable to help them thrive in the current economic environment			
Administrative complexity	Tax administrations may need more resources to administer	Tax administrations may need more resources to administer	Requires comparatively fewer administrative resources	Tax administrations need more resources to administer; however, considering that VAT has existed for a long time, many technological solutions have emerged, and tax authorities have implemented many

## 3. What the OECD Two-Pillar Solution Aims to Achieve: The Fate of Developed and Developing Economies Adopting OECD-Proposed Solution

### 3.1. Potential implications

Some of the potential implications of implementing the OECD's Two-Pillar Solution include low or no tax jurisdictions facing increasing global pressure to modify their income-tax rates to appear globally competitive, for instance, in Middle Eastern countries where no corporate taxes are implemented.<sup>[28]</sup>

The other implication could be allocational issues of residual profit under Pillar One<sup>[29]</sup> to market jurisdictions. Another potential challenge to the proposed Two-Pillar Solution is that not all countries of the world are part of the IF, and few countries of the IF have not consented to the proposal. Needless to say, all major countries have accepted the Two-Pillar Solution, but it cannot be ruled out that MNEs may have business in countries that have not accepted the proposal either partially or fully. This may raise a new sort of competition – corporations may search for countries without the minimum tax rule as their residence. Further, every country may experience a different impact from these pillars on inbounds and outbounds (some will be winners and some losers). Hence, it would not be appropriate to say that the current OECD Two-Pillar Solution is the panacea to all-digital tax

28. C. Kallen, *Options for Reforming the Taxation of U.S. Multinationals*, Tax Foundation (12 Aug. 2021), see <https://taxfoundation.org/us-multinational-tax-reform-options-gilti/> (accessed 30 Nov. 2021).

29. The statement provides that extractives and regulated financial services will be excluded from Amount A.

woes of the revenue authorities, nor that this is a one-size-fits-all solution. Against this context, the authors will briefly discuss the impact of the OECD Two-Pillar Solution on developing and developed countries in section 3.1.1.

### 3.1.1. What's in it for developed and developing countries?

A study of EconPol states<sup>[30]</sup> that based on the current threshold of 10% for applicability of Pillar One (and given that financial and extractive companies are excluded), only 78 of the world's 500 largest companies will be covered in Pillar One. In future, when this threshold is revisited, the number of companies covered in the limb of Pillar One will be expanded. Prima facie reason for this seems to be that even some of the largest companies reports return on revenue less than 10%. For example, if we were to look at European companies with revenues above USD 20 billion almost twice as many companies have a return on equity above 10% compared to those that have a return on revenue above 10%. Singh<sup>[31]</sup> stated that the EUR 20 billion in-scope threshold and the 10% profitability margin imply that about 50% of the MNEs in the scope of Amount A are US MNEs. About 22% are headquartered in other G7 countries, and about 8% are headquartered in China.

Under Pillar Two, the idea of a global minimum tax appears attractive because it tries to ensure a slice of the pie for everyone; however, time will tell whether the country's existing slice of pie is larger or smaller than what is proposed. Moreover, it may well be that companies having major operations in jurisdictions with an effective tax rate (ETR) greater than 15% may not be impacted much. On the other hand, Pillar One would not raise new revenues but rather reallocate tax revenues to jurisdictions where sales occur, and consumers are located.

As per the OECD impact assessment study published in 2020, the Pillar One and Pillar Two Blueprint showed a modest increase in countries' revenue. However, the design element in the current version of the proposal has changed from that of the Blueprint version of 2020, and it is yet to be seen how the revised rates would impact the economies. Yet, countries have agreed to accept the global multilateral solution, thereby agreeing to bear potential trade-offs. That means countries should weigh the limited revenue they gain under Pillar One and Pillar Two against the cost of forgoing unilateral measures and decide implementation accordingly. For example: Ireland mentioned its implementation approach would involve a set of two separate rates, 15% for the companies falling in the scope of the minimum effective tax under Pillar Two and 12.5% corporate tax rates for other companies<sup>[32]</sup>.

Earlier, OECD had recognized in the Report to the G20 Developing Working Group on the impact of BEPS in low-income countries that the need of developing countries varies from that of developed countries in respect of both tax design and tax administration, and that the BEPS issues may manifest differently for developing countries given the specialities of their legal and administrative governing framework.<sup>[33]</sup> A similar analogy would hold good for even the OECD Two-Pillar Solution. The other bigger challenge for developing countries would be the complexities of the implementation of these proposals. Investment hubs and low-tax jurisdictions are likely to be most hit and lose revenue as less profit is shifted towards them. Countries that do not host the headquarters of large MNEs, but have a large user base of their customers, may likely gain some portion of the revenue from the reallocation under Pillar One.<sup>[34]</sup>

Also, if we were to talk about incentives, in countries like India which use legitimate tax incentives and tax breaks for specific purposes such as facilitating investments in export industries, backward areas, special economic zones, green companies, or promotion of research and development,<sup>[35]</sup> their effectiveness would be reduced under Pillar Two, and in many cases where the Effective tax rate (ETR) of the company falls below 15%, they may even become ineffective.

Developed countries could benefit from Pillar One as the largest markets would attract most of the new reallocated income.<sup>[36]</sup> In relation to Pillar Two, most countries already have a higher tax rate than the globally proposed minimum and often represent the headquarters jurisdiction that should receive a large part of the top-up relating to low-tax jurisdictions (if any).

30. M. Devereux & M. Simmler, *Who will Pay Amount A?*, Econpol Policy Brief Vol. 5 (July 2021), available at [https://www.econpol.eu/sites/default/files/2021-07/EconPol\\_Policy\\_Brief\\_36\\_Who\\_Will\\_Pay\\_Amount\\_A\\_0.pdf](https://www.econpol.eu/sites/default/files/2021-07/EconPol_Policy_Brief_36_Who_Will_Pay_Amount_A_0.pdf) (accessed 30 Nov. 2021).

31. K. Singh, *Amount A: The G-20 Is Calling the Tune, And U.S. Multinationals Will Pay the Piper*, Tax Notes International (Aug. 2021).

32. D. Connolly, *EU directive will implement OECD tax deal 'as is'*, MNE Tax (13 Oct. 2021), available at <https://mnetax.com/eu-directive-will-implement-oecd-tax-deal-as-is-45944> (accessed 30 Nov. 2021).

33. I. Burgers & I. Mosquera, *Corporate Taxation and BEPS: A Fair Slice for Developing Countries?*, Erasmus Law Review 1, 29-47 (2017).

34. *IMF Issues Paper on Digitalization and Taxation in Asia*, Orbitax (16 Sept. 2021), available at <https://www.orbitax.com/news/archive.php/IMF-Issues-Paper-on-Digitaliza-47632> (accessed 30 Nov. 2021).

35. *Global tax deal: long miles and a few years to go ...*, Qubit, available at <https://qu-bit.in/2021/07/03/global-tax-deal-long-miles-and-a-few-years-to-go/> (accessed 30 Nov. 2021).

36. However, the revised proposal still does not apply to companies like Amazon or Facebook as their profit margin falls below the mandated threshold of 10%.

### 3.1.2. Other considerations – COVID-19 impact, sustainable development goals and sovereignty issues

As pointed out earlier, the disruption of trade and commerce as a result of the COVID-19 restrictions put the fiscal budgets of countries under enormous strain. As a result, to boost the economy, countries doled out generous benefits and support payments. To tide over the COVID-19 situations in some cases, countries had to resort to external borrowings to keep the economy afloat. With economies slowly gaining traction, there is a need to bridge the fiscal gap. An international consensus solution that would increase revenue can be just the panacea to the economic woes of debt-burdened countries.

Additionally, in some cases, countries need additional revenue sources to ensure that their social obligations/sustainable development goals are duly met within the prescribed timelines. Hence, countries would need to undertake domestic resource mobilization to beat the COVID-19 impact and meet sustainable development goals. Separately, significant concerns have also been raised on how the proposed solution impacts the sovereignty of countries (one being, preventing governments from funding financial priorities). Initially, this was addressed as it was stated that even with the BEPS 2.0 proposal, countries would remain free “to set their tax rates or not to have a CIT system at all” and “to determine their own tax system, including whether they have a corporate income tax and where they set their tax rates”, i.e. that tax sovereignty<sup>[37]</sup> would be respected.<sup>[38]</sup> However, this now seems doubtful with the current version of the proposal. Separately, throughout the negotiations, developing countries have raised concerns about mandatory binding arbitration, which could impact their sovereignty and puts low-resource tax administrations at a disadvantage against other countries and companies.<sup>[39]</sup> Practically, countries may undoubtedly lose some freedom in terms of setting corporate income-tax rates and granting tax incentives. Further, resource and capacity constraints are other challenges that a developing country might face as implementing and granting the benefits of a “minimum tax” arrangement requires generating, communicating and verifying large quantities of tax-relevant information (e.g. on the effective tax rates in a given jurisdiction) and additional safeguards to prevent its circumvention.<sup>[40]</sup>

## 4. The Future of Unilateral Digital Tax Levies

The OECD Interim Report (2018) on the Tax Challenges Arising from Digitalization mentioned that any interim measures should be temporary. It was thus expected that the interim measures (i.e. unilateral digital tax measures) will cease to apply after the uniform global solution is agreed upon and implemented. Even though the current Two-Pillar Solution discusses revoking the existing unilateral measures once it is implemented, the proposal does not detail how relevant measures will be identified nor is there any clarity on the timing for their removal. The authors below discuss certain points that depict what the future entails for these unilateral digital tax measures and why more work needs to be done on the certainty front.

### 4.1. Threshold for applicability and variation in revenue collection

Regarding the threshold for application of unilateral digital tax, it varies widely, and not all countries have a high threshold of even EUR 750 million for its applicability. While, the current Pillar One solution only targets companies crossing the threshold of EUR 20 billion, Pillar Two aims to cover companies crossing the threshold of EUR 750 million. Thus, there is a significant gap between the threshold specified by various countries in applying unilateral levies (quite low in some situations or no threshold in some situations) and the threshold for the pillar proposals (arguably, too high). Hence, it is likely that many businesses which were covered in the scope of country-specific unilateral measures because of a low threshold may not be covered in the scope of the OECD's Two-Pillar Solution.

Governments worldwide have realized that they are able to generate good contributions from unilateral levies. For instance, from an Indian experience, data shows that,<sup>[41]</sup> Google India, with a turnover of INR 53,840 million (approx. EUR 636 million), paid approximately INR 6,000 million (approx. EUR 71.3 million) EL in the financial year 2020. Similarly, Facebook's gross advertising billings stood at INR 6,612.66 crore (approx. EUR 786 million), and it paid INR 369.50 crore (EUR 44 million) as EL during the same financial year. Separately, EL collected during the financial year 2021 was INR 2,057 crore (EUR 244.5 million)

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37. No doubt that any limitation to tax sovereignty would be sensitive for developing countries. (K. Andersson states: “small countries could not set the corporate tax rate to compensate companies for the disadvantages of doing business in a small country relative to a large country. Large countries have an advantage over smaller countries, even if they have a higher corporate tax rate due to the size of their consumer market”, see K. Andersson, *Should We Use Value Creation or Destination as a Basis for Taxing Digital Businesses?* – *Krister Andersson's Comments on the 2018 Klaus Vogel Lecture Given by Professor Michael Devereux*, 72 Bull. Intl. Taxn. 12, 688 (2018), Journal Articles & Opinion Pieces IBFD.)
38. A. Riccardi, *Implementing a (global?) minimum corporate income tax: an assessment of the so-called 'Pillar Two' from the perspective of developing countries*, 4 Nordic Journal on Law and Society 1, pp. 1-38 (2021).
39. *Developing Countries Seek More Benefit From Global Tax Deal* (2), Bloomberg Tax (10 June 2021), available at <https://news.bloomberglaw.com/daily-tax-report/global-tax-deal-leaves-developing-countries-seeking-more-benefit> (accessed 30 Nov. 2021).
40. Another aspect to consider is an implementation challenge, like the European Union, which forms an important bloc of economic power, must unanimously agree to certain legal changes for tax issues in their directives.
41. The Economic Times (4 Dec. 2020).

against INR 1,136 crore (EUR 135 million) for the immediate previous financial year, which means roughly 80% higher.<sup>[42]</sup> In India, the collection numbers for EL are estimated to be around INR 338.6 crores in 2016/17 (EUR 40.3 million), INR 589.6 crores (EUR 70 million) in 2017/18, INR 938.9 crores (EUR 112 million) in 2018/19, INR 1136.5 crores (EUR 135 million) in 2019/20 and INR 1492.7 crores (EUR 177.5 million) in 2020/21.<sup>[43]</sup> In the recent IMF report,<sup>[44]</sup> it is mentioned that the UK government estimated the government revenue from DST to be GBP 390 million (EUR 463 million) in 2019/20, GBP 280 million (EUR 333 million) in 2020/21, GBP 390 million (EUR 463 million) in 2021/22, GBP 425 million (EUR 505 million) in 2022/23, GBP 465 million (EUR 552 million) in 2023/24 and GBP 515 million (EUR 612 million) in 2024/25.<sup>[45][46]</sup> The Independent authority for the fiscal responsibility of Spain estimated the revenue from DST to be between EUR 546 million and EUR 968 million per year.<sup>[47]</sup> Similarly, the Italian government estimated this amount to be around EUR 708 million per year.<sup>[48]</sup> In many cases, it is doubtful whether the Two-Pillar Solution would yield the same amount of revenue collection as unilateral levies collection – more so from a developing economy standpoint. Hence, if they revoke these unilateral measures, they might lose the additional revenues gained by keeping the threshold low. If a country sees after a few years that the collection from the Two-Pillar Solution is less vis-à-vis the removed unilateral measures, it may impose other forms of levies in the name of doing business with a particular country simply to meet the revenue deficit. Countries with large capital outflows are likely to be less impacted, than countries which still rely on foreign direct investment (like India) and may have to think twice about introducing new levies (even though not in the name of digital tax per se).

Nonetheless, there remains a distinct lack of certainty as to what is to be gained from the Two-Pillar Solution. Countries which did not impose any unilateral measures are likely to see some increased revenue but that is not certain and neither is it known to what extent. It is more uncertain for countries that will be required to repeal any DST imposed as to how the tax collection will turn out for them; some forecasts suggest that for France, the net gain would be USD 900 million; whereas for the United Kingdom, some estimates find a gain, some find a loss of GBP 254 million.<sup>[49]</sup>

Finally, although a review time has been proposed, seven years after implementation, is a considerably long time.

## 4.2. Different variants of unilateral digital tax levies

As discussed in section 2., there exists a diverse variant of unilateral digital tax levies, though DST remains the most widely known. The 8th October 2021 statement of the OECD mentions that the Multilateral Convention will require removal of digital services taxes and “other relevant measures”, the detailed definition of “other relevant measures” is yet not available and will be finalized as part of the Multilateral Convention adoption.

It seems that despite the OECD’s proposed global solutions, some of these unilateral levies are here to stay. For example, VAT/GST is a policy choice of a country, and where countries have opted for the VAT/GST as a route to taxing the digital economy, it is for the country to decide if they would remove it or not. Further, many developing countries of Latin America and Asia have implemented VAT on some or other form of digital transactions of goods/services and have consequently seen a significant rise in revenue collection.<sup>[50]</sup> Additionally, some forms of indirect taxes to tax certain limbs of digital business existed before the BEPS Action Plan. For example, the regime for applicability of GST on “Online Information Database Access and Retrieval” (OIDAR) Services in the Indian GST regime. The services covered under this are mainly those which are facilitated by information technology via the Internet or an electronic network, i.e. of a nature that means their supply essentially is automated and involves minimal human intervention (taxed at 18%). Countries would be very hesitant to let go of such a significant source of revenue which can go a long way in meeting their fiscal goals. Therefore, countries will have to make some difficult choices (where possible within the confines of the Pillar Two Agreement) when it comes to meeting their fiscal and development goals over global political consensus and co-operation. Even Pascal Saint Amans in a fireside chat

42. The Business Standard (14 Apr., 2021).

43. S. Kritika, *Rs 1,492 cr worth equalization levy collected in last 10 months: Govt. to Parliament*, The Economic Times (12 Feb. 2021), available at <https://economictimes.indiatimes.com/news/economy/finance/govt-collects-rs-1492-crore-equalisation-levy-between-apr-2020-jan-2021/articleshow/80879675.cms> (accessed 30 Nov. 2021).

44. World Economic Forum, *Digital Trade in Services and Taxation* (Oct. 2021).

45. HM Revenue and Customs, *Digital Services Tax Policy Paper* (11 Mar. 2020), available at <https://www.gov.uk/government/publications/introduction-of-the-digital-services-tax/digital-services-tax> (accessed 30 Nov. 2021).

46. The conversion of INR and GBP to EUR equivalent is done at rates of 19 November 2021.

47. C. Enache, *Spain Determined to Cash in on Digital Services Tax*, Tax Foundation (18 June 2021), available at <https://taxfoundation.org/spain-digital-services-tax/> (accessed 30 Nov. 2021).

48. PwC, *Italy’s draft 2020 budget calls for unilateral digital services tax* (14 Nov. 2019), available at <https://www.pwc.com/us/en/tax-services/publications/insights/assets/pwc-italy-draft-2020-budget-calls-for-unilateral-digital-services-tax.pdf> (accessed 30 Nov. 2021).

49. PwC, *Tax Policy Alert, 130 countries reach political agreement on a new international corporate tax framework* (2 July 2021), available at <https://www.pwc.com/gx/en/tax/newsletters/tax-policy-bulletin/assets/pwc-130-countries-agree-on-a-new-intl-corporate-tax-framework.pdf> (accessed 30 Nov. 2021).

50. Mexico, which began taxing digital services in mid-2020, increased its tax revenues by \$ 304 million – a 915% jump compared to 2019. Meanwhile, from June 2020 to June 2021, Chile has secured more than 194 million of VAT from digital services. Ecuador is expected to collect more than 19 million dollars for the same services during 2021. See R. Frias, *Latin American Countries Lead World in Taxing Digital Services*, CPA Practice Advisor (13 Oct. 2021).

mentioned “To summarize digital levy is not permitted, but overall excise taxes of VAT, which are not targeted, are instruments of tax policy and shouldn’t be a problem.”<sup>[51]</sup>

Additionally, there are also other unilateral measures such as SEP, which are part of domestic tax laws and are likely to remain regardless of the Two-Pillar Solution. It is likely that SEP rules would not have any impact for countries that can claim treaty protection and hence, countries may find reasons to retain it. Ultimately, only time will tell which forms of unilateral levies will finally be scrapped out apart from DST’s.

### 4.3. Withdrawal of unilateral digital tax levies

The US administration has highlighted its willingness to continue with the proposal should countries withdraw unilateral levies, including the European Union’s upcoming proposals. In relation to the implementation of the current proposal, the European Commission is to propose a directive for the implementation of the Pillars. Separately, on 21 October 2021, Austria, France, Italy, Spain, the United Kingdom and the United States announced the agreement on how the DSTs will be withdrawn after OECD’s global solution implementation. The countries agreed that the excess amount collected under the international agreement will be available to claim back as tax credit.<sup>[52]</sup> It is yet to be seen, however, how companies which recharge these taxes to their customers (in the name of regulatory fees) and which will also fall under the limb of Pillar One (e.g. Google) would be able to claim a tax credit for the amount paid under Pillar One as these costs have actually been passed to their customers.

Countries are responding differently to this requirement to withdraw unilateral digital tax levies. Europe is taking its own unified action for the taxation of the digital economy (which is due for release). It seems that if all the DSTs are supposed to be eliminated, the European Union is going to want to create something different that doesn’t have to be withdrawn. Canada has taken a wait and see approach, stating that its DST law will be enacted from 1 January 2022 but the applicability of the same will be deferred to 1 January 2024 (with retrospective effect from 1 January 2020), if the OECD’s Two-Pillar Solution doesn’t come into force by 2024. Some countries seem to be introducing some sort of tariff or an entrance fee or levy for doing business in the country (a recent example being that of Italian AgCom’s contribution – Law No. 178 of 30 December 2020) where companies will be required to pay a certain portion of contribution (percentage yet to be specified) on the revenues.

Another point to consider is whether unilateral measures will be removed for all companies, even those not falling within the scope of either of the Pillars, including groups headquartered in countries that have not signed in favour of the Two-Pillar Solution. It is also to be seen whether countries will keep DSTs or other unilateral levies for MNCs that are based out of countries that will not be part of the Two-Pillar Solution.

Thus, even qualifying under Pillar One or Pillar Two does not provide MNEs with the surety that host/operating countries will do away with unilateral digital tax levies in their entirety or instead introduce some other form of a tariff that is a disguised digital tax. Businesses are already worried about the complexities and ambiguities in its implementing the Two-Pillar Solution as well as the lack of certainty. Hence, more work needs to be done in the direction of certainty to ensure that the companies that fall in the limb of Pillar One or Two are not burdened with other forms of levies. Certain questions that would need consideration in the coming days could be:

- countries need to take through analysis of the proposed vs. realized gain from the Two-Pillar Solution after its implementation; and
- the Two-Pillar Solution has considered new technology to an extent, however, as technology is evolving at a much more rapid pace, the Two-Pillar Solution will need to be revisited after a few years (for example, because of advances in crypto/fintech). We are living in an era of data economy; hence the emerging topics of data/Artificial Intelligence/robotics taxation may need further emphasis in coming times.

Needless to say, the impact of this Two-Pillar Solution may be limited initially but should evolve over time.<sup>[53]</sup> Though substantial progress has been made and the remaining considerations are expected to be taken care of in the coming meetings, the battle is far from over – and the outcome may turn out being less than equitable. The Two-Pillar Solution comes into play, countries will have to implement the necessary changes and considering that different economies have different administrative capabilities, the implementation phase may create complexity for some. Further, a lot still needs to be resolved on the design

51. M. Bhutani, *We will eliminate double taxation in timely manner*, livemint, available at <https://www.livemint.com/companies/people/we-will-eliminate-double-taxation-says-oecd-tax-chief-11629305887610.html> (accessed 30 Nov. 2021).

52. *UK agrees transition toward new global tax system* (2021), available at [https://www.gov.uk/government/news/uk-agrees-transition-toward-new-global-tax-system?utm\\_medium=email&utm\\_campaign=govuk-notifications&utm\\_source=5114a3c4-4739-4f70-b8be-772c0b5649d7&utm\\_content=immediately](https://www.gov.uk/government/news/uk-agrees-transition-toward-new-global-tax-system?utm_medium=email&utm_campaign=govuk-notifications&utm_source=5114a3c4-4739-4f70-b8be-772c0b5649d7&utm_content=immediately) (accessed 30 Nov. 2021).

53. R. Collier & M. Devereux, *On Why it really is such a big deal* (2 July 2021), available at [https://oxfordtax.sbs.ox.ac.uk/article/on-why-it-really-is-such-a-big-deal?dm\\_i=17AR,7FVO8,4BCQ8I,U8H25,1](https://oxfordtax.sbs.ox.ac.uk/article/on-why-it-really-is-such-a-big-deal?dm_i=17AR,7FVO8,4BCQ8I,U8H25,1) (accessed 30 Nov. 2021).

and technical side. Thus, the path ahead is not easy, to quote the US Supreme Court: “allocating income among various taxing jurisdictions bears some resemblance... to slicing a shadow”.<sup>[54]</sup>

Even with the agreement, there is uncertainty on the path forward. Keeping in mind that the success of the BEPS Project lasted for only a few years, without taking an appropriate direction on ensuring certainty, the solution would be suboptimal and may not be sustainable even in the long run. It may not be long until we find ourselves here again, playing catch-up.

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<sup>54</sup>. *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 1594 (1983). See also D. Bradford & H. Ault, *Taxing International Income: An Analysis of the U.S. System and Its Economic Premises*, in *Taxation in the Global Economy* 11, 30-31 (1990): The source of income is not a well-defined economic idea.