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## Taxing Digital Platforms

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## Taxing Digital Platforms

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## INTRODUCTION

By the end of the 20<sup>th</sup> century, international tax law was a dinosaur: outdated, outmoded, and inadequate at collecting and allocating the taxing rights to the activities of multinational enterprises (MNEs), particularly activity associated with the digital economy. Scholars often observed that the basic structure and conceptual apparatus of international taxation were roughly a hundred years old and had mostly undergone only modest tweaks and adjustments in the intervening century.<sup>1</sup> But the diagnosis of the system's ills by tax scholars was never enough to trigger a re-evaluation of the fundamentals of international tax by lawmakers,<sup>2</sup> and it took the global recession and financial crisis beginning in 2008 to motivate that reconsideration.<sup>3</sup>

In a history well-told by Professor Ruth Mason,<sup>4</sup> the social, economic and budget stresses of the Great Recession placed corporate tax avoidance under heightened scrutiny, and a series of sensational public hearings and investigations helped mobilize public opinion to provide the political impetus for international tax reform.<sup>5</sup> The result was a multilateral effort to combat corporate tax avoidance coordinated through the Organization for Economic Cooperation and Development (OECD) known as the “Base Erosion and Profit Shifting” (BEPS) project. In the United States, the influence of BEPS can be seen in the 2016 version of the U.S. model income tax treaty and in the dramatic changes made in 2017 to the Internal Revenue Code,<sup>6</sup> changes that introduced tax practitioners to a slew of new tax concepts with now-familiar acronyms such as the Base Erosion and Anti-Abuse Tax (BEAT), Global Intangible Low-Taxed Income (GILTI), and Foreign-Derived Intangible Income (FDII).

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<sup>1</sup> See, e.g., Michael J. Graetz, *The David R. Tillinghast Lecture, Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 54 TAX L. REV. 261, 263 (2000) (“The rules for taxing international income put in place following the First World War, however, have been tweaked from time to time”).

<sup>2</sup> See, e.g., *id.* at 269 (“this is a propitious time for a fundamental reexamination of the system of international income taxation and the principles and concepts on which it is based.”).

<sup>3</sup> Ruth Mason, *The Transformation of International Tax*, 114 AM. J. INT’L L. 353 (2020).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 355 (“revenue pressures created by the 2008 financial crisis combined with public backlash against corporate tax dodging to generate the political impetus needed to embark upon the multilateral BEPS Project.”).

<sup>6</sup> Reuven S. Avi-Yonah, *A Positive Dialectic: BEPS and The United States*, 114 AM. J. INT’L L. 255, 256 (2020) (“The TCJA clearly relies on BEPS principles”).

The BEPS project focused on how gaps and mismatches across national tax regimes created opportunities for corporate income tax avoidance,<sup>7</sup> but it did not deal with some of the most fundamental and growing grievances with the international tax system. Specifically, BEPS did not address discontent—particularly in Europe—with the effects of international tax competition and with the longstanding rules for allocating tax rights over the enormous profits of large digital platforms such as Google, Facebook, and Amazon. These companies had been able to enjoy low rates of taxation overall and to pay almost no tax in countries where they had no physical presence, even if they had many users in those countries.

With these issues still unresolved as of 2018, the European Commission, along with the United Kingdom and national governments in Europe and around the world, began to unilaterally announce novel taxes—digital services taxes or “DSTs”—on the revenue of digital platforms derived from the platforms’ users in those jurisdictions.<sup>8</sup> Many of the taxes have deferred effective dates and, in the case of the EU tax proposals, were adopted to provoke a multilateral solution to the problem of allocating taxing rights. And the European DSTs have spurred action by the OECD and G20 countries, which are currently managing a “BEPS 2.0” process designed to coordinate a global effort to implement a global minimum tax on corporate profits and allocate some income from large multinationals to jurisdictions where their users are located.

The most important tax issues facing digital platforms have to do with the outcome of BEPS 2.0, whether a multilateral agreement that includes the United States will be reached or if, instead, a global patchwork of DSTs will apply to digital platforms’ activities. We provide more detail about what is at stake in Part I. But, for tax law scholars, there is another interesting aspect to the appearance of DSTs too. As the other essays in this Symposium illustrate, the rise of big tech has generated a set of regulatory and political challenges of which tax is only one. The adoption of DSTs is not only about the fair allocation of taxing rights, but also economic competition between the U.S. and the EU, anxiety over the effects of digital platforms on society, and antitrust/competition concerns about the economic power of the tech giants.

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<sup>7</sup> *BEPS, Inclusive Framework on Base Erosion and Profit Shifting*, OECD & G20, <https://www.oecd.org/tax/beps/> (last visited Aug. 28, 2022).

<sup>8</sup> *Taxation of the Digitalized Economy*, KPMG, <https://home.kpmg/us/en/home/insights/2019/06/tmf-digital-economy0.html> (last visited Aug. 28, 2022). Countries have also adopted proposals to extend value-added taxes to the goods and services transacted on digital platforms.

Emerging as they have from such a diverse set of regulatory and political concerns, and from the minds of politicians rather than tax scholars, it is unsurprising that DSTs do not easily fit within the existing international tax architecture.<sup>9</sup> DSTs provides an interesting illustration of how tax scholarship grapples with a novel tax, oscillating between trying to shoehorn the tax into existing legal categories and providing familiar justifications from within the dominant tax theory discourses, or allowing the tax to introduce new concepts and new justifications.

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<sup>9</sup> Moreover, DSTs *have* to be outside the scope of existing tax treaties—i.e., not taxes on income—because otherwise they would be inconsistent with provisions of those treaties. Georg Kofler & Julia Sinnig, *Equalization Taxes and the EU's 'Digital Services Tax'*, 47 *INTERTAX* 176 (2019).

## I. THE STATE OF INTERNATIONAL TAX

The international tax regime is in flux. The rules applicable to digital platforms with a global reach will likely look very different in five years, and they already look dramatically different than they did five years ago. When the dust settles, the resulting tax rules will represent departures from longstanding international tax norms and require conceptual innovations on the existing framework. And many of these changes will have been compelled by the gravitational force of the massive global platforms—Facebook (Meta), Amazon, and Google—so that the most interesting aspect of these developments is not how the tax rules have shaped the business models of digital platforms but how digital platforms have shaped international tax law.

For decades, the profits of foreign subsidiaries of U.S.-headquartered MNEs were not generally subject to current U.S. income tax, which gave those businesses a strong incentive to locate their profits in low-tax jurisdictions. This was particularly easy for digital platforms because of the ease with which intellectual property—the primary engine of profits—can be transferred across borders. U.S. income tax law changed significantly in 2017, so that the profits of those foreign subsidiaries are now generally subject to current U.S. tax, albeit at a reduced rate.<sup>10</sup> This is perhaps the most important change in U.S. domestic tax law made in response to the rise of the digital economy and the importance of IP.

As the U.S. revised its income taxation of multinationals, India and Europe began to consider alternatives to the income tax as a way of reaching the profits of the U.S. tech giants.<sup>11</sup> Although the platforms may have many users in these countries, they have not had the physical presence—offices, employees, and so on—that international income tax norms and the bilateral treaty network have generally recognized as necessary to establish nexus for income tax purposes.

DSTs emerge against that backdrop by allowing a country to tax the *gross revenue* or “turnover” of certain companies derived from the users in that country. Consider, for example, the French DST enacted in July 2019. The amount of tax is equal to 3% of the revenue that a company earns from

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<sup>10</sup> See e.g., Eric Toder, *Explaining the TCJA’s International Reforms*, TAX POLICY CENTER <https://www.taxpolicycenter.org/taxvox/explaining-tcjias-international-reforms>. (2018)

<sup>11</sup> See *infra* Part II.

providing certain digital services—such as intermediation or advertising sales—where users are an important part of the value created.<sup>12</sup> The revenue subject to the tax is based on the share of the company’s users located in France.<sup>13</sup> This assertion of taxing rights on the basis of where the platform’s users are, rather than where it has a physical presence (a “permanent establishment”), represents a challenge to a longstanding norm in international income tax law. Of course, because they are taxes on revenues or turnover rather than on income, DSTs are not really income taxes.<sup>14</sup> But neither are they really consumption taxes, because they are not calculated based on the price of the services that the digital platforms provide to their users. They are something different.

France’s DST—and many others like it—only applies to very large companies with worldwide revenues of €750 million and revenues from France of €25 million.<sup>15</sup> The effect of the thresholds is to limit the tax to large U.S. companies, and this is not by accident.<sup>16</sup> The discriminatory effect and intent of the DSTs in targeting U.S. tech giants set off threats of retaliatory tariffs by the United States. The U.S. and Europe are currently observing an economic ceasefire, suspending the tariffs and collection of the DSTs pending ongoing multilateral discussions about how to allocate tax rights from the digital tech giants. The United States has individual agreements with the United Kingdom, France, Italy, Spain, and Austria, that permit the DSTs to be enforced if the global tax is not implemented by 2023.<sup>17</sup> EU officials have also signaled that they are considering a EU-wide DST if the global tax deal fails.<sup>18</sup>

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<sup>12</sup> EY, *France Issues Comprehensive Draft Guidance on Digital Services Tax*, (2020) [https://www.ey.com/en\\_gl/tax-alerts/france-issues-comprehensive-draft-guidance-on-digital-services-tax](https://www.ey.com/en_gl/tax-alerts/france-issues-comprehensive-draft-guidance-on-digital-services-tax).

<sup>13</sup> A number of countries has also explored expanding their VAT to tax transactions between users and digital platforms. See KPMG, *supra* note 8.

<sup>14</sup> See Kofler & Sinnig, *supra* note 9.

<sup>15</sup> It is not even clear that unilateral DSTs would be legal under EU law. See Ruth Mason & Leopoldo Parada, *The Legality of Digital Taxes in Europe*, 40 VA. TAX REV. 175 (2020); Ruth Mason & Leopoldo Parada, *Digital Battlefield in the Tax Wars*, 92 TAX NOTES INT’L 1183, 1197 (2018) (“[W]e argue[] that revenue thresholds in current digital tax proposals are vulnerable to nationality discrimination claims because they are intended to – and as applied by individual member states, likely would – burden mostly nonresident companies.”).

<sup>16</sup> See Robert E. Lighthizer, Off. of the U.S. Trade Representative, Report on France’s Digital Services Tax (2019) [hereinafter USTR Report].

<sup>17</sup> Press Release, Office of the United States Trade Representative, USTR Welcomes Agreement with Austria, France, Italy, Spain, and the United Kingdom on Digital Services Taxes(2021), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/october/ustr-welcomes-agreement-austria-france-italy-spain-and-united-kingdom-digital-services-taxes> (indicating DSTs will be removed once Pillar 1 is in effect).

<sup>18</sup> *EU’s Vestager Says One EU Digital Tax Might Be Easier for Firms*, BLOOMBERGTAX



The multilateral solution to the challenges of the digital economy is being negotiated within the OECD/G20 “inclusive framework” on base erosion and profit shifting. This solution would obviate the need for DSTs by addressing two key issues within a new international income tax regime. “Pillar One” of this global tax agreement would require the reallocation of some taxing rights for very large MNEs (not only digital services companies) to jurisdictions where they have profits even if they do not have a physical presence. “Pillar Two” would establish a global minimum tax of 15% on MNEs—imposed on a country-by-country basis.

Whereas DSTs are criticized as discriminatory taxes leveled at U.S. tech giants, and initial Pillar One discussions were focused on the platform economy (social media platforms, digital advertising platforms, online marketplace), the scope of Pillar One expanded to include consumer-facing businesses such as Starbucks and Walmart before dropping the sectoral limitation altogether.<sup>19</sup> The result is that the Pillar One profits reallocation rules apply to all MNEs that exceed certain revenue thresholds, regardless of their business model. In other words, Pillar One is no longer a solution only for the platform economy. It remains to be seen how many countries will ultimately implement domestic laws that conform with Pillar One and Pillar Two model rules. And if the global tax deal fails, then DSTs will be revitalized and perhaps become a permanent fixture of the global tax landscape.

## II. HOW SCHOLARS MAKE SENSE OF A NOVEL TAX

This Part examines the policy justifications for DSTs. The history of the legal and political debates around DSTs provides an interesting case study of how tax policy discourse around a novel problem and solution evolves and adapts, sometimes trying to accommodate the apparent novelty within

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(2020), <https://news.bloombergtax.com/daily-tax-report/eus-vestager-says-one-eu-digital-tax-might-be-easier-for-firms>.

<sup>19</sup> Compare OECD, Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy (May 29, 2019); OECD, Secretariat Proposal for A “Unified Approach” under Pillar One 8–9 (Nov. 2, 2019); OECD, Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint 3 (2020); and OECD, OECD/G20 Base Erosion and Profit Shifting Project, Statement on a Two Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy (Oct. 8, 2021), <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf> [hereinafter, the Statement].

existing concepts and norms, and sometimes recognizing the need for something new.

The origin of Pillar One of the pending global tax deal and the contemporary DST can be found in two proposals, respectively, made by the European Commission (EC) in 2017 for addressing tax challenges of the digital economy:<sup>20</sup> a long-term solution that expands the definition of a “permanent establishment” for income tax purposes, and a short-term solution that introduced a new turnover tax of 3% on the gross revenue of select companies. The digital businesses subject to the turnover tax included those: (1) placing digital advertising targeted at users in a member state; (2) transmitting data generated from user activity; and (3) providing intermediation services that allow users to find other users and interact with them.<sup>21</sup> Business that provided digital content, financial services, and online sales of goods or services were excluded.<sup>22</sup> And, as noted above, only MNEs meeting certain revenue benchmarks would be subject to the tax,<sup>23</sup> so that the tax effectively targeted certain big U.S. tech firms,<sup>24</sup> at least ostensibly and in part because those firms had economics of scale and market power.<sup>25</sup> For this reason, it is perhaps unsurprising that EU antitrust officials such as European Competition Commissioner Margrethe Vestager have been strong supporters of DSTs.<sup>26</sup> When the EC DST proposal failed in 2019, major

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<sup>20</sup> *Communication from the Commission to the European Parliament and the Council: A Fair and Efficient Tax System in the European Union for the Digital Single Market*, COM (2017) 547 final (Sept. 21, 2017), at 8–10. India introduced an earlier “equalisation levy” of 6% on non-resident digital advertising platforms in 2016. *See e.g.*, Ashok K. Lahiri, Gautam Ray & D. P. Sengupta, *Equalisation Levy*, Brookings India (2017), [https://www.brookings.edu/wp-content/uploads/2017/01/workingpapertax\\_march2017\\_final.pdf](https://www.brookings.edu/wp-content/uploads/2017/01/workingpapertax_march2017_final.pdf). Whereas DSTs are imposed on the platforms, the Indian tax is a withholding tax imposed on the digital service recipient.

<sup>21</sup> *Commission Proposal for a Council Directive on the Common System of a Digital Services Tax on Revenues Resulting from the Provision of Certain Digital Services*, at 7–10, COM 148 final (2018), at 24–25.

<sup>22</sup> *Id.* at 25.

<sup>23</sup> *Id.* at 25–26.

<sup>24</sup> *See, e.g.*, JASON FURMAN ET AL., UNLOCKING DIGITAL COMPETITION, REPORT OF THE DIGITAL COMPETITION EXPERT PANEL (2019) (providing analysis of major tech companies as monopolies).

<sup>25</sup> *Commission Proposal for a Council Directive on the Common System of a Digital Services Tax on Revenues Resulting from the Provision of Certain Digital Services*, *supra* note 19, at 7–10 (supporting a global revenue threshold to limit application of tax to “companies of a certain scale, which are those which have established strong market positions that allow them to benefit relatively more from network effects and exploitation of big data”).

<sup>26</sup> *See e.g.*, Foo Yun Chee, *Von der Leyen Takes Aim at U.S. Tech Giants' Low Tax Bill*

European economies such as the UK, France, Italy, Spain, and Austria, adopted DSTs unilaterally.

The discriminatory nature of the DSTs generated outrage in the United States and triggered the threat of retaliatory tariffs, making them a topic of negotiation by high-level officials in the United States. While the U.S. and Europe wrangled over the right to tax big U.S. tech firms, tax law scholars and economists have tried to make sense of DSTs and evaluate whether they represent sound policy. For example, the EC and some of its member states have argued that the DST is justified because value is created by the users of digital services and value should be taxed where it is created, a principle which countries' finance ministries, the OECD, and the EC recite and seem to endorse.<sup>27</sup> But "value creation" has much less purchase among legal scholars. Michael Devereux and John Vella,<sup>28</sup> Allison Christians,<sup>29</sup> Susan Morse,<sup>30</sup> and Johanna Hey,<sup>31</sup> have all challenged the concept of "value creation" as a guide to the allocation of taxing rights. For example, Christians argues that value creation has "everything to do with preserving a distributive justice status quo that cannot be defended on normative grounds." If she is right, of course, then the principle of value creation is simply a fig leaf for the exercise of political power.

Now, value creation may not be the only principle that would justify the allocation of taxing rights to the jurisdictions where users are located, so DSTs need not stand or fall on the coherence of that concept. Wei Cui has provided a conceptual defense of DSTs that is grounded in fairness and efficiency concerns having to do with the taxation of location-specific rents.<sup>32</sup>

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*in Europe*, REUTERS (July 16, 2019), <https://www.reuters.com/article/us-eu-jobs-tech/vonder-leyen-takes-aim-at-u-s-tech-giants-low-tax-bill-in-europe-idUSKCN1UB1IK>.

<sup>27</sup> Michael Devereux and John Vella (2018) *Value Creation as the Fundamental Principle of The International Corporate Tax System*, Eur. Tax Policy Forum Policy paper (2018); Alan Auerbach, Michael Devereux, Michael Keen, and John Vella, *Destination-Based Cash Flow Taxation*, Oxford Univ. Centre for Bus. Tax'n Working Paper 17/01 (2017) ("The OECD, the EU Commission and Parliament, Finance Ministries around the world, and many academics now repeat the mantra that profits should be taxed where value is created without question.")

<sup>28</sup> Michael P. Devereux and John Vella, *Are We Heading Towards a Corporate Tax System Fit For The 21<sup>st</sup> Century?*, 35 FISCAL STUDIES 449, 463-468 (2014).

<sup>29</sup> Allison Christians, *Tax According to Value Creation*, TAX NOTES (2018).

<sup>30</sup> Susan Morse, *Value Creation: A Standard in Search of a Process*, BULLETIN FOR INT'L TAX'N 196-202 (April/May 2018). Morse describes value creation as "a messy, political, idea." *Id.* at 197.

<sup>31</sup> Johanna Hey, *'Taxation Where Value Is Created' And The OECD/G20 Base Erosion And Profit Shifting initiative*, BULLETIN FOR INT'L TAX'N 203-208 (April/May 2018).

<sup>32</sup> Wei Cui, *The Digital Services Tax: A Conceptual Defense*, 73 TAX L. REV. 69 (2019).

Focusing on fundamental normative goals—efficiency and equity—suggests to Professor Cui that the DST has policy merits that cannot easily be satisfied by the existing international tax infrastructure, with its reliance on concepts such as a permanent establishment to establish taxing rights. Thus, there may be good reasons to retain DSTs rather than to try and accomplish some of their objectives with international income tax reform.<sup>33</sup> In Cui’s view, international business tax reform requires “different concepts” and the concepts that are so important in the international income tax treaty framework “often delineate superfluous conventions” and “clinging to these conventions will likely impede discussions of reform by obscuring reform objectives.”<sup>34</sup>

Other scholars also see intrinsic theoretical merit to the DSTs. One of us has argued that DSTs are an effective tool for market countries to tax digital platforms, which operate in a two-sided market.<sup>35</sup> Professor Kim also addresses concerns about tax cascading issues relating to a turnover tax and the potential tax incidence on consumers. Peter Barnes and David Rosenbloom adopt a more practical approach,<sup>36</sup> arguing that consumption taxes, even those based on the MNEs gross revenue, are likely to be more effective at raising revenue from large, successful digital companies, than the income tax.<sup>37</sup>

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<sup>33</sup> Wei Cui, *The Superiority of the Digital Services Tax over Significant Digital Presence Proposals*, 72 NAT’L TAX J. 839 (2019). Cui notes that OECD’s “Programme of Work” to develop solution to taxing rights allocation “whatever reallocation of taxing rights is agreed upon, they must be formulated and comprehensible through the concepts of nexus, attribution of income to nexus (or “source of income”), the alleviation of double taxation, and adequate dispute resolution. Although certain new profit allocation rules are also suggested, their descriptions are similarly couched in traditional treaty (especially transfer pricing) jargon, with more references to the technicalities of administration than to what international tax reform is supposed to accomplish.”

<sup>34</sup> *Id.*

<sup>35</sup> Young Ran (Christine) Kim, *Digital Services Tax: A Cross-Border Variation of the Consumption Tax Debate*, 72 ALA. L. REV. 131 (2020); Young Ran (Christine) Kim & Darien Shanske, *State Digital Services Taxes: A Good and Permissible Idea (Despite What You Might Have Heard)*, 98 NOTRE DAME L. REV. 741 (2022).

<sup>36</sup> Peter A. Barnes & H. David Rosenbloom, *Digital Services Taxes: How Did We Get into This Mess*, 166 TAX NOTES FED. 1927, 1932 (Mar. 23, 2020) (“Rather than seek to develop a new income tax regime to apply to some group of multinational companies, the OECD should redirect its attention to the imposition of harmonized gross-basis taxes on defined categories of income. Those rules could be administered and applied by all relevant companies (regardless of their annual revenue). And the discussion could change from seeking a transformation of international tax rules to how to make long-standing rules work better.”).

<sup>37</sup> *Id.* at 1928. Like Rosenbloom and Barnes, Reuven Avi-Yonah accepts DSTs as a useful tax instrument and would even allow a foreign tax credit for DSTs against the U.S.

By contrast, Amanda Parsons argues that the existing framework for international corporate income tax permits the allocation of taxing rights over digital MNEs to the jurisdictions where users are located. This is so not because the prevailing rules permit the taxation of users in their capacities as customers or consumers of digital platforms' services, but because they should be understood to be laborers in the digital economy and countries can already tax the income from services performed there.<sup>38</sup> Whereas Professor Cui welcomes the conceptual innovation that would allow for new tax instruments like the DST that have good policy justifications, Professor Parsons rejects the need for major structural change and argues that more modest changes, such as understanding users as workers, allows for a desirable re-allocation of taxing rights while minimizing disruption to the international tax system.<sup>39</sup>

DSTs emerged from the volatile mix of power and policy concerns swirling around the rise of tech behemoths like Google and Facebook. The issues include user privacy, market power, and the concentration of these firms in the United States. And the initial structure of the DSTs reflected this mix of concerns—focusing, for example, on only large (and not incidentally) U.S. firms—rather than traditional tax policy criteria.

The scholarly reaction to this novel set of taxes has taken two interesting turns. One reaction is to reject DSTs' radical departure from prevailing tax policy norms and seek achieve some of the same goals through the existing income tax regime. This approach favors the basic architecture of the current system and the value of stability. A second reaction has been to focus on foundational tax policy criteria—efficiency and equity—when considering

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multinational's tax liability if that would help ease their adoption. Reuven S. Avi-Yonah, *What's Everyone's Problem With DSTs?*, 169 TAX NOTES FED. 1631 (Dec. 7, 2020) ("It is unrealistic to expect countries to abandon a revenue-raising measure that is popular among their people and provides revenue to help alleviate the terrible costs of a global pandemic. The United States should calm down and abandon its punitive tariffs; the OECD should continue working on improving the international tax regime without requiring countries to give up on DSTs; and if there is a problem of double taxation because the DST is not in fact passed on to consumers, then the United States should provide a foreign tax credit for it."). We note that the recently finalized foreign tax credit regulations are clear in making DSTs non-creditable. T.D. 9599.

<sup>38</sup> Amanda Parsons, *Tax's Digital Labor Dilemma*, 71 DUKE L.J. 1781 (2022).

<sup>39</sup> *Id.* at 1782 ("This Article rejects the notion that these major theoretical and structural changes are necessary or even appropriate methods to allow digital laborers' home countries to tax income directly related to their data and content creation.... In addition to minimizing disruption in international tax law, this approach reinforces coherence and fairness by taxing equivalent economic activities equivalently.").

the novel tax and embrace conceptual innovation if helpful to get good policy.<sup>40</sup> Both approaches have merits, and we note that tax law scholarship often tries to come to grips with proposals for novel taxes—wealth taxes, for example—in precisely these ways: by looking for alternatives that accomplish similar goals without requiring significant additions or renovations to the existing legal structure, or by arguing that the merits of the novel tax are sufficiently great to justify more radical changes to the structure.<sup>41</sup>

### CONCLUSION

DSTs may be here to stay. It is unclear whether the BEPS 2.0 global tax deal will actually be implemented, particularly in the United States.<sup>42</sup> The initial timeline for implementing Pillar One contemplated a signed multilateral instrument by 2022, to take effect in 2023.<sup>43</sup> This deadline has passed. Multilateral instruments and the tax treaty ratification process are plagued by various challenges, such as achieving consensus among the nearly 140 signatories, reconciling the distinct rules and political realities of each country's legal system to the agreement, and overcoming logistical challenges to implementation and adherence.

Political realities in the United States add more reason to be cautious

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<sup>40</sup> This approach also justifies, *ex post*, a form of taxation that may have—and probably was—motivated at least in part by different concerns. Professor Mason conjectures that if DSTs survive, Cui's account may become the “standard explanation for a tax whose original motivation was blatantly political and protectionist.” Mason, *supra* note 4, at 393.

<sup>41</sup> See *e.g.*, Press Release, Elizabeth Warren, Senator, Senator Warren Unveils Proposal to Tax Wealth of Ultra-Rich Americans (Jan. 24, 2019), <https://www.warren.senate.gov/newsroom/press-releases/senator-warren-unveils-proposal-to-tax-wealth-of-ultra-richamericans> [<http://perma.cc/2MA2-N87C>] (describing a proposal by Senator Elizabeth Warren (D-MA) for a tax of 2% on net wealth above \$50 million and 3% on net wealth above \$1 billion); Daniel J. Hemel, *Taxing Wealth in an Uncertain World*, 72 NAT'L TAX J. 755 (Dec. 2019) (criticizing a wealth tax for valuation uncertainty and constitutional uncertainty and a mark-to-market income tax for valuation uncertainty, and instead advocating a retrospective capital gains tax); Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717 (2020) (proposing several methods of taxing wealth through the current income tax, which could not only replicate the economic effects of a traditional wealth tax but also be upheld by the Court as constitutional); Brian D. Galle, David Gamage, and Darien Shanske, *Solving the Valuation Challenge: A Feasible Method for Taxing Extreme Wealth*, DUKE L.J. (forthcoming 2022-23) (proposing a mark-to-market taxation on unrealized capital gains of the ultra-rich, which would not require valuation).

<sup>42</sup> Aime Williams, *G7 Tax Deal Faces Opposition in US Congress*, FIN. TIMES (June 9, 2021), <https://www.ft.com/content/6c98b271-bd13-4517-81bb-6ef7f1798085>.

<sup>43</sup> OECD, the Statement, *supra* note 17, at 3.

about U.S. implementation of the G20/OECD international tax plan.<sup>44</sup> Neither the current U.S. regime for taxing U.S.-owned foreign corporations nor the new corporate alternative minimum tax is consistent with Pillar Two of the global tax deal, notwithstanding some superficial similarities.<sup>45</sup> And the fate of Pillar One is also not promising.<sup>46</sup> Given the importance of the U.S. to ensure the effective implementation of both Pillars, the successful implementation of the global tax deal is an open question. And if it fails, the global tax landscape may be permanently altered by revitalized DSTs. Before long, what once was seen as novel and a threat to the stability of the international tax order will become familiar.

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<sup>44</sup> James-Paul Galligan, Christine Green, Kevin Kelly & Kenneth Wear, *OECD Tax Deal: When Does it Become Law?*, JDSUPRA (2021), <https://www.jdsupra.com/legalnews/oecd-tax-deal-when-does-it-become-law-3448977/>.

<sup>45</sup> Stephanie Soong Johnston, *The End is Nigh: An Update on the OECD Tax Reform Plan*, FORBES (2021), <https://www.forbes.com/sites/taxnotes/2021/10/19/the-end-is-nigh-an-update-on-the-oecd-tax-reform-plan/?sh=353cdb891634>.

<sup>46</sup> Some have argued that Pillar One might be implemented by an executive agreement, but the legality of this is far from clear. Reuven Avi-Yonah, Young Ran (Christine) Kim & Karen Sam, *A New Framework for Digital Taxation*, 63 HARV. INT'L L.J. 401, 436–39 (2022).