

Digital Services Tax in the Double Tax Treaties

Tributação de Serviços Digitais nos Tratados para Evitar a Dupla Tributação

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Abstract

This paper examines whether Digital Services Taxes (DSTs) fall within the scope of Double Tax Treaties (DTTs), focusing on Article 2 of the OECD Model Convention. Digitalization has made traditional nexus rules – particularly permanent establishment – inadequate for digital business models, creating systemic double non-taxation. With BEPS, Pillar One, and the UN's Article 12B all falling short of a unified solution, many jurisdictions have enacted unilateral DSTs. Treaty compatibility is analyzed through four dimensions: (i) whether DSTs qualify as “taxes on income” under Article 2(1)-(2), by reference to income theories including Schanz-Haig-Simons; (ii) whether they satisfy the substantial similarity test of Article 2(4), assessed via taxable event and tax base; (iii) whether structuring them as gross revenue levies places them outside treaty scope; and (iv) whether purposive interpretation under the Vienna Convention and the BEPS anti-avoidance preamble restores treaty coverage. No dimension yields a definitive answer.

Keywords: digital services tax, double taxation treaties, permanent establishment, tax nexus, OECD Model Convention, purposive interpretation.

Resumo

Este artigo examina se os Tributos sobre Serviços Digitais (DSTs) estão abrangidos pelo escopo dos Tratados para Evitar a Dupla Tributação (DTTs), com foco no art. 2º da Convenção Modelo da OCDE. A digitalização tornou as regras tradicionais de nexo, especialmente o estabelecimento permanente, inadequadas para os modelos de negócios digitais, gerando hipóteses sistemáticas de dupla não tributação. Diante da insuficiência do BEPS, do Pilar Um e do art. 12B da ONU como soluções unificadas, diversas jurisdições passaram a adotar DSTs unilaterais. A compatibilidade com os tratados é analisada sob quatro dimensões: (i) se os DSTs se qualificam como “impostos sobre a renda” nos termos do art. 2(1)-(2), à luz de teorias da renda como a de Schanz-Haig-Simons; (ii) se satisfazem o teste de similaridade substancial do

art. 2(4), aferido pelo fato gerador e pela base de cálculo; (iii) se sua estruturação como tributos sobre receita bruta os exclui do escopo dos tratados; e (iv) se a interpretação teleológica à luz da Convenção de Viena e do preâmbulo antielisivo do Modelo OCDE pós-BEPS restabelece sua cobertura convencional. Nenhuma das dimensões conduz a uma resposta definitiva.

Palavras-chave: serviços digitais, dupla tributação, estabelecimento permanente, nexu tributário, Convenção Modelo da OCDE, interpretação teleológica.

1. Introduction

From the perspective of direct taxation, the digitalized economy triggered many challenges to the State's power to tax. These challenges can be summarized in three main categories: nexus, data and characterization, as written in "Broader tax challenges raised by the digital economy" by the OECD¹. As such, the adequacy of the international tax framework (or the international tax regime) is under discussion due to the challenges arising from the digitalization of the economy and its new business types. Some discussions concern the allocation of taxation rights between jurisdictions of origin and residence.

While the digital economy has brought tremendous economic growth, it has simultaneously created significant challenges for traditional tax frameworks designed in an analog era. This work contends that the current patchwork of unilateral DST measures, while understandable as interim solutions, ultimately underscores the urgent need for coordinated multilateral action to establish clear, consistent rules for taxing digital activities across borders.

As stated in the BEPS action plan, OECD was called to develop actions against gaps in allocation of taxable profit arising from application to digitalized economy residence and source tax principles, especially in its "Action 1". To illustrate this issue, it is possible to refer to the political argument of the position of the EU Commission regarding the double non-taxation, as the Anti-Tax Avoidance Directive (ATAD) and in particular hybrid mismatches rule implemented by the EU targeting double non-taxation². Moreover, it is necessary to say that some scholars see risks or distortion of free movement freedoms in the form of double non-taxation or state aid. In situations when residence state does not apply taxing rights there is a risk that respective income is taxed with effective rate around zero³.

¹ OECD (2014). *Addressing the tax challenges of the digital economy*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <https://doi.org/10.1787/9789264218789-en>. Chapter 7.

² REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the implementation of Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market as amended by Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries p. 6.

³ Marcel Olbert and Christoph Spengel International Taxation in the Digital Economy: Challenge Accepted? p. 41.

In this sense, according to the OECD, double non-taxation may lead to “a reduction of the overall tax paid by all parties involved as a whole, which harms competition, economic efficiency, transparency and fairness”⁴. Indeed, digital businesses that explore a market should not have a tax benefit mechanism different from other businesses, if we follow a logic of isonomic equality, fair market and a fair distribution of taxation.

The new digital markets, as the economy that encompasses the economic value derived from the internet and the economic and social activities arising from Information and Communication Technologies, have challenged key concepts such as “permanent establishment” and “value creation”⁵. And increasingly, the most diverse sectors of the economy depend on the digital environment to develop their products and services⁶.

Likewise, the collection and processing of data may give rise to debates regarding its attribution to the taxable nexus. The tax treatment of income arising from “digitalized” transactions needs to be examined. There is a discussion in the literature about the acceptability of physical presence as the sole reason for charging taxes due to a lack of legal basis⁷.

Two international tax rules pose a challenge to the taxation of the digitalized economy. The first is the permanent establishment (PE) rule, which assigns taxation rights to a country where a multinational enterprise (MNE) creates a sufficient physical presence. The second is the profit allocation rule, based on the arm’s length principle (ALP), which allocates profits based on the value created. In today’s digital environment, MNEs can operate without creating a taxable physical presence in a market jurisdiction and use business models that challenge notions of where and how value is created.

In 2016, the OECD established the OECD/G20 Inclusive Framework that brings together non-member countries and jurisdictions to discuss and collaborate on the challenges and implementation of the BEPS project. In October 2020, the OECD/G20 Inclusive Framework published the Report on Pillar One Blueprint (Pillar One)⁸. The report aims to reach a global agreement on adapting the

⁴ OECD. *Action Plan on Base Erosion and Profit Shifting* (OECD, 2013), at p. 15.

⁵ LI, Jinyan. *Protecting the tax base in the digital economy*. United Nations. Department of Economic and Social Affairs United Nations Secretariat, DC2-2178. New York, N.Y. 10017, USA, p. 5. Available at: https://www.un.org/esa/ffd/wp-content/uploads/2014/10/20140604_Paper9_Li.pdf. Accessed in: 05/12/2023.

⁶ COLLIN, Nicolas; COLLIN, Pierre. *Task force on taxation of the digital economy*: report to the Minister for the Economy and Finance, the Minister for Industrial Recovery, the Minister Delegate for the Budget and the Minister Delegate for Small and Medium-Sized Enterprises, Innovation and the Digital Economy. Paris: Ministère de l’Économie et des Finances, 2013, p. 5. Disponível em: www.hldataprotection.com/files/2013/06/Taxation_Digital_Economy.pdf. Acesso em: 17/07/2020.

⁷ E. Kemmeren, *Principle of origin in tax conventions*: a rethinking of models p. 18 (Pijnenburg Vormgevers/Uitgevers 2001).

⁸ OECD Action 1; OECD. *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint* OECD (Paris: OECD, 2020) (hereinafter “Pillar One”).

allocation of taxing rights on business profits in a way that will expand the taxing rights of market jurisdictions⁹. However, years have passed now and yet the BEPS project did not achieve its intended effects.

While the OECD tries to reach a global consensus among the most developed countries on a unified approach, the United Nations and its Committee of Experts on International Cooperation in Tax Matters (UN Tax Committee) have also begun to study a more comprehensive and unified cooperation to solve the problem of erosion of tax bases. And given that the vast majority of UN Member States are neither members of the OECD nor the G20, the UN Tax Committee has an important role to play in ensuring greater international cooperation on tax matters, to the benefit of both developing countries, especially the least developed ones, in relevant activities¹⁰.

In August 2020, the United Nations Subcommittee on Tax Challenges Related to the Digitalization of the Economy (the “UN Subcommittee”) proposed a new provision to be implemented in its model convention: Article 12B, on income from automated digital services. The revised version of Article 12B was published in October 2020¹¹. In April 2021, the UN released the final version of the proposal that will be incorporated into the Model UN¹².

The new Article 12-B grants additional tax rights to “source countries” with regard to income from automated digital services, where an automated digital services provider’s customers are located, even if the service provider may not have a permanent establishment in the source country.

Article 12B would allow a contracting state to tax gross automated digital services income earned by a beneficial owner that is resident in the other contracting state and has no local PE. Article 12B does not specify any quantitative or qualitative nexus thresholds and leaves specific tax rates to be negotiated bilaterally, but it does suggest a “modest rate” of 3 percent or 4 percent to address concerns about double or excessive taxation, according to the commentary. The UN proposal radically departs from OECD’s Pillar One and has been praised for its practical and simple approach¹³.

⁹ OECD Action 1; OECD. Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint OECD (Paris: OECD, 2020), p. 11.

¹⁰ UN, Strengthening the UN Role in International Tax Cooperation. Available at: <https://financing.desa.un.org/what-we-do/ECOSOC/tax-committee/thematic-areas/strengthening-UN-role-in-international-tax-cooperation>. Accessed in: 05/12/2023.

¹¹ The 20th Session of the Committee of Experts on International Cooperation in Tax Matters (October 20-23 and 26-29, 2020), E/C.18/2020/CRP.41, Co-Coordinator’s Report (hereinafter “The 20th Session Report”), p. 5 and p. 9 f.

¹² The 22nd Session of the Committee of Experts on International Cooperation in Tax Matters (April 19-28, 2021), E/C.18/2021/CRP.1, Co-Coordinator’s Report (hereinafter “The 22nd Session Report”). In the same sense is the United Nations Model Tax Convention Between Developed and Developing Countries.

¹³ Rawal, Radhakishan, *Taxation of Digitalized Economy – Proposed UN Solution*, Asia-Pacific Tax Bulletin v. 26, No. 3, 2020.

According to the modern international tax regime, the states' taxing rights with regard to cross-border situations are limited for a few reasons. Initially, genuine and substantial *connection* between state and subject matter is required to justify the taxation of respective income. This is what we call "nexus". If all Member states introduce digital taxes simultaneously, nothing prevents double taxation except a genuine link introduced in international law: the *nexus*.

The taxation of income from cross-border transactions resulted in a situation in which legitimate tax credit was limited to cases in which the State was linked to a person ("personal link") or to a territory (based on the so-called "territoriality principle"¹⁴). However, politically expedient solutions need to be supported by sound legal principles. In other words, solutions used to reconsider the allocation of taxing rights need to better align economic activities within the state with the proxies used to tax it. In this context, a single pattern or nexus is a problem.

At the beginning of the 20th century, on the initiative of the League of Nations, research was carried out into the economic alliance between the State and taxable income. It is the cornerstone of the entire global tax system designed in the 20th century, supporting the principles of residence and source of direct taxation¹⁵. Regarding all these classes of activities, the group came to the conclusion that the place of production of income is "of preponderant weight" and "in an ideal division, a preponderant portion should be attributed to the place of origin"¹⁶.

Overall, treaties establish rules that business profits of a business are subject only to taxation in the state of residence unless the business is carried out in the other state through a permanent establishment situated in that state ("source principle"). A permanent establishment is defined in Article 5 of the Treaty as "a fixed place of business through which the business of an enterprise is wholly or partly carried on." A permanent establishment includes places such as offices or factories.

This is mostly based on Article 7 of the OECD-Model Convention, which provides that: "[t]he profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein". Under OECD

¹⁴ SCHOUERI, Luís Eduardo. Revisiting territoriality as a fundamental principle of international tax law. *ITP@20, Celebrating Twenty Years Of The International Tax Program Of The New York University School Of Law*. New York: New York University School of Law, 2016, p. 378.

¹⁵ Report on Double Taxation submitted to the Financial Committee – Economic and Financial Commission Report by the Experts on Double Taxation – Document E.F.S.73. F.19 (April 5th 1923) – Volume 4 Section 1: League of Nations (hereinafter – *the Report*) accessed 21 May 2021, <https://adc.library.usyd.edu.au/view?docId=split/law/xml-main-texts/brulegi-source-bibl-1.xml;collection=;database=;query=;brand=default>.

¹⁶ OECD (2014). *Addressing the Tax Challenges of the Digital Economy*, OECD/G20 Base Erosion and Profit Shifting Project (hereinafter – *Addressing the Tax Challenges of the Digital Economy*) OECD Publishing, Paris, <https://doi.org/10.1787/9789264218789-en>.

commentaries on Article 7, if “an enterprise carries on business in the other State through a permanent establishment situated therein, the profits that are attributable to the permanent establishment”¹⁷.

The justification given to this is that, in general, the permanent establishment is the measurement of the economic presence of a foreign company and its integration in a given local economy, in a sense that the PE concept justifies the taxation of profits arising from such presence. Therefore, most tax treaties provide that businesses should be taxed in the jurisdiction where they have a physical presence, a permanent establishment¹⁸, and this physical presence would be, in the past, the *nexus* rule, as per the definition of Article 5 of the OECD-Model Convention.

A physical presence was considered to be sufficient enough to identify the participation in economic life of a state. Which would make sense for the reality of the past century, at least, as in the words of Professor Calderón Carrero, “an enterprise of one contracting state that carries on business in another state does not participate to a significant extent in the ‘economic life’ of the other state, unless it operates in its territory through a permanent establishment”¹⁹. Such an approach – that made sense for that time – was followed by Courts, following the example of the practice of the United States Courts, which established the approach that a sufficient physical presence in the state is a factor determining connection between state and the entity subject to imposed tax (*Quill Corp v. North Dakota*²⁰).

We must have a critical look at the past, as many rules today considered as indisputable truths, or “international consensus” (as stated by the OECD Official Commentary), were once a simple idea sponsored by someone in power. In this sense, the international network of tax treaties is grounded in the Model texts developed by the League of Nations in the 1920s and has remained remarkably intact²¹. And the drafting history²² of the double tax treaties and its historical in-

¹⁷ OECD (2017). *Model Tax Convention on Income and on Capital: Condensed Version 2017*, OECD Publishing, p. 175.

¹⁸ J. M. Calderón Carrero. *Artículo 7. La tributación de los beneficios empresariales in Comentarios a los convenios para evitar la doble imposición y prevenir la evasión fiscal concluidos por España*, p. 414 (J. R. Ruiz García & J. M. Calderón Carrero eds., Fundación Pedro Barrié de la Maza 2004).

¹⁹ J. M. Calderón Carrero. *Artículo 7. La tributación de los beneficios empresariales in Comentarios a los convenios para evitar la doble imposición y prevenir la evasión fiscal concluidos por España*, p. 414 (J. R. Ruiz García & J. M. Calderón Carrero eds., Fundación Pedro Barrié de la Maza 2004).

²⁰ USA. *Quill Corp v. North Dakota*, 504 U.S. 298 (1992) 504 U.S. 298 (more) 112 S. Ct. 1904; 119 L. Ed. 2d 91; 1992 U.S. LEXIS 3123; 60 U.S.L.W. 4423; 92 Cal. Daily Op. Service 4458; 92 Daily Journal DAR 7142; 6 Fla. L. Weekly Fed. S 269.

²¹ Graetz/O’Hear, The “Original Intent” of U.S. International Taxation, 46 Duke Law Journal (1997) 1021.

²² Pratter, À la Recherche des Travaux Préparatoires: An Approach to Researching the Drafting History of International Agreements, Hauser Global Law Paper, December 2005; LANG, Joa-

terpretation²³ gives us some light on how we got here.

This can be seen in the concept of “income” itself. A 1923 double taxation Report of the former League of Nations noted that the tax systems of countries were at different stages of development at that time of drafting, and that there was no “all-inclusive conception of income”²⁴ at that time. In this regard, the double tax convention would need to cover as many direct taxes as possible, despite their various conceptions adopted around the world. The “taxation of income” and “taxes on income and on capital” were used for the first time in the titles of the draft model convention prepared by the League of Nations in 1943, known as the Mexico Model, and the draft model convention prepared by the League of Nations in 1946, known as the London Model²⁵.

In the context of such problems of erosion of the tax base in relation to the digital economy, many countries have started to implement unilateral tax measures to impose a levy on such digital markets.

2. Interpretation issues related to the digital services tax

The background of the present analysis will be to obtain useful insights for the perspective on the digital services tax, in general. This is justified because depending on whether the States implemented the digital services tax over consumption (as a form of Value Added Tax – VAT), on simple income or on the total and gross revenue of non-resident companies (as a turnover tax), it will generate different and relevant outcomes to some discussions about the validity, application and coverage of digital services tax by Double Tax Treaties.

2.1. Article 2 of the OECD-Model Convention and a concept of income

These interpretative challenges primarily concern Article 2 of the 2017 OECD Model Tax Convention, which defines the scope of taxes covered by double taxation agreements. The analysis focuses particularly on whether DSTs qualify as “taxes on income” under Article 2(1)-(2) or alternatively fall outside treaty coverage as indirect taxes.

quim. General Rules of Statute Interpretation in Germany. In: VOGEL, Klaus (coord.). *Interpretation of Tax Law and Treaties and Transfer Pricing in Japan and Germany*. The Hague: Kluwer Law International, 1998, p. 65).

²³ ZOLLER, E. (1988). *Droit International Public* (3d ed.). By Nguyen Quoc Dinh. Revised and updated by Patrick Daillier and Alain Pellet. Paris: Librairie Générale de Droit et de Jurisprudence, 1987. Indexes. F.290. *American Journal of International Law*, 82(2), 384-385. doi:10.2307/2203205, p. 267.

²⁴ League of Nations, *Report on Double Taxation submitted to the Financial Committee Economic and Financial Commission Report by the Experts on Double Taxation* (LoN, 1923), document number E.F.S.73.F.19, p. 4030.

²⁵ League of Nations, *London and Mexico Model Tax Conventions Commentary and Text* (LoN, 1946), document number C.88.M.88.1946.II.A.

Article 2 establishes which taxes are covered by the OECD-MC²⁶. In summary, there are two main ways for a tax to be within the Double Tax Treaty' scope: (i) through Arts. 2(1) and 2(2) (*substantive scope*) or (ii) through Art. 2(4) (*similarity scope*).

According to Art. 2(1) of the OECD-MC, the Treaty applies to "taxes on income and on capital imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied". Because of this, many countries are enacting their digital services tax as taxes over gross revenue, to be considered "turnover taxes", which would result in the digital service tax being outside the scope of the Treaty application.

One of the main issues in this strategy is that Art. 2(2) of the OECD-MC describes taxes on income and capital as "all taxes imposed on total income, on total capital, or on elements of income or of capital". Based on this provision, companies tend to allege that revenue is either an element of income, or is income itself, and the Treaty should apply to the digital services tax in spite of it having its fictitious name over *gross revenue*.

Accordingly, revenue²⁷ refers to "the total amount of money the business receives [...] for its products and services"²⁸. In this regard, when Art. 2(2) seeks to provide a definition of "taxes on income and on capital" referring to "all taxes on total income...or on elements of income", it is to make an obvious definition, giving it the widest scope possible, including elements of income, which "revenue" relates to.

This issue is also sustained by the concept of income, generally adopted around the world. According to Professors Vogel²⁹ and Irving Fisher³⁰, the types of income in the Model texts and in existing treaties follow no logical order or systematic conception. Even then, some scholars may identify taxes on income mainly based on two features. *First*, a tax on income concerns flow³¹ figures rather than stock figures³², following a net accretion theory of income³³. *Second*, taxes

²⁶ R. Ismer & A. Blank, *Klaus Vogel on Double Taxation Conventions*, Art. 2 (Taxes Covered), m.no. 3 (Reimer & Rust eds, 4th ed., 2015).

²⁷ Joseph Bankman, Daniel N. Shaviro, Kirk J. Stark & Edward D. Kleinbard, *Federal Income Taxation* 51 (Wolters Kluwer, 18th ed. 2019), note 31, at 52 (quoting Henry Simons, *Personal Income Taxation* 50 (1938)).

²⁸ Jane Caror et al., *Income vs. Revenue*, Diffen. Available at: <http://perma.cc/UY9M-T5BL>.

²⁹ Vogel, *The Scholarly Structure of Tax Treaties*, *Bulletin for International Fiscal Documentation* June 2002, p. 260.

³⁰ Irving Fisher, *Are Savings Income?*, *American Economic Association Quarterly*, 3rd Series, v. 9 (1908) 21.

³¹ Hans Georg Ruppe, *Übertragung – Möglichkeiten und Grenzen der Übertragung von Einkunftsquellen als Problem der Zurechnung von Einkünften*, in Tipke (ed.) *Übertragung von Einkunftsquellen im Steuerrecht* (1978) 7 et seq. See further Rolf Wittmann, *Das Markteinkommen* (1992).

³² R. M. Haig, *The Concept of Income: Economic and Legal Aspects*, in *The Federal Income Tax* 7 (Haig ed. 1921).

³³ K. J. (Kevin) Holmes, *The Concept of Income* p. 83 (ch. 2, Summary) (IBFD 2001), Books IBFD.

on income focus on the characteristics and the economic power of the recipient of the payment (*destination-based*), rather than consumers.

The *first* feature is determined by what Schanz-Haig-Simons³⁴ defines as “the money value of the net accretion to one’s economic power during a certain period of time”³⁵. In the same sense that, according to Professor Irving Fisher, “income consists of benefits”: “a flow of benefits during a period of time is called income”³⁶. Following this logic, the economic test of income is whether a particular item increases the economic power of the recipient to command goods or services. If it does, it should be seen as income for tax purposes, as decided by the US Supreme Court in *Commr v. Glenshaw Glass Co*³⁷.

This argument is intertwined with the *second* feature of a tax on income: that taxes on income tend to focus on the characteristics and the economic power of the recipient of the payment, and not on the consumer. It tends to be said that this is so to the extent that a typical tax on income (or revenue) is levied on everything that a taxpayer earns during the taxation period, regardless of whether the taxpayer spends what it earns or saves what it earns³⁸. Such argument would be ratified by the OECD Official Interim Report, which states that a tax covered by Double Tax Treaty is usually one that focuses on the supplier, the provider of the service, and not on the supply itself³⁹.

2.2. Similarity test based on Article 2(4) of the OECD-Model Convention

Furthermore, the OECD Official Commentaries state that the Double Tax Treaty should also “apply to all identical or substantially similar taxes that are imposed in a Contracting State after the date of signature of the Convention in addition to, or in place of, the existing taxes in that State” (Official Commentaries on Art. 2, paragraph 7). Which is the similarity scope of the Treaty’s application, based on paragraph 4 of Art. 2.

The wording of Art. 2(4) is that “any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes” should be automatically included by the Treaty’

³⁴ Henry C. Simons. *Personal Income Taxation: The Definition of Income as a Problem of Fiscal Policy*. (1938) 50.

³⁵ R. M. Haig, *The Concept of Income – Economic and Legal Aspects* (included at p. 1-28 of volume, *Federal Income Tax*, a series of lectures at Columbia University in December 1920. (Columbia University Press, 1921), p. 7. Haig-Simons definition of income, “[p]ersonal income may be defined as the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and the end of the period in question.”

³⁶ Irving Fisher, *Elementary Principles of Economics*, 1908, p. 98 at p. 2-3.

³⁷ USA. Supreme Court. *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955).

³⁸ Karnosh, Katherine E. (2021) *The Application of International Tax Treaties to Digital Services Taxes*, Chicago Journal of International Law: v. 21: No. 2, Article 8, p. 520.

³⁹ OCDE. *Tax Challenges Arising from Digitalisation – Interim Report 2018*. Paris: OECD Publishing, 2018, p. 181-182.

scope of application. In this regard, Professor Vogel once stated that the rule of Art.2(4) “takes into account the fact that the treaty text can expressly name only such taxes as exist at the time when the treaty is being concluded”⁴⁰.

Therefore, according to Professor Patricia Brandstetter⁴¹, where there is no general description of the taxes covered, a tax not named in the exhaustive list of paragraph 3 of Art. 2 of the Double Tax Treaties can only come within the Treaty scope via the provision in Art. 2(4): where a tax is imposed in addition to, or in place of, the taxes existing at the time the treaty was signed, and such tax is “substantially similar” to the taxes existing at the time of signature.

This provision follows the old Draft Conventions of Mexico and London, which speak of taxes “upon substantially the same bases as the taxes enumerated in the preceding paragraph of this Article”. Besides this automatic extension, the London Draft specifies in Art. XIX that “in the event of substantial changes in the tax laws of either of the Contracting states, the competent authorities of the two Contracting states shall confer together and take the measures required in accordance with the spirit of the present Convention”⁴².

The same can be seen in the Italian expert in WP No. 3, that held that “taxes as defined above comprise not only those in force on the conclusion of the Convention, but also all other taxes of the same character and with the same objects which are imposed subsequently”⁴³. Therefore, it can be said that since the early stages of the Double Tax Conventions States recognize that *similar* taxes should also be covered. As stated by the honorable High Court of Ireland, such an approach is consistent with the reciprocal nature of the Double Tax Treaties and it is also supported by the obligation of annual notification of tax changes by the contracting States, as decided in *Lorraine Kinsella v. The Revenue Commissioners*⁴⁴.

According to Vogel⁴⁵, whether a new tax is essentially “similar” is to be determined in the context of the tax system, to analyze the characteristics of each tax⁴⁶, not just by comparing the new with the old tax. Thus, and in this context, the

⁴⁰ K. Vogel, Commentary on Art. 2 para.4, m.no. 52. See the similar statement of Sutter regarding Art. 2(4) of the Estates, Inheritances and Gifts MC: Sutter in Aigner et al. (ed.). *Erbschaftssteuern und Doppelbesteuerungsabkommen* (2002), p. 60.

⁴¹ BRANDSTETTER, Patricia (2010). The Substantive Scope of Double Tax Treaties – a Study of Article 2 of the OECD Model Conventions. [Doctoral thesis, WU Vienna], p. 122.

⁴² OEEC, Council, Report of the Fiscal Committee on its Activities, Part II, Annex A: Commentary on the Draft Article on Taxes which should be covered by Double Taxation Conventions, C(58)118, m.no. 12.

⁴³ FC/WP 3(57)1 of 1 January 1957, m.no. 4(e).

⁴⁴ IRELAND. High Court. *Lorraine Kinsella v. The Revenue Commissioners*, July 31, 2007, IEHC 250, m.no. 53.

⁴⁵ Klaus Vogel, On Double Tax Conventions, 2nd edition, Kluwer, 1990, paragraph 53 at p. 97.

⁴⁶ M. TENORE, 2012, “Taxes covered”: *The OECD Model (2010) versus EU Directives*, Bulletin for International Taxation 6/2012, online 12 April 2012. section 2.4.

intention of the Contracting States and the destination of the assessed tax are irrelevant⁴⁷.

The litmus test by which *substantial similarity* is also measured is an assessment of the substantial features of the tax⁴⁸, with particular weight on the nature of the taxable event⁴⁹. The wording “in addition to, or in place of” contained in Art. 2(4) is derived from the formulation “new taxes, or taxes replacing those to which the Convention applies” used in the 1957 Report of OEEC Working Party No 3. And the League of Nations Draft Conventions of Mexico and London, whose formulations have influenced the OEEC’s drafting process, referred to taxes “upon substantially the same bases” in the corresponding provision. Therefore, the taxable event and the tax base are the main characteristics of a tax in order to investigate its similarity.

This approach is often used as the tax base is the tax feature that exposes the essence of the tax the most, despite of whether names the tax may have, and as such, it is the characteristic capable of identifying it, as applied by other jurisdictions, such as Supreme Administrative Tribunal of Portugal in *STA Case No. 0272/18*⁵⁰, Austria’s Verwaltungsgerichtshof in case n. 2000/13/0134⁵¹, the UK Court of Appeal in *Bricom Holdings Limited v Commissioners of Inland Revenue*⁵² and the Belgium Conseil d’État in *Conseil d’État No 34.796*⁵³.

In this regard, Art. 2(1) of the OECD-MC mentions that the manner in which taxes are levied is irrelevant when determining whether a tax is covered by the Treaty. Therefore, it would be irrelevant if the tax is levied by direct assessment, by deduction at source, in the form of a surtax, as additional tax or as a withholding tax.

2.3. Turnover tax or tax over revenues?

On the other hand, considering the difficulty of framing digital services taxes within the concept of income tax of Article 2(1) and (2), or even the substan-

⁴⁷ VOGEL, Klaus et al. *Klaus Vogel on double taxation conventions: a commentary to the OECD, UN, and US model conventions for the avoidance of double taxation on income and capital, with particular reference to German treaty practice*. 3. ed. London: Kluwer Law, 1998, p. 157.

⁴⁸ K. Vogel, Commentary on Art. 2 para.4, m.no. 52. See the similar statement of Sutter regarding Art. 2(4) of the Estates, Inheritances and Gifts MC: Sutter in Aigner et al. (eds.) *Erbschaftssteuern und Doppelbesteuerungsabkommen* (2002) p. 60.

⁴⁹ Haruhiko Hori, *Future Prospects for Eliminating International Double Taxation: With a Focus on Recent Unilateralism in Each Country*, Doctoral Dissertation, Hitotsubashi University, 2021, p. 124.

⁵⁰ PORTUGAL. STA. Case No. 041/12.5BEALM 041/12.5BEALM 0272/18, November 6, 2019.

⁵¹ AUSTRIA. Verwaltungsgerichtshof, 2000/13/0134, 28 March 2001. In this sense also: *Verwaltungsgerichtshof* Case No. 98/13/0021, 15 December 1999; *Verwaltungsgerichtshof*. No. 99/15/0265, 3 August, 2000.

⁵² UK. Court of Appeal. *Bricom Holdings Limited v Commissioners of Inland Revenue* [1997] EWCA Civ 2193.

⁵³ BELGIUM. Conseil d’État (Council of State). *Case No. 34.796*, January 30, 1990.

tial similarity of Article 2(4), some States have instituted the digital services tax as if it were over revenue, considered to be a turnover tax. In this sense, Article 2 can be seen as vague in order to encompass this new tax imposed on the digitalized economy.

The OECD Working Party No. 30 itself states that “the general descriptions given in paragraphs 1 and 2 are not too precise and might probably be called to be rather vague”⁵⁴. So when some States enact their digital services taxes to be imposed over gross revenue of non-residents, they are aiming for that tax to be qualified as a turnover tax⁵⁵ and, as such, outside of the scope of Treaty application, as it is levied over the gross revenue.

If a corporate income tax is levied on income – that is, on real profits and other sources of capital, considering the entire financing thereof and allowing deductions in relation to expenses or other costs incurred as a result of the business venture, such as labor cost, capital cost, losses, contracts with suppliers, etc⁵⁶ – a turnover tax, on the other hand, is considered a type of indirect tax, as it is levied upon the revenues of a company, i.e., to “the total amount of money the business receives [...] for its products and services”⁵⁷.

In this regard, it can be argued that taxes on income and turnover taxes⁵⁸ differ as income can only be levied upon the net positive results of a business, whereas a turnover tax is levied whenever a business generates revenue from a given activity (such as providing digital services), regardless of the actual profitability and not allowing for any kind of deduction and regardless of personal aspects related to the taxpayer⁵⁹.

And when faced with the concept of income itself, it is arguable that different income theories – such as the source theory, accrual theory, net accretion theory or the cash flow theory – have varying relevance in different states’ tax laws, as they are insufficient to determine tax law concepts exhaustively⁶⁰. As such, and as the digital services tax is considered in a globalized world and in the context of

⁵⁴ FC/WP 30(69)1, p. 5, m.no. 9.

⁵⁵ Pasquale Pistone, Andreas Ullmann. Chapter 8: *Digital Services Taxes and Article 2 OECD Model Convention 2017*. Georg Kofler et al. *Taxes Covered under Article 2 of the OECD Model: The Scope of Tax Treaties in a Dynamic Global Environment of Newly Created Taxes*. Books IBFD, 2021.

⁵⁶ Even Tarver and Charlie Rhinehart. Revenue vs. Earnings: What’s the Difference? Investopedia. 2023.

⁵⁷ Jane Caror et al., *Income vs. Revenue*, Diffen. Available at: <http://perma.cc/UY9M-T5BL>.

⁵⁸ ISMER, Roland; JESCHECK, Christoph. Taxes on Digital Services and the Substantive Scope of Application of Tax Treaties: Pushing the Boundaries of Article 2 of the OECD Model? *Intertax*, v. 46, n. 6/7, 2018, p. 577.

⁵⁹ ISMER, Roland; JESCHECK, Christoph. Taxes on Digital Services and the Substantive Scope of Application of Tax Treaties: Pushing the Boundaries of Article 2 of the OECD Model? *Intertax*, v. 46, n. 6/7, 2018, p. 577.

⁶⁰ See for the different theories, for example, J. Lang, 2005, *The Influence of Tax Principles on the Taxation of Income from Capital*, in *The Notion of Income from Capital*, EATLP, p. 18-24.

international tax treaties, the international consensus should be taken into consideration. And even if there were a small similarity between the digital services tax and a typical tax over income, some States can argue that the digital services tax would still not be considered substantially similar for purposes of Article 2.

For example, in a case regarding the Denmark–France tax treaty of 1957, the Danish Administrative Court held that it is not sufficient for a duty to be subsequently imposed in lieu of a tax mentioned in the list of taxes covered, and held that a flat-rate tax on the gross amount of payments on the purchase of a pension could not be classified as substantially similar to an ordinary progressive tax on net income (*Landsskatteretten* Cases No. 1985-5-173⁶¹, 300/1989⁶², 1985-5-173⁶³).

In another example, if the purpose of a foreign levy is to impose a fee on the privilege of doing business in a jurisdiction, the fee is not necessarily considered to be a tax on income even if the fee was computed partly or wholly on the basis of income, as decided by the Tax Court of Canada in *Exolon Co. v. Minister of National Revenue*⁶⁴. In this sense, the Lower Civil Court of Paris reasoning to determine the similarity of a tax was that the French tax authorities had not questioned the fact that the French net wealth tax was a tax which, if not identical to the Austrian capital tax, was at least similar to it⁶⁵. Therefore, it is very disputable whether a tax is to be considered to be over income and, as such, it is disputable whether a digital services tax would be covered by the scope of application of Double Tax Treaties.

2.4. *An autonomous international interpretation of the Double Tax Treaties*

However, it is often said that the Double Tax Conventions have an autonomy⁶⁶ and international context in which the words are used⁶⁷. Summarized by the Supreme Court of the United Kingdom, in a way that “a treaty should be construed in a manner which is ‘international’, not exclusively English”⁶⁸.

⁶¹ DENMARK. Danish Administrative Tax Court (*Landsskatteretten*) Case No. 1985-5-173, decision of 22 May 1985.

⁶² DENMARK. High Court of Eastern Denmark (*Østre Landsret*). Case No. 300/1989, May 5, 1992.

⁶³ DENMARK. National Tax Tribunal (*Landsskatteretten*). Case No. 1985-5-173, sessão de 22 de maio de 1985.

⁶⁴ CANADA. Tax Court. *Exolon Co. v. Minister of National Revenue* (1951) 4 Tax ABC 175 (Canada).

⁶⁵ As discussed by Henry Lazarski, Applicability of Tax Treaties, *European Taxation* July 1985, p. 200 et seq.).

⁶⁶ JONES, John F. Avery. *Treaty Interpretation – Global Tax Treaty Commentaries 2021*. Global Topics IBFD, item 5.4; NIKOLAKAKIS, Angelo, et al. *Fowler v HMRC* (Supreme Court): Neither Fish nor Fowler: Tax Treaty Implications of Domestic Deeming Rules. *British Tax Review*, n. 4, 2020, p. 537-547. JONES, John F. Avery, et al. The Origins of Concepts and Expressions Used in the OECD Model and their Adoption by States. *Bulletin – Tax Treaty Monitor* v. 60, n. 6, 2006, p. 220.

⁶⁷ Waters, The relevance of the OECD Commentaries in the interpretation of Tax Treaties, in Lang/Jirousek (eds.). *Praxis des Internationalen Steuerrechts, liber amicorum Helmut Loukota* (2005) p. 677.

⁶⁸ UK. Supreme Court. *Fowler v. Commissioners for Her Majesty's Revenue and Customs*. [2020] UKSC

This is because under Art. 31(1) of the Vienna Convention, the terms of a treaty have to be interpreted in good faith in accordance with the ordinary meaning in light of the context, object and purpose. And this provision is a customary international law⁶⁹.

In the case of Double Tax Treaties, it can be said that purpose of such treaties is “to widen as much as possible the field of application of the Convention”⁷⁰, according to the OECD Official Commentary on Art. 2. That is, in case of doubt, the tax should be considered as covered by the treaty. And as stated by the Andhra High Court of India in *Commr of Income Tax v. Vishakhapatnam Port Trust*⁷¹, when an expression or a clause is picked up from the OECD-MC, the presumption is that the persons using the said clause or expression are also aware about the meanings assigned to the said clause or expression by the OECD and have used it in the same sense and for the same purpose. In the meaning that the language employed in those documents are the “international tax language”, as decided in *Ostime Inspector Of Taxes v. Australian Mutual Provident Society*⁷².

The historical interpretation of the Double Tax Treaties would reinforce these ideas. As already stated, the international network of tax treaties is grounded in the Model texts developed by the League of Nations in the 1920s and has remained remarkably intact⁷³. And the drafting history⁷⁴ of the Double Tax Conventions and its historical interpretation⁷⁵ can be used, following Article 32 of the

22 *On appeal from: [2018] EWCA Civ 2544*, at paragraph 18, where Lord Briggs cites *Commissioners for Her Majesty's Revenue and Customs v Anson* [2015] STC 1777, UKSC 2013/0068, at paragraph 110.

⁶⁹ ICJ. *Islamic Republic of Iran v. United States of America*, ICJ Reports 1996, p. 803, paragraph. 23.

⁷⁰ “This Article is intended [...] to widen as much as possible the field of application of the Convention [...] to avoid the necessity of concluding a new convention whenever the Contracting States’ domestic laws are modified, and to ensure for each Contracting State notification of significant changes in the taxation laws of the other State”. [OECD, C(2)-1] OECD (2019), Commentary on Article 2: Concerning Taxes Covered by the Convention, in Model Tax Convention on Income and on Capital 2017 (Full Version), OECD Publishing, Paris.

⁷¹ INDIA. Andhra Pradesh High Court. *Commissioner Of Income-Tax v. Vishakhapatnam Port Trust* (1983) 144 ITR 146 (AP).

⁷² INDIA. *Ostime v. Australian Mutual Provident Society* (1960) 39 ITR 210, 219 (HL), referring to Lord Redcliffe’s observation in which he described the language employed in those documents as the “international tax language”.

⁷³ Graetz/O’Hear, The “Original Intent” of U.S. International Taxation, 46 *Duke Law Journal* (1997) 1021.

⁷⁴ Pratter, À la Recherche des Travaux Préparatoires: An Approach to Researching the Drafting History of International Agreements’, *Hauser Global Law Paper*, December 2005; LANG, Joaquim. General Rules of Statute Interpretation in Germany. In: VOGEL, Klaus (coord.). *Interpretation of Tax Law and Treaties and Transfer Pricing in Japan and Germany*. The Hague: Kluwer Law International, 1998, p. 65).

⁷⁵ Zoller, E. (1988). *Droit International Public* (3d ed.). By Nguyen Quoc Dinh. Revised and updated by Patrick Daillier and Alain Pellet. Paris: Librairie Générale de Droit et de Jurisprudence, 1987. Indexes. F.290. *American Journal of International Law*, 82(2), 384-385. doi:10.2307/2203205, p. 267.

Vienna Convention, when referring to the preparatory work of a treaty as a supplementary way of interpretation.

As such, it can be said that the LoN drafters intended for taxation of income to be understood as taxation of wealth as a flow⁷⁶, following the net accretion theory. That would be the reason for a tax on income to be “imposed on” a total income or on elements of income (Art. 2(2), OECD-MC) of someone, to a taxpayer⁷⁷. Someone who is a tax subject, a person who derives income as well as the person to whom the income is payable and attributable⁷⁸.

However, even then, it can be argued that the role of the digital services tax is to avoid double *non*-taxation in regard to the digital economy, relating to streaming and or digital applications, as explained in the introduction of the present work. In this sense, the existing tax systems are based on the principle of taxing profits and revenues where value is created. In a digital business environment, understanding how value creation occurs is essential for defining what counts as a digital business for tax purposes⁷⁹. This is the main problem OECD is urging states to fight against⁸⁰.

As stated in *Tax Challenges Arising from Digitalization*, revenue in digital value networks may be generated through subscription fees (e.g., LinkedIn Premium) or by offering access to the platform without a demand for financial compensation upon the user providing some input valuable to the platform operator (e.g., Instagram, Facebook, Twitter). Such input could be personal information about the user's interests that can be employed to generate revenue from targeted advertising (e.g., Spotify, PlaceID), or personal content accessible by other users, which increases the platform's utility and value⁸¹. By this, we can summarize in the maximum “users are the new raw material”.

⁷⁶ League of Nations, Report on Double Taxation submitted to the Financial Committee Economic and Financial Commission Report by the Experts on Double Taxation (LoN, 1923), document number E.F.S.73.F.19, p. 4028.

⁷⁷ KOTHA, Ashrita Prasad. Chapter 2: Taxes on Income According to Article 2(1) and (2) OECD Model Convention 2017 in Taxes Covered under Article 2 of the OECD Model: The Scope of Tax Treaties in a Dynamic Global 1 Environment of Newly Created Taxes (G. Kofler et al. eds., IBFD 2021).

⁷⁸ OECD, Working Party No. 30 of the Fiscal Committee (Austria-Switzerland), Mandate (OECD, 1969), document FC/WP30(69)1, p. 6-9; OECE. Working Party n. 3 – Comité Fiscal. Report concerning the listing and definition of taxes on income and capital (including taxes on estates and inheritances) which should be covered by double taxation agreements (Received on 5th October 1956), FC/WP3(56)1, Paris.

⁷⁹ Eli Hadzhieva, *Impact of Digitalisation on International Tax Matters*, Pol'y Dep't for Econ., Sci. & Quality of Life Policies 16 (2019).

⁸⁰ OECD/G20 Base Erosion and Profit Sharing Project, OECD, Tax Challenges Arising from Digitalization—Interim Report 2018: Inclusive Framework on BEPS (2018).

⁸¹ OECD/G20 Base Erosion and Profit Sharing Project, OECD, Tax Challenges Arising from Digitalization – Interim Report 2018: Inclusive Framework on BEPS (2018). note 12, at 39.

As a result of work undertaken as part of the OECD/G20 BEPS Project, the Official Committee decided to amend the title of the convention and to include the preamble⁸². The preamble expressly recognises that the purposes of the convention are not limited to the elimination of double taxation, but also to not create opportunities for non-taxation or reduced taxation through tax evasion and avoidance.

Thus, it can also be said that since the title and preamble form part of the context of the Double Tax Treaty and constitute a general statement of the object and purpose of the convention, they should play an important role in the interpretation of the provisions of the convention. This is the real context of the Treaty to be interpreted by this honorable Supreme Court, according to Art. 31(1) of the Vienna Convention. As such, even with an autonomous and international interpretation of the Double Tax Treaties, its application to digital services taxes is still subject to arduous interpretation discussions.

3. Conclusion

The analysis presented in this paper demonstrates that the question of whether Digital Services Taxes fall within the scope of Double Tax Treaties is one of genuine and substantial legal difficulty. It is not a question that admits of an easy answer, and the competing doctrinal arguments on both sides reflect a deeper structural tension: that the international tax framework – conceived in the 1920s and built on the premise that economic presence requires physical presence – is being asked to govern a category of economic activity for which it was not designed.

The traditional nexus rules, anchored in the concept of permanent establishment, were developed at a time when the League of Nations expressly recognized that there was no “all-inclusive conception of income” and that the framework would need to be capable of evolving alongside economic reality. That evolutionary imperative has rarely been more urgent. Digital business models participate in the economic life of market jurisdictions without triggering any of the conventional markers of taxable presence – no fixed place of business, no office, no factory – yet they extract significant economic value from the users and data networks located in those jurisdictions. The consequence, as the OECD has itself acknowledged, is a systemic risk of double non-taxation that undermines the principles of fair competition, economic efficiency, and equitable fiscal burden-sharing.

It is against this backdrop that the legitimacy of unilateral DSTs must be assessed. These measures are not merely fiscal opportunism; they are a response

⁸² OECD (2017), Model Tax Convention on Income and on Capital: Condensed Version 2017, OECD Publishing.

to a genuine and demonstrable failure of the existing framework to allocate taxing rights in a manner that reflects the economic reality of the digital economy. The argument that “users are the new raw material” captures, in essence, the normative claim underlying DSTs: that the market jurisdiction in which value is extracted through user participation, data collection, and network effects is entitled to a share of the resulting tax base.

The legal question, however, is not whether DSTs are normatively justified, but whether they are treaty-compatible. On this issue, the paper has identified a fundamental ambiguity within Article 2 of the OECD Model Convention that cannot be resolved by reference to the text alone. The substantive scope of Article 2(1) and 2(2) depends on how “taxes on income” is defined – a question that, as Working Party No. 30 itself acknowledged, Article 2’s general description does not answer with precision. The leading income theories, particularly the Schanz-Haig-Simons net accretion framework and Fisher’s flow-based concept, point towards the inclusion of revenue-based levies within the concept of income, since revenue constitutes an element – indeed, the foundational element – of any income calculation. The OECD Interim Report’s own characterization of a covered tax as one that focuses on the supplier rather than the supply reinforces this reading. On this basis, DSTs – which are levied on digital service providers by reference to their revenues generated in a given jurisdiction – exhibit characteristics that are materially consistent with a “tax on income” in substance, regardless of their formal label.

The similarity test of Article 2(4) leads to an analogous conclusion, albeit through a different route. Where a DST is imposed in lieu of, or in addition to, a pre-existing corporate income tax, and where the taxable event – the generation of revenue through the provision of digital services to market-jurisdiction users – substantially mirrors the economic event that the income tax captures, there are strong arguments that the new levy satisfies the substantial similarity threshold. The weight of comparative jurisprudence confirms that similarity is assessed on the basis of the tax’s substantive characteristics, particularly the nature of the taxable event and the composition of the tax base, not on the basis of the legislature’s chosen nomenclature or stated intent.

The counterargument – advanced by states that deliberately structure their DSTs as turnover taxes – rests on the proposition that a tax levied on gross revenue, without any allowance for deductions, is categorically distinct from a tax on income. This distinction is not without foundation in principle: income, properly understood, is a net concept, and a tax that disregards the costs of generating revenue departs in an important respect from the economic logic of income taxation. Judicial decisions in Denmark and Canada, cited in this work, lend some support to the view that a flat-rate gross levy on payments cannot be straightforwardly assimilated to a progressive net income tax. Yet this line of reasoning has its own limits.

The OECD Model Convention itself states, in Article 2(1), that the manner of levying a tax is irrelevant to the question of treaty coverage. If the substance of the tax (the identity of the taxpayer, the economic event giving rise to the liability, and the function of the levy within the broader fiscal system) aligns with the characteristics of a tax on income, the formal choice of a gross base cannot, by itself, be determinative. A contrary conclusion would allow states to engineer their DSTs in ways that produce substantive income taxation while escaping treaty discipline through definitional artifice – an outcome inconsistent with the principle that DTTs should be interpreted purposively, in good faith, and in accordance with their object and purpose.

This purposive dimension is perhaps the most significant development in the framework governing the interpretation of DTTs since the BEPS project amended the OECD Model Convention preamble. The preamble now expressly provides that the Convention is intended not only to eliminate double taxation but also to prevent non-taxation and reduced taxation through tax evasion and avoidance. This represents a normative shift of considerable importance: the treaty framework is no longer neutral as between overtaxation and undertaxation. It expressly endorses the objective of preventing base erosion. An interpretation of Article 2 that allows DSTs to fall outside treaty coverage on the strength of a formalistic label – when their economic substance corresponds to taxation of income derived from digital activities in the market jurisdiction – may be in tension with this anti-avoidance objective, even when the taxpayer's treaty position is not itself a result of abusive planning.

The autonomous and international character of treaty interpretation, as required by Article 31(1) of the Vienna Convention and confirmed by national courts across multiple jurisdictions, reinforces this point. When treaty terms are given their autonomous meaning – rather than being filtered through any single domestic legal tradition – the concept of “taxes on income” is properly understood in light of the intent of the original drafters of the League of Nations model conventions, who sought to encompass as broad a range of direct taxes as possible, notwithstanding the diversity of national approaches. A restrictive interpretation that excludes DSTs on the basis of their gross revenue base may fail to give effect to that original intent, particularly where the practical effect of such exclusion is to permit the persistence of the very double non-taxation that the modern treaty framework is now expressly designed to combat.

The conclusion to be drawn from this analysis is not that DSTs are clearly treaty-compatible, the doctrinal disputes identified in this paper are real and cannot be dismissed. It is, rather, that the legal framework does not provide a clear answer, and that the uncertainty itself is a symptom of a deeper pathology. The international tax system is confronting a category of economic activity that its foundational rules did not anticipate, and the interpretive tools available to

treaty partners (however sophisticated) cannot substitute for clear and agreed rules that directly address the taxation of the digital economy.

Until a genuinely multilateral agreement is reached, ratified, and implemented into domestic law across a critical mass of jurisdictions, the ambiguity surrounding DSTs and their treaty status will persist. National courts and competent authorities will continue to reach divergent conclusions, creating legal uncertainty for taxpayers and eroding the coherence of the international framework. The proliferation of unilateral measures will continue to generate geopolitical friction, as evidenced by the trade retaliatory responses that DSTs have already prompted. And the risk of cascading disputes – both under treaty law and under broader principles of international economic law – will remain elevated.

The path forward requires international cooperation of a kind that has thus far proven elusive. It demands a willingness by states to revisit foundational principles (including the primacy of physical presence as a *nexus* standard) and to design allocation rules that reflect where economic value is genuinely created in the digital age. It also requires recognition that the current patchwork of interim measures, however understandable as expressions of fiscal sovereignty, is an inadequate and ultimately unstable substitute for a coherent, rule-based global regime. The century-old architecture of international tax law has shown remarkable resilience, but it was not built to withstand the structural demands of the digital economy indefinitely. Adaptation is necessary.

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