A LEGAL INDETERMINACY IMPASSE: CHARTING INDIA'S DIGITAL TAX MEASURES THROUGH INTERNATIONAL TRADE AND TAX RULES

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ABSTRACT

This article follows two interim digital tax measures introduced by India against the framework of international tax laws and India's WTO obligations. India has introduced an equalization levy which takes the form of a standardized levy on specified services, and a Significant Economic Presence (SEP) nexus rule which shows profit attributability of digital businesses to India. These taxes were introduced to fill legal gaps that gave way for profitable artificial arrangements in the digital economy even without a physical taxable presence in the source country. The Organization for Economic Cooperation and Development (OECD) set with the task of reaching a global solution, has been deliberating on tax issues arising out of digitalization since 1997 till

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date. Growing impatience has made countries such as India propose interim digital tax solutions. In following these digital taxes against the backdrop of international tax and trade rules, the article identifies six ways in which they have contributed to the indeterminacy in the tax environment which is in turn affecting international competitiveness. The features of the tax measures that contributed to the indeterminacy are the nature of the equalization levy as a quasi-levy; extraterritoriality of the digital taxes; the incidence of levy as "online sale of goods"; tax implications of the personal data law; unilateral nature of the levy; and its effect on international competitiveness. In talking about a better way for interim digital taxes, this article argues that while the SEP test is less distortive than the equalization levy, it is also difficult to quickly repeal any interim tax measure. Although, there is less willingness to wait till global solution is reached, the two digital tax measures could be brought in alignment with the core principles of international taxation and trade obligations.

I. INTRODUCTION

We live in a time when all our laws and rules are in need of updating to confront the challenges posed by the digital economy to

conventional forms of thinking.[1] There are definitive markers that make the digital economy distinct from the traditional economy such as the flexibility in designing business models, immense reach, and the ability to offer complementary services for free.[2] Conventional international tax frameworks relied on the strength of the "physical presence" of businesses in the source country as a nexus rule to share taxing rights between residence and source countries.[3] Double Taxation Avoidance Agreements (DTAAs) modelled along the standard set by the OECD Model Tax Convention have a "Permanent Establishment" (PE) clause that requires a "fixed place of business through which the business of an enterprise is wholly or partly carried on" to conclusively establish physical presence in the source country.[4] Physical presence is one among the few ways to form a permanent establishment in the source country. The test of a physical presence of business would fluster the moment any technology is used as an accessory to perform significant tasks because a device is not construed to be a "physical presence" unless otherwise ruled by domestic courts. The legal gaps in this regard were largely addressed by the judiciary as and when a dispute arose, for example, on a few occasions, courts have recognized that servers can also form a PE.[5]

[1]Peter Jacobs, Hannah Pugh and Jasmine Wang, 'A 21st Century Update to Digital Copyright Law' (2020) The Regulatory Rev <https://www.theregreview.org/2020/08/01/saturday-seminar-21st-century-update-digital-copyright-law/> accessed 27 March 2021; R. S. Neeraj, 'Trade Rules for the Digital Economy: Charting New Waters at the WTO' (2019) 18 WTR S121-S141.

[2]OECD, 'Addressing the Tax Challenges of the Digital Economy, Action 1: 2014 Deliverable' (2014) <https://www.oecd.org/ctp/addressing-the-tax-challenges-of-the-digital-economy-9789264218789-en.htm> accessed 27 March 2021 [*hereinafter* "2014 Deliverable"].

[3] Report Presented by the General Meeting of Government Experts on Double Taxation and Tax Evasion (October, 1928) League of Nations Doc. C.562 M.178 1928 11.

[4]OECD, 'Model Tax Convention on Income and on Capital' arts 5, 7 (21 November 2017) [*hereinafter* "OECD Model Treaty"].

[5] *ITO v Right Florists Pvt. Ltd.* [2013] 32 taxmann.com 99 (Income Tax Appellate Tribunal, Kolkata); *Swiss Server decision*, 2001 case no. II 1224/97, Finanzgericht of Schleswig-Holstein (Tax Court of First Instance).

As digital services can reap profit from a market without having PE within its territory,[6] the determinative parameters for levying tax have shifted from physical nexus to economic nexus.[7] However, this shift has deposed a number of legal and regulatory concerns on the misuse of legal loopholes to avoid payment of tax.

The appropriate solutions to make tax rules relevant for the digital economy has been debated since 1997 till date in the Organization for Economic Cooperation and Development (OECD). For nearly twenty-five years, the OECD has created an enormous body of work surrounding the digital economy, albeit first under the banner of "e-commerce"[8] and now in the broader context of Base Erosion and Profit Shifting (BEPS).[9] Although the BEPS Project did not conclusively recommend a particular course of action, its 2015 Final Report had mentioned three possible interim options: significant economic presence, equalization levy, and withholding tax on digital transactions.[10] Long-term indeterminacy in digital tax rules has triggered political and legal responses from various countries in the

[6]2014 Deliverable (n 2) 24-27; G20, 'Leaders' Declaration' (*OECD*, 5-6 September 2013) <https://www.oecd.org/g20/summits/saint-petersburg/Saint-Petersburg-Declaration.pdf> accessed 27 March 2021.

[7]OECD, 'Addressing the Tax Challenges of the Digital Economy, Action 1: 2015 Final Report OECD/G20 Base Erosion and Profit Shifting Project' (2015) <https://www.oecd.org/tax/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report-9789264241046-en.htm> accessed 27 March 2021 [*hereinafter* "2015 Final Report"]; J.Á.G Requena, 'Adapting the concept of permanent establishment to the context of digital commerce: from fixity to significant digital economic presence' (2017) 25 Intertax.

[8]Rav P Singh and Vinti Agarwal, 'Taxation of the Digital Economy in India: The Way Forward' (*Vidhi Legal Policy*, 6 April 2019) <https://vidhilegalpolicy.in/research/taxing-digital-economy-in-india/> accessed 27 March 2021.

[9]OECD, 'Addressing Base Erosion and Profit Shifting' (2013) <https://www.oecd.org/tax/beps/addressing-base-erosion-and-profit-shifting-9789264192744-en.htm> accessed 27 March 2021 [*hereinafter* "2013 Report"]; Monica Gianni, 'OECD BEPS (In)Action 1: Factor Presence as a Solution to Tax Issues of the Digital Economy' (2018) 72 Tax Lawyer 255-298 [*hereinafter* "Monica Gianni"].

[10]2015 Final Report (n 7) 106-117.

form of an endeavour to introduce interim digital tax measures. Many countries such as France, Italy, Turkey, Malaysia, UK, Austria, and Hungary have either proposed or implemented 'digital services tax' (DST).[11]

To address these challenges, in 2016 India constituted the "Committee on Taxation of E-Commerce" headed by Akhilesh Ranjan.[12] The Committee's report considered three options for alternative nexus rules as specified in the OECD's 2015 Final Report[13] but only supported the introduction of an equalization levy. It also explored the options of significant economic presence and withholding tax, and highlighted that both these options require renegotiation of DTAAs.[14] The Committee argued that equalization levy is simpler in form and implementation as it can bypass the requirement of laborious amendments to the various tax treaties.[15] It further argued that among the three options provided, equalization levy provided for more "certainty" and "predictability" in the tax environment.[16]

Subsequently, chapter VIII was inserted in the Finance Act of 2016 to provide for an equalization levy of 6% on the amount of consideration received by a non-resident in respect of "specified services".[17] The

[11]See eg, Web tax, Law of 27/12/2017 n. 205 (Italy); 151 Key Rules on Advertisement tax, 2017 (Hungary); The Law no. 7194 on Digital Service Tax and Amendment of Certain Laws and the Decree Law numbered 375 (Tukey); Law No. 2019-759 of July 24, 2019 creating a tax on digital services and modifying the trajectory of the decline in corporate tax (France).
[12]Government of India, 'Proposal for Equalization Levy on Specified Transactions', Report on the Taxation of E-Commerce (February 2016) <https://incometaxindia.gov.in/News/Report-of-Committee-on-Taxation-of-e-Commerce-Feb-2016.pdf> accessed 27 March 2021 [*hereinafter* "Akhilesh Ranjan Committee Report"].
[13]2015 Final Report (n 7) 106-117.
[14]Akhilesh Ranjan Committee Report (n 12) 67-75.
[15]ibid 77.
[16]ibid 75-77.
[17]The Finance Act, 2016 (28 of 2016) s 166.

definition of "specified services" indicated that it was applicable to advertisement services but can be extended to other "online"[18] services as and when notified by the Central Government.[19] However, in spite of expanding the scope of the term specified services, a separate levy was introduced to tax a broad category of non-residents who receive consideration as "e-commerce operators" by supplying goods and services online.[20] The definition of e-commerce operators is also not clear and merely adds to the surprise by including online sale of goods or provision of services owned by the e-commerce operator *directly*, or *facilitated* by the e-commerce operator, or *any combination* of the above facilities.[21] Equalization levy will not be charged from non-residents that have a Permanent Establishment in India; or on amounts of consideration that are not paid for the purpose of business or profession; or if the aggregate amount of consideration for specified services does not exceed one lakh rupees in the previous year.[22] One inherent limitation in equalization levy that the Akhilesh Ranjan Committee's Report notes is the non-availability of a foreign tax credit in cases of double taxation of income, as the levy is not on profits or income but merely on consideration.[23]

After the imposition of Equalization Levy, India also introduced the concept of "Significant Economic Presence" (SEP) through the Finance Act of 2018 amending Section 9 of the Income-tax Act, 1961.[24] The fulfilment of the SEP criterion points to the existence of a "business connection"[25] under the Income-tax Act of 1961. Non-resident businesses have SEP in India if transactions with respect to goods, services or properties including download of data or software

[18]ibid s 164(f).
[19]ibid s 164(i).
[20]ibid s 153(iv).
[21]ibid s 153(ii).
[22]ibid s 165(2).
[23]Akhilesh Ranjan Committee Report (n 12) 101.
[24]The Finance Act, 2018 (13 of 2018) s 4.
[25]The Income Tax Act, 1961 (43 of 1961) s 9.

(1) exceed the aggregate payments of two crore rupees, or (2) there is systematic and continuous solicitation of business or interaction with more than 300,000 users.[26] The determination of SEP is effective from 1st April 2022. The scope of application of SEP was further amended *vide* the Finance Act of 2020, which provides that the provision of "goods, services or properties including download of data or software" can constitute SEP irrespective of whether the agreements were entered into in India, or if the non-resident has a residence or place of business in India, or if the non-resident renders services in India.[27]

This article looks at the two digital tax measures (Equalisation levy and Significant Economic Presence) introduced by India against the framework of international tax and trade laws in great detail. It illustrates that the digital tax measures have been hurriedly brought into force, with neither of them having convincing justifications or clarity in application. The legal strength of interim tax measures affecting non-residents is important for four reasons. Firstly, loose determination of territorial link with the country can result in extra-territorial operation of a domestic tax law. Secondly, unilateral tax measures are not expressly prohibited by the OECD or the WTO through their legal instruments, but to avoid future WTO disputes such unilateral measures have to comply with the country's WTO obligations. Thirdly, tax laws that are not targeted, run the risk of affecting international competitiveness and creating discriminatory conditions favouring domestic services and service suppliers. Finally, unilateral tax measures targeting non-residents can result in double taxation with no scope for tax credits as they are not mutually agreed solutions adopted by countries through DTAAs.

[26]The Finance Act, 2018 (13 of 2018) s 4(II); Central Board of Direct Taxes, Notification No. 41/2021, 3 May 2021 <https://www.incometaxindia.gov.in/communications/notification/notification_41_2021.pdf> accessed 27 March 2021.

[27]The Finance Act, 2020 (12 of 2020) s 5.

This article proceeds as follows. After the introduction, **Part II** discusses whether the policy objective justifying the digital taxes in India adequately considered the OECD's work on tax challenges arising from the digitalization of the economy, and core international tax principles.[28] It does this in two ways, first by introducing the enormous body of work published by the OECD that forms the foundations of future digital tax frameworks and the guidelines it has provided for interim digital tax measures. Towards the end, it synthesizes the OECD's work and situates the interim digital taxes against this framework. **Part III** delves into the architecture of General Agreement on Trade in Services and the consistency of the digital tax measures with India's GATS anti-discrimination obligations. This Part sets the tone for the rest of the article as it shows that the measures appear to be *de jure* consistent with non-discrimination obligations. However, if there are disputes that show *de facto* discrimination, the measures fall foul of the caveats placed in the exemptions' clause of the GATS as they operate as a "disguised restriction on trade in services". Against this setting, **Part IV** explores a series of questions that try to identify whether India's digital taxes are "discriminatory" and a concealed restriction on trade in services. This Part shows six areas that contribute to legal indeterminacy in the interim digital tax measures, that consequently operate as a concealed protection. The six murky areas of the measures are— the disputed nature of the equalization levy as a direct tax and its inability to take shelter under the direct tax exemption of the GATS; extra-territorial operation of the measures; the expansive scope of 'online sale of goods' and its effects; long-term legal uncertainty caused by unilateral taxes and the OECD's inaction; and its effect on

[28]All references made to 'core international tax principles' in this article refer to the OECD Ministerial Conference on Electronic Commerce, held in October 1998 in Ottawa, Canada. See Committee on Fiscal Affairs, OECD, 'Electronic Commerce: Taxation Framework Conditions' (1998) <https://www.oecd.org/ctp/consumption/1923256.pdf> accessed 27 March 2021 [*hereinafter* "1998 Electronic Commerce Report"].

international competitiveness based on this foreground. We offer a possible set of broad reorientation in **Part V** to align the current measures with core international tax principles proposed by the OECD, or to keep the SEP test alone after renegotiating DTAAs with countries that have larger market share in digital services, or to rollback unilateral measures and wait to adopt the global solution.

II. OECD'S WORK ON TAX CHALLENGES ARISING FROM THE DIGITALIZATION OF THE ECONOMY AND ITS RECOMMENDATIONS

As a response to the policy issues concerning e-commerce raised by visible non-OECD conferences,[29] the OECD looked to identify tax challenges posed by e-commerce. The following chronology groups the development of the OECD's work on tax issues arising out of digitalization into three categories – the phase of recognizing the problems (1997-2013), identification and inaction (2013-2018), and introduction of pillars one and two (2020).

A. *Recognizing the Problems (1997-2013)*

The OECD sought to identify issues posed by e-commerce to matters within its institutional jurisdiction by organizing an international conference titled 'Dismantling the Barriers to Global Electronic Commerce' in Turku, Finland in November 1997. The summary report of the Conference singles out the OECD's expertise in

[29]G7 Ministerial conference on the global information society, Round-table meeting of business leader, (*EU Publications*, 25-26 February 1995) <https://op.europa.eu/en/publication-detail/-/publication/a3426f7a-17fa-4327-80e1-8e1068f1fe52/language-en> accessed 27 March 2021; Global Information Networks Ministerial Conference (*European Commission*, 6-8 July 1997) <https://cordis.europa.eu/article/id/8627-global-information-networks-ministerial-conference> accessed 27 March 2021.

formulating general principles for taxation that can further prompt government action at the national level.[30] The Committee of Fiscal Affairs (CFA) also recognized that governments may introduce new administrative or legislative measures to tailor tax collection with advancements in e-commerce, but the application of such tax must not be discriminatory and must account for any incidents of double-taxation.[31]

In 2000, yet another Conference in Ottawa led to the constitution of five Technical Advisory Groups (TAG) comprising both government and business participants. These TAGs worked on specific problems that arose in relation to e-commerce such as characterization of income, rules for taxing business profits in the digital economy, consumption taxes, technological inputs and professional data assessment.[32] The TAG's clarification dated 22nd December, 2001 on the applicability of the PE definition to e-commerce was incorporated to the Commentary on Article 5 of the OECD Model Tax Convention.[33] These changes stipulate that, the issue of whether a

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[30]OECD, 'Dismantling the barriers to global electronic commerce' (16 October 1997) <http://www.oecd.org/sti/ieconomy/dismantlingthebarrierstoglobalelectroniccommerce.htm> accessed 27 March 2021.

[31]1998 Electronic Commerce Report (n 28) 3.

[32]See OECD, 'Report by the Technical Advisory Group on Monitoring the Application of Existing Treaty Norms for the Taxation of Business Profits' (December 2000) <http://www.oecd.org/tax/treaties/1923350.pdf> accessed 27 March 2021; OECD, 'Report by the Technical Advisory Group on Tax treaty Characterization issues Arising from E-commerce' (1 February 2001) <http://www.oecd.org/tax/consumption/1923396.pdf> accessed 27 March 2021; OECD, 'Report by the Technology Technical Advisory Group' (December 2000) <http://www.oecd.org/ctp/consumption/1923248.pdf> accessed 27 March 2021; OECD, 'Report by the Consumption Tax Technical Advisory Group' (December 2000) <http://www.oecd.org/ctp/consumption/1923240.pdf> accessed 27 March 2021; OECD, 'Report by the Personal Data Assessment Technical Advisory Group' (December 2000) <http://www.oecd.org/ctp/administration/1923304.pdf> accessed 27 March 2021.

[33]OECD, 'Clarification of the Application of the Permanent Establishment Definition in E-Commerce: Changes to the Commentary on the Model Tax

computer equipment being in a specific location constitutes a PE will depend on whether its functions can exceed the preparatory and auxiliary threshold.[34] It acknowledges that these determinations can only be made on a case-to-case basis.[35] The TAG tasked with the rules for taxing Business Profits in the digital economy released its final report in 2005,[36] which critically evaluates the efficacy of the existing international tax framework in relation to E-commerce, and proposes certain alternatives for taxing business profits. Emphasising on the concept of PE, the alternatives suggested were modification, elimination and additions to the definition of PE without fundamentally altering the existing rules. The report also considered another course of substantially modifying the definition of PE by adopting new rules of nexus for B2B and B2C transactions, along with introduction of the concept of virtual PE.

Following this report, in 2008 and 2010 the OECD's work focused on profit attribution to PE rules under Article 7 of the Model Tax Convention.[37] The poignant detail about these reports is that their focus was not strictly limited to the digital economy but had shifted to evasion of taxes broadly, underscoring the need for OECD to modulate its criteria in accordance with changing and complex business models.

Convention on Article 5' (December 2000), <http://www.oecd.org/ctp/treaties/1923380.pdf> accessed 27 March 2021.

[34]ibid 4.

[35]ibid 6.

[36]OECD, 'Are the current treaty rules for taxing Business Profits Appropriate for E-Commerce? Final Report' (2005) <http://www.oecd.org/tax/treaties/35869032.pdf> accessed 27 March 2021.

[37]See OECD, 'Report on the Attribution of Profits to Permanent Establishment' (17 July 2008), <http://www.oecd.org/tax/transfer-pricing/41031455.pdf> accessed 27 March 2021; OECD, 'Report on the Attribution of Profits to Permanent Establishment' (22 July 2010) <http://www.oecd.org/tax/transfer-pricing/45689524.pdf> accessed 27 March 2021.

B. *Identification and (In)action (2013-2018)*

The increasing ability of companies to relocate and move to other countries for reducing their tax liabilities is not a new phenomenon,[38] though it brought huge attention to international tax law and the OECD at that time due to indeterminate rules.[39] The exploitation of legal gaps in taxing the digital economy has come to be known as "Base Erosion and Profit Shifting" (BEPS).[40] The BEPS project explores far varying themes beyond just the digital economy.[41] Nevertheless, Action 1 focusing on "tax challenges arising out of digitalization of the economy" has been given due importance.[42]

a) The BEPS Project and Action Plan of 2013

The OECD began its work on BEPS with its February 2013 Report titled "Addressing Base Erosion and Profit Shifting" by expressing concerns that international tax rules did not keep up with evolving global business practices, particularly with respect to digitalization of the economy.[43] It is problematic if in a business environment rules do not provide sufficient clarity on taxability of entities with no physical presence, and the tax treaties do not fairly allocate taxing rights on business profits, and may even result in the profits being not taxed at all in either of the countries. In July 2013, the OECD issued the proposed Action Plan, identifying 15 Actions to address BEPS

[38]Pascal Saint-Amans and Raffaele Russo, 'What the BEPS Are We Talking About?' (*OECD*) <http://www.oecd.org/ctp/what-the-beps-are-we-talking-about.htm> accessed 27 March 2021 [*hereinafter* "What the BEPS"].

[39]Barry Ritholtz, 'The U.S. Corporate Tax Dodge' (*Bloomberg*, 19 July 2014) <https://www.bloomberg.com/opinion/articles/2014-07-09/the-u-s-corporate-tax-dodge> accessed 27 March 2021.

[40]What the BEPS (n 38); 2013 Report (n 9).

[41]'BEPS Actions' (*OECD*) <https://www.oecd.org/tax/beps/beps-actions/> accessed 27 January 2022.

[42]2015 Final Report (n 7).

[43]2013 Report (n 9) 7, 47, 49.

issues.[44] Tax challenges arising out of the digital economy were identified as Action No. 1. The Action Plan highlights that there is a need for closer examination on how enterprises in the digital economy "add value" and "make their profits" in order to identify the extent to which changes in the current rules are required to prevent BEPS.[45]

b) OECD Action 1 Deliverable 2014

The OECD issued a public discussion draft on Action 1 in March 2014,[46] followed by the Action 1 Deliverable Report in September 2014 ('2014 Deliverable').[47] The report laid out several options to address the tax challenges in the digital economy for direct taxes. Firstly, a new nexus was proposed based on "significant digital presence referring" to businesses that operate wholly through virtual means.[48] The threshold criteria proposed is, if an enterprise conducts its business through "fully dematerialized digital activities" and has "significant digital presence" in the other country, it could be construed as having a taxable nexus with that country.[49]

Secondly, it also proposed to partially replace the physical presence requirement with a "significant presence" test that can account for changing customer relationships in the digital economy.[50] Thirdly , it explores the option of placing a withholding tax on payments for digital goods or services to a foreign provider.[51] This option could

[44]OECD, 'Action Plan on Base Erosion and Profit Shifting' (July 2013) <https://www.oecd.org/ctp/BEPSActionPlan.pdf> accessed 27 March 2021 [*hereinafter* "Action Plan"].
[45]ibid 10.
[46]OECD, 'BEPS Action 1: Address the Tax Challenges of the Digital Economy, Public Discussion Draft' (March-April 2014) <https://www.oecd.org/ctp/tax-challenges-digital-economy-discussion-draft-march-2014.pdf> accessed 27 March 2021.
[47]2014 Deliverable (n 2).
[48]ibid.
[49]ibid 143-145.
[50]ibid 146.
[51]ibid.

cause unnecessary burden on individual customers for minor transaction amounts, so the 2014 Deliverable potentially looks to enforce it through withholding by financial institutions. Lastly, it looks at the option of introducing a bandwidth or "bit" tax based on the number of bytes used by the website.[52] This could however vary depending on the size of the company and its turnover.

c) OECD Action 1 Final Report 2015

In September 2015, the OECD issued final reports on all 15 BEPS Actions and issued an Explanatory Statement that consolidates the work.[53] The 2015 Final Report broadly focuses on three challenges – data, nexus and characterization issues for direct taxes. Of the three challenges explored in the report, this Article focuses on the nexus challenge alone. The 2015 Final Report consolidates the many options stated in the 2014 Deliverable to three possibilities – significant economic presence nexus, a withholding tax on specified digital transactions and an equalization levy to 'equalize' the disparity in tax treatment between domestic businesses and foreign businesses.[54] The OECD did not recommend pursuing any of these three possibilities as the options presented would require substantial changes to current rules and did not suggest any new options either.[55]

Following this inaction,[56] the OECD reconciled it by formally approving the introduction of any of the three possibilities in domestic laws provided they are not in variance with the country's treaty obligations.[57] This Report and its particular endorsement of domestic

[52]ibid.

[53]OECD, 'Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project' (2015) <www.oecd.org/tax/beps-explanatory-statement-2015.pdf> accessed 27 March 2021 [*hereinafter* "Explanatory Statement"].

[54]ibid 106-117.

[55]ibid 13, 106-117.

[56]This article borrows the characterization of the OECD's work as "(in)action" from Monica Gianni (n 10).

[57]Monica Gianni (n 9).

measures forms the basis of India's equalization levy. By refusing to adopt a specific approach as an interim measure, scholars argue that the "OECD itself contributed to BEPS exacerbation"[58] acting inconsistent with its fundamental goal of preventing unilateral solutions to BEPS challenges. The 2015 Final Report sets out 2020 as the year for issuing a report on its continuing work, and the OECD established the Inclusive Framework on BEPS to monitor the implementation of the BEPS project.[59]

d) Increasing Unilateral Actions and Interim Report 2018

Post the 2015 Final Report and the deadline set for 2020, individual countries embarked on the unthinkable by proposing unilateral solutions.[60] With growing restlessness and indeterminacy, countries in the EU led by France proposed a turnover tax on digital companies.[61] This proposal had the support of 10 EU members, but evidently not the public approval of OECD.[62] The proposed tax operated on a similar footing with the equalization levy proposed by India, and is also viewed as an interim measure until the OECD decisively recommends a particular course of action.

In its 2018 Interim Report, the OECD once again recommends no solutions or specifically endorses the introduction of any interim

[58]ibid 271.
[59]About the Inclusive Framework on BEPS, OECD <http://www.oecd.org/tax/beps/bepsabout.htm> accessed 27 March 2021.
[60]See text to (n 11).
[61]European Commission, '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' (21 September 2017) COM (2017) 547 <https://ec.europa.eu/taxation_customs/sites/taxation/files/1_en_act_part1_v10_en.pdf> accessed 27 March 2021 [hereinafter "2017 EC Report"].
[62]Jennifer Rankin, 'EU to find ways to make Google, Facebook and Amazon pay more tax' (*The Guardian*, 21 September 2017) <http://www.theguardian.com/business/2017/sep/21/tech-firmstax-eu-turnover-google-amazon-apple> accessed 27 March 2021.

measure.[63] The most significant update that the Interim Report offers is an aerial view of what is to become the two folds of Pillar One Report in 2020 – allocation of profits and changes to nexus rules.[64] While it does not provide specific recommendations for interim measures, it suggested a schematic list of factors that could help design interim measures in line with the OECD's policy: (1) compliance with international obligations (e.g., double tax treaties, WTO obligations, etc.), (2) temporary measure until global consensus is reached, (3) target specific services that pose high risk (e.g., internet advertising) and (4) minimizing excess tax, impact on small or new businesses, and cost and complexity.[65]

C. Blueprints for Pillar One and Pillar Two 2020

In the run up to its deadline of 2020, a series of communications set the tone for introducing the two-pillar approach. In a policy note issued in January 2019, the OECD proposed the idea of a two-pillar approach recognizing that the challenges caused due to digitalization is "pervasive" and is not "limited to highly digitalized businesses".[66] The first pillar focused on allocation of taxing rights to countries, where value is created by active participation of a business activity in the user's country or market jurisdiction, with specific regard to nexus issues.[67] Under the second pillar, the Inclusive Framework proposed

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[63]See OECD, 'Tax Challenges Arising from Digitalization: Interim Report 2018' <https://www.oecd.org/tax/tax-challenges-arising-from-digitalisation-interim-report-9789264293083-en.htm> accessed 27 March 2021 [*hereinafter* "2018 Interim Report"].

[64]2018 Interim Report (n 63) ch 5. ibid ch 5.

[65]See 1998 Electronic Commerce Report (n 28).

[66]See OECD, 'Addressing the Tax Challenges of the Digitalisation of the Economy – Policy Note' (23 January 2019) <https://www.oecd.org/tax/beps/policy-note-beps-inclusive-framework-addressing-tax-challenges-digitalisation.pdf> accessed 27 March 2021.

[67]OECD, 'Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project' (2020) <https://www.oecd.org/tax/beps/tax-challenges-arising-

an option that would enable countries to tax business profits when the other jurisdiction with taxing rights applies a "low effective rate of tax" to those profits.[68] As a part of this work, a public consultation document requesting inputs from stakeholders was released in February 2019.[69] A dynamic programme of work was issued in May 2019 which draws attention to the need for an "early political steer" towards the comprehensive revamp of international tax rules.[70] It noted that the OECD is exploring the development of a concept of "remote taxable presence"[71] and a taxing right not constrained by the temporalities of physical presence.[72] This work programme offered a fair idea that these changes could be directly made to Articles 5 and 7 of the OECD Model Tax Convention or could also be developed as a stand-alone rule with a separate nexus rule.[73] Upon holding further

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from-digitalisation-report-on-pillar-one-blueprint-beba0634-en.htm> accessed 27 March 2021 [*hereinafter* "Pillar One Blueprint"].

[68]OECD, 'Tax Challenges Arising from Digitalisation – Report on Pillar Two Blueprint: Inclusive Framework on BEPS, OECD/G20 Base Erosion and Profit Shifting Project' (2020) <https://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-report-on-pillar-two-blueprint-abb4c3d1-en.htm> accessed 27 March 2021 [*hereinafter* "Pillar Two Blueprint"].

[69]See OECD, 'Public Consultation Document: Addressing the Tax Challenges of the Digitalisation of the Economy' (2019) <https://www.oecd.org/tax/beps/public-consultation-tax-challenges-of-digitalisation-13-14-march-2019.htm> accessed 27 March 2021; See OECD, 'Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy' (2020) <https://www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework-on-beps-january-2020.pdf> accessed 27 March 2021 [*hereinafter* "January 2020 Statement"].

[70]OECD, 'Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy' (2019) <https://www.oecd.org/tax/beps/programme-of-work-to-develop-a-consensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.htm> accessed 27 March 2021 [*hereinafter* "Programme of Work 2019"].

[71]A 'remote taxable presence' is one that shifts from the traditional physical presence rule by setting a new set of standards for identifying when such a remote taxable presence exists. See Programme of Work 2019 (n 70) 18.

[72]Programme of Work 2019 (n 70) 18.

[73]ibid.

public consultations on the two pillars in 2019,[74] a statement issued by the Inclusive Framework in January 2020 detailed the architecture of the Unified Approach on Pillar One as the basis for further negotiations.[75]

The OECD powered through the COVID-19 pandemic and released the Reports on the Blueprints of Pillar One and Pillar Two in October 2020.[76] Among the two, this article focuses on Pillar One that proposes actions to reallocate tax rights that addresses the taxability of business activities of non-residents having no physical presence; determines where tax must be paid and on what basis; and what portions of profits can be taxed in a given jurisdiction where users are located.[77]

Pillar One report condenses its inquiry into two - options for profit allocation and new nexus rules for the digital economy. In this context, its central contribution is the expansion of taxing rights of countries to jurisdictions where there is an "active and sustained participation of a business in the economy" through activities in, or remotely directed at that jurisdiction.[78] The current scope intends to include automated digitalized businesses and consumer-facing businesses with cross-border activity.[79] The OECD presented three core components, each with subsidiary aspects that define their contours. Firstly, a new taxing right called "Amount A" has been

[74]See OECD, 'Public consultation document Secretariat Proposal for a "Unified Approach" under Pillar One' (November – December 2019) <https://www.oecd.org/tax/beps/public-consultation-document-secretariat-proposal-unified-approach-pillar-one.pdf> accessed 27 March 2021; OECD, 'Public consultation document Global Anti-Base Erosion Proposal ("GloBE") - Pillar Two' (November – December 2019) <https://www.oecd.org/tax/beps/public-consultation-document-global-anti-base-erosion-proposal-pillar-two.pdf.pdf> accessed 27 March 2021.
[75]January 2020 Statement (n 69).
[76]Pillar One Blueprint (n 67); Pillar Two Blueprint (n 68).
[77]Pillar One Blueprint (n 67).
[78]ibid.
[79]ibid 19-20.

introduced where the Multi-National Entities (MNE's) residual profits will be reallocated. This new Amount A taxing right will be implemented by changes to domestic law or by a multilateral conventional bound by public international law, and supplemented by guidelines where necessary.[80] Secondly, the "Amount B" taxing right proposes a fixed return for certain baseline marketing and distribution activities taking place physically in a market jurisdiction, with the outcomes consistent with arm's length principle.[81] Aside from the technical options presented, Pillar One also focuses on enhancing tax certainty by providing an "innovative" dispute prevention and resolution mechanisms.[82]

With this in context, Pillar One suggests large changes to nexus rules that identify market jurisdiction eligible to receive potential profit reallocations as Amount A.[83] The nexus rules are supported by sourcing rules and a profit reallocation key, that reflect the particularities of digitally operated businesses and consumer facing businesses balancing the need for accuracy with the compliance costs.[84] The OECD has proposed that this could be achieved through due diligence rules to a body with clearly defined hierarchy. Lastly, the OECD also accounts for potential safe harbours where residual profits of businesses are already allocated relying on existing arm's length principle-based rules, thereby avoiding "double-counting" issues.[85] It also eliminates "double-taxation" by identifying paying entities and equitable apportioning of Amount A taxing rights among eligible market countries. [86]

[80]ibid 14.
[81]ibid 155-165.
[82]ibid 12.
[83]ibid 64-68.
[84]ibid 70-95, 120-133.
[85]ibid 121.
[86]ibid 139.

D. Synthesising the OECD's Work and Recommendations

The OECD's work on e-commerce did not anticipate the force that the online business environment would become and particularly, the leverage they offer through network effects and hybrid business models. Action 1 was formulated as a reaction to BEPS events that occurred due to digitalization.[87] Although, the OECD made significant technical progress, it has largely not taken proactive efforts to reach a globally agreed solution. Its inaction has contributed to the legal uncertainty surrounding the nexus between digital services and taxation systems. In disputes that involved a digital service as an accessory to the core service, courts around the world had to grapple with questions answering whether servers or websites can constitute permanent establishments.[88] The central difficulty posed by legal indeterminacy on digital tax was that the courts had to apply older rules and nexus to answer these difficult questions.[89] Furthermore, countries were losing large chunks of tax revenue solely on account of 'absence of law'.[90] It is in this context that restless countries have taken unilateral measures from the very clear options laid out but not particularly recommended by the OECD in its 2015 Final Report.

[87]Action Plan (n 44).

[88]See *ADIT v Valentine Maritime (Mauritius) Ltd.*, ITA No. 350/Ahd/2018; *M/s. Esm Sys Pvt. Ltd.v ITO* [2020] ITA No. 350/Ahd/2018 (Income Tax Appellate Tribunal, Ahmedabad); *ITO v Right Florists Pvt. Ltd.* [2013] 32 taxmann.com 99 (Income Tax Appellate Tribunal, Kolkata); *Swiss Server decision*, 2001 case no. II 1224/97, Finanzgericht of Schleswig-Holstein (Tax Court of First Instance).

[89]For example, the concept of 'geographical and commercial coherence' as an element of PE was tested in various cases where technology acts as an accessory. See *ADIT v Valentine Maritime (Mauritius) Ltd.*, ITA No. 350/Ahd/2018.

[90]ITU, 'GSR15 Discussion Paper on Impact of Taxation on the Digital Economy' (June 2015) <https://www.itu.int/en/ITU-D/Conferences/GSR/Documents/GSR2015/Discussion_papers_and_Presentations/ GSR16_Discussion-Paper_Taxation_Latest_web.pdf> accessed 27 March 2021; Global Alliance for Tax Justice, 'The State of Tax Justice 2020: Tax Justice in the time of COVID-19' (November 2020) <https://www.globaltaxjustice.org/sites/default/files/The_State_of_Tax_Justice_2020_ENGLISH.pdf> accessed 27 March 2021).

India also felt the need to introduce interim digital taxes that can fill the legal lacunae until global consensus is reached. Equalization levy and SEP have been envisaged as "temporary" measures that will be replaced by commonly agreed solution(s). The OECD suggested that the final options will take the approaches detailed in the long-winded Blueprints of the Pillar One and Pillar Two reports. It is observable from a reading of Pillar One Blueprint that the OECD has moved away from the terminologies employed in the 2015 Final Report. The terms equalization levy, significant economic presence, and withholding tax have been replaced by sophisticated technical concepts of "Amount A" and "Amount B" alongside new nexus rules. The Pillar One Blueprint addresses various elements that are needed to establish a global framework for taxation and allocation of profits to market countries, notably, details relating to scope, nexus, revenue sourcing, base determination, and profit allocation. Additional work is required to be done in refining the proposals to avoid double taxation, improve tax certainty and dispute resolution.

Nevertheless, even transitory "interim" measures introduced by countries is expected to be in compliance with international tax treaties and its core principles such as "neutrality, efficiency, certainty and simplicity, effectiveness and fairness, flexibility and sustainability, and proportionality".[91] It further requires that these measures must be in compliance with the country's international trade obligations.[92] Part III will provide an insight into the various ways in which indeterminate tax rules can negatively affect competitiveness and international trade.

[91] 2018 Interim Report (n 63) 177; 1998 Electronic Commerce Report (n 28).
[92] 2018 Interim Report (n 63) 181-184.

III. THE DIGITAL TAXES UNDER WTO LAW

There have been unending discussions on electronic commerce at the WTO since the 2nd Ministerial Conference in 1998.[93] While the WTO is gearing up its own trade rules to the dynamic changes in e-commerce, the unilateral digital tax measures taken by countries can be a subject of WTO disputes as they can be in variance with their obligations under two relevant legal instruments: (1) The WTO moratorium on customs duties on electronic transmissions (The Moratorium)[94] and (2) The General Agreement on Trade in Services (GATS).[95] Unlike an international tax dispute where domestic courts of one of the parties to a DTAA hears disputes from taxpayers and tax authorities, WTO disputes are launched by member countries.[96] Therefore, any country that is discontented with the application of unilateral digital taxes can bring a dispute to the dispute settlement body contesting the measure as a violation of specific obligations under WTO instruments.

The Moratorium was agreed to amidst a deadlock over trade rules related to e-commerce in 1998, and member countries decided to "not impose customs duties on electronic transmissions".[97] However, it is likely that the WTO Moratorium would not cover the equalization

[93]See Declaration on global electronic commerce, WTO Doc. WT/MIN(98)/DEC/2 (May 1998) <https://www.wto.org/english/thewto_e/minist_e/min98_e/ecom_e.htm> accessed 27 March 2021 [*hereinafter* "Declaration on E-Commerce"].

[94]ibid.

[95]General Agreement of Trade in Services (adopted 15 April 1994, entered into force January 1995) Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183 [*hereinafter* "GATS"].

[96]Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 UNTS 401, 33 LLM 1226 (1994) [*hereinafter* "DSU"].

[97]Declaration on E-Commerce (n 93).

levy and the SEP as they are merely "internal taxes".[98] Moreover, violation of the moratorium cannot be the subject of a WTO dispute, as Article 1 of the Dispute Settlement Understanding of the WTO limits the jurisdiction of the dispute settlement body to claims under "covered agreements", which does not include General Council decisions like the Moratorium.[99] Therefore, in its current form the digital taxes do not act in variance with the Moratorium, and even otherwise such variance cannot be challenged in the dispute settlement body.

A. The Architecture of the GATS

In its architecture, the GATS is almost congruent to the General Agreement on Tariffs and Trade (GATT) but the substantive obligations under the GATS vary considering the nature of services trade.[100] Unlike the GATT that regulates cross-border trade alone, the GATS distinguishes four modes of supply: cross-border supply, consumption abroad, commercial presence, and presence of natural persons.[101]

Legal rights and obligations in the GATS are broadly demarcated into "General Commitments" that apply to all WTO member countries and "Specific Commitments" that are legally binding only in the sectors in which a member has taken commitments.[102] These commitments are

[98]Council for Trade in Services, The Work Programme on Electronic Commerce: Note by the Secretariat, WTO Doc S/C/W/68, 16 November 1998, paras 34, 35 [*hereinafter* "Electronic Commerce"].
[99]DSU (n 96) art 1.
[100]Unlike goods trade that could be controlled by tariffs to the extent that it is bound by the country's tariff schedule, services trade presents an impossibility of introducing tariff-type measures. The guarantee of national treatment across all sectors could amount to a guarantee of free access. See Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis and Michael Hahn, *The World Trade Organization: Law, Practice, and Policy* (3rd edn, OUP 2015) 585.
[101]GATS (n 95) art I:2.
[102]The GATS contains general obligations under Part II (MFN) and specific commitments under Part III (National Treatment and Market Access).

inscribed in the member's "Schedule of Specific Commitments" which details the scope and extent of each country's commitment in a given sector.[103] Most schedules correspond to the list of 12 broad sectors given in the Services Sectoral Classification List.[104] Commitments can vary across modes of supply for each sector and they are broadly of three kinds. Firstly, a member enters 'NONE' if it does not intend to limit its commitment in that specific sector and in a given mode of supply.[105] Secondly, a member enters 'UNBOUND' if it intends or in the future may intend to have measures inconsistent with national treatment and market access.[106] Thirdly, members can also provide textual descriptions of the limitations they place on market access or national treatment commitments.[107] Any measure introduced by a country is tested for its consistency with the Schedule of Specific Commitments for a given sector and mode of supply, and further, if there is a treatment no less favourable.

The General Commitments under the GATS are specified in Part II which includes the general most-favoured nation (MFN) clause which requires members not to discriminate between foreign market participants of different countries.[108] National Treatment (NT) is a 'specific commitment' which requires member countries to not treat their domestic producers more favourably than foreign market participants from different countries.[109] The Specific Commitments that were made in national treatment, market access and 'other' obligations in the GATS are a result of a lack of political will to extend commitment to well-established rules of international trade in goods to services. Therefore, national treatment, market access and

[103]GATS (n 95) art XX.
[104]World Trade Organization, Services Sectoral Classification List, WTO Doc MTN GNS/W/120 (10 July 1991) [*hereinafter* "Services Sectoral Classification List"].
[105]ibid 10.
[106]ibid 11.
[107]ibid 9-10.
[108]GATS (n 95) art II.
[109]ibid art XVII.

other trading privileges are legally binding on countries only to the extent they individually commit to it in their schedules. Time constraints during the negotiations left crucial aspects such as telecommunications, financial services, and maritime transport inconclusive during the Uruguay Rounds and annexes to that extent were attached later.

B. Situating India's Digital Taxes in the GATS Framework

The digital economy is predominantly, but not entirely about services. As a result, all WTO member countries can impose digital taxes only when they are consistent with their GATS obligations. Digital services can be offered through all four modes of supply depending on the kind of service involved, but the modes of 'commercial presence' and 'presence of natural persons' give rise to permanent establishments and therefore, such businesses will not be subject to the new digital taxes. In contrast, businesses that offer services through the modes of cross-border supply and consumption abroad, with no territorial presence that could attract PE provisions in DTAAs, are the subject matter of the paper's inquiry. The equalization levy and the significant economic presence test interact differently with the GATS as the former is a blunt levy on specified sectors while the latter operates as a test to determine taxability across multiple sectors. Consequently, these measures will be analysed separately in this section.

a) Equalization Levy under the GATS

The equalization levy targets specific sectors – advertising services and e-commerce operators. It automatically attracts the 'advertising services' sector of W/120 Classification. India has not taken any commitments and has chosen to remain free from stringent obligations across all four modes of supply, and therefore, the

advertising services entry does not appear in India's schedule.[110] The definition of the term "online" can fundamentally alter the operation of the law and the sectors it involves. India has chosen to define "online" as a facility or service that is obtained through the internet or any other form of "digital or telecommunication network".[111] We argue that any imprecision in identifying the scope of the word "online" can potentially cause variation in the WTO commitments mentioned above, thereby nullifying or impairing such commitments. The scope of the word "online" extends its operation to all forms of Information and Communications Technologies (ICT), which will trigger three distinct categories of services in the W/120 Classification - namely IT (computer-related) services, telecommunications services and audio-visual services.[112] India's national treatment commitments for the modes of cross-border supply and consumption abroad are as follows –

[110]WTO, Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services adopted by the Council for Trade in Services, WTO Doc S/L/92 (23 March 2001) para 46 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/s/l/92.pdf> accessed 27 March 2021. "Where all modes of supply are "unbound", and no additional commitments have been undertaken in the sector, the sector should not appear on the schedule."

[111]The Finance Act, 2016 (28 of 2016) s 164(f).

[112]Rolf H. Weber and Mira Burri, *Classification of Services in the Digital Economy* (Springer 2012) 51 [*hereinafter* "Weber and Burri"].

W/120 Classification	Cross Border Supply	Consumption Abroad
Telecommunication Services	None	Unbound
Computer Related Services	Unbound	Unbound
Audio Visual Services	Unbound	Unbound

As regards computer-related services and audio-visual services, India has not made any commitment under the modes of cross-border and consumption abroad having mentioned 'UNBOUND' in the relevant entries.[113] Therefore, India is not required to fulfil its national treatment or market access obligations in the two sectors that are subject to the equalization levy.

However, in most cases a classification ambiguity arises with respect to computer-related services and telecommunication services. It is increasingly common for sub-categories of computer-related services such as database services and data-processing services to be performed or supplied online using internet telecommunication technologies.[114] In general, there is some agreement that telecommunication services may form the "means of delivery" for many other services including e-commerce.[115] Given the increasing interconnectedness of digital services and the unavailability of a suitable category, India has to comply with its national treatment obligations for telecommunication services. The National Treatment

[113]WTO, GATS Schedule of Specific Commitments: India, WTO Doc GATS/SC/4215 (15 April 1994).
[114]Lee Tuthill and Martin Roy, 'GATS Classification Issues for Information and Communication Technology Services' in Mira Burri and Thomas Cottier (eds), *Trade Governance in the Digital Age* (2012) 157-178.
[115]Weber and Burri (n 112) 74.

principle mandates member countries to accord no less favourable treatment to services and service suppliers of any other Member than it offers to its own *like* services and service suppliers.[116] It could be argued that the domestic services already pay Income Tax, but taxes on income account for individual circumstances including any losses that could be set off in the next year. Foreign services and service suppliers are expected to pay a standardized equalization levy without any regard to losses incurred by the business. The equalization levy is only imposed on non-resident entities which modifies the conditions of competition in favour of domestic services and service suppliers,[117] and as a result, constitutes *de jure* discrimination. The general MFN obligation under GATS requires that India does not discriminate between the services and service suppliers of one country, over "like" services and service suppliers of another country.[118] Such a discriminatory treatment must be based on origin and the equalization levy must be proven to give "less favourable treatment" to services from a given country in comparison to "like services" from other countries.[119] In order to be "like services", they must be substitutable and competitive with each other.[120] The definition of "e-commerce operators" under the Finance Act of 2020 is broadly worded,[121] it can encompass a wide variety of services such as video streaming services, cloud services, and stores that sell goods digitally. An MFN dispute could involve for example, a claim from the United States that

[116]GATS (n 95) art XVII.
[117]Appellate Body Report, 'Argentina - Measures Relating to Trade in Goods and Services', WTO Doc. WT/DS453/AB/R (adopted 14 April 2016) para 6.103 [*hereinafter* "Argentina – Goods and Services"].
[118]GATS (n 95) art II.
[119]ibid.
[120]Panel Report, 'Japan – Taxes on Alcoholic Beverages' WTO Doc WT/DS8/R (adopted 1 November 1996); Appellate Body Report, 'Japan – Taxes on Alcoholic Beverages' WTO Doc WT/DS8/AB/R (adopted 1 November 1996) para 6.23; Panel Report, 'Korea – Taxes on Alcoholic Beverages' WTO Doc WT/DS75/R (adopted 17 February 1999) para 10.38.
[121]For a discussion on the definition of e-commerce operators, See Text to (n 22), (n 23). See The Finance Act, 2020 (12 of 2020) s 153(ii)(ca).

a South Korean fashion brand selling clothes through a website is getting more favourable treatment than a "like service" from the US selling clothes online. The equalization levy does not differentiate between two different countries and merely places a blunt levy on two defined services across all countries, it neither discriminates nor accords less favourable treatment to any member country per se.

The exemption provided by Paragraph 2 to Article XIV for direct tax measures taken by member countries is not applicable to the equalization levy.[122] Equalization levy is not a tax on income, and is therefore, levied as a charge outside the Income-tax Act, 1961. As we shall show in Part IV,[123] equalization levy is not in the nature of a direct tax and at the most it resembles an indirect tax measure. Even if it is successfully established that the nature of equalization levy is a direct tax, the measure itself must not be arbitrary or unjustifiably discriminatory between countries where like conditions prevail, and must also not operate as a disguised restriction on international trade.[124] The equalization levy functions as a "disguised restriction on international trade" considering it adds to the unpredictability of tax liability. The three caveats "arbitrary discrimination", "unjustifiable discrimination" and "disguised restriction" operate side-by-side and not as individual tests.[125] A concealed restriction that prohibitively impacts foreign services and suppliers in comparison to domestic services and service suppliers, is arbitrary and unjustifiable.[126]

b) Significant Economic Presence Test and the GATS

The SEP test broadly applies to any non-resident making profits from India without a taxable physical presence. In other words, unlike the

[122]GATS (n 95) art XIV.
[123]See discussion infra Part IV.
[124]ibid.
[125]Appellate Body Report, 'United States — Standards for Reformulated and Conventional Gasoline' WTO Doc WT/DS2/AB/R (adopted 20 May 1996) 25.
[126]Some of the factors that contribute to a "disguised restriction on international trade" will be discussed in more detail in Part IV.

equalization levy, the SEP is not limited in its application to indicated sectors. Any dispute arising out of the application of SEP test has to be decided on a case-by-case basis, depending on the sector and mode of supply involved, and the corresponding commitments taken. For example, legal services can be provided digitally by a company that has no physical presence in India. The Services Sectoral Classification List categorizes 'legal services' under the category of professional services. Additionally, there are categories such as 'database services', 'data processing services' that form a part of the core functioning of the digital economy. The SEP test equally applies to legal services provided online and core services, in the determination of whether they have an economic nexus with India that can give rise to tax liabilities. In contrast to the equalization levy that places a blunt charge ignoring any finding of economic nexus or a permanent establishment in India, the SEP is less disruptive as it easily synchronizes with the current international tax rules. The SEP test tries to identify a permanent establishment going beyond the need for 'physical presence' by tailoring the test to include businesses that operate completely online and whose profits or user-base can be sufficiently attributable to India. However, as we shall see, all is not well in the SEP test too.

Unilateral levies on non-residents by provisions in law that do not find place in a mutually agreed tax treaty between the countries can be challenged for a violation of obligations under GATS.[127] Section 90 read along with section 9 of the Income-tax Act, 1961 provide that the double taxation avoidance agreements signed between countries will have an overriding effect over the domestic law, to the extent that the former is beneficial.[128] India has signed DTAAs or limited

[127]GATS (n 95) art XXII:3.
[128]The Income Tax Act, 1961 (43 of 1961) s 9, 90.

agreements with more than 95 jurisdictions[129] and introduction of SEP requires India to renegotiate these treaties considering that fulfilling SEP criteria provides India with taxing rights on income or business profits. In the absence of a provision to recognize SEP in DTAAs, businesses cannot receive credit for tax paid in India in their country of residence, thereby resulting in a cascading effect of taxes. This scenario makes the DTAA's role redundant for digital services.

As the scope of application of SEP is wide, almost any service that can gain profits by operating digitally will come under its scrutiny. Accordingly, it is quite impossible to catalogue the fulfilment of NT commitment in each service and such an inquiry is beyond the scope of this paper. Nonetheless, the SEP test is universally applicable to all non-residents and the text of Explanation 2A to Section 9(1)(i) of the Income-tax Act, 1961 does not specify any qualifications or reservations as regards its territorial scope.[130] Therefore, *prima facie* the SEP does not stand in variance with the MFN obligations under GATS.

Even if there are disputes that challenge taxes placed on non-residents that have a SEP, India can take resort to the 'direct tax' exemption in Paragraph 2 to Article XIV of the GATS.[131] Tax measures have to comply with Article XVII of the GATS (NT), except where such tax has been imposed for ensuring "the equitable or effective imposition or collection of direct tax in respect of services or service suppliers of other Members".[132] This exemption comes with two qualifiers, that the measure in question must not be arbitrary or unjustifiably discriminatory between countries where like conditions prevail, and it must not operate as a disguised restriction on international trade in

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[129]See Income Tax Department, 'Double Taxation Avoidance Agreements' <https://incometaxindia.gov.in/Pages/international-taxation/dtaa.aspx> accessed 27 March 2021.
[130]The Income Tax Act, 1961 (43 of 1961) Explanation 2A to s 9(1)(i).
[131]GATS (n 95) art XIV:2.
[132]ibid.

services. Thus, although Article XIV provides a direct tax exemption, the WTO's panel is allowed to rule on the measure's congruence with the two qualifying tests.

Although the SEP test is not arbitrary or unjustifiably discriminatory between countries where like conditions prevail or act as a disguised restriction on international trade, it has been introduced unilaterally and without specific incorporation into the tax treaties. As SEP is in the form of a test to determine taxable nexus, and the tax itself is on the income of non-residents to which both resident and source countries have taxing rights, renegotiation of DTAA can help ensure simplicity and predictability.[133] Shri Shiv Pratap Shukla, Minister of State for Finance in a written reply to a Question in Rajya Sabha (Council of States) on 12 February 2019 stated that in respect of countries that already have a DTAA with India, the SEP will be effective only upon renegotiation of the treaties.[134] However, the Finance Act of 2020 mentions that the provisions concerning SEP will be effective from 1 April 2022, without any specific mention of DTAAs.[135] In its current form the SEP test has been incorporated directly into the domestic tax law as a nexus test to determine "Business Connection" and if fulfilled, such business profits shall be chargeable to tax under the "Income from Profits and Gains of Business or Profession" head of Income-tax Act of 1961.[136] Presently, the Finance Act of 2020 unilaterally includes the SEP to expand the definition of business connection in India.

Transnational tax measures that are unilaterally imposed by one country, cannot directly be the subject of a WTO dispute as it does not fall within the language of the substantive obligations. Even if it is

[133]See text to (n 3), (n 4).
[134]Government of India, 'Taxation of Digital Businesses' (12 February 2019) <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1564086> accessed 27 March 2021.
[135]The Finance Act, 2020 (12 of 2020) s 5.
[136]Akhilesh Ranjan Committee Report (n 12) 73.

considered violative of the substantive obligations, it can take shelter under the exemption for collection of direct taxes. Aside from organizational competence to intervene in direct tax measures, there are also systemic considerations that arise in any intervention to the collection of direct taxes as they are the sole prerogative of the State and is one of the highest privileges of sovereignty.[137] The GATS exemption has strong normative reasons and should not be disturbed until there is a fundamental shift in the collection of direct taxes.

In fact, among the three options presented, the SEP test can easily harmonize with existing domestic laws and tax treaties on taxation, with less disruption.[138] The threshold number of users or aggregate of payments method can delineate "high risk" businesses, if such threshold is high enough to minimize double-taxation. The current thresholds of two crores aggregate payments and three lakhs users to trigger SEP, casts the wide net on many businesses that may not necessarily pose high risk of tax evasion. Businesses can determine their tax liabilities well in advance through SEP test than equalization levy, as the latter varies according to the consideration received in every transaction.

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[137]For more discussion on this See Christian L. Neufeldt, 'The WTO and Direct Taxation: Direct Tax Measures and Free Trade' (2018) 59 HILJ <https://harvardilj.org/wp-content/uploads/sites/15/Neufeldt_FORMATTED-1.pdf> accessed 27 March 2021.

[138]OECD, 'Tax Challenges of Digitisation, Comments received on the request for input – Part II' (25 October 2017) <https://www.oecd.org/tax/beps/tax-challenges-digitalisation-part-2-comments-on-request-for-input-2017.pdf> accessed 27 March 2021.

IV. THE EFFECTS OF AN INDETERMINATE DIGITAL TAX ENVIRONMENT ON INTERNATIONAL TRADE AND COMPETITIVENESS

This chapter will look at six different aspects in which the digital tax measures proposed by India as a temporary solution could possibly do more harm than good. It particularly addresses the effects of indeterminate digital tax environment on international trade and competitiveness.

A. The Nature of Equalization Levy: A Quasi-Levy?

Even though the equalization levy was introduced *via* The Finance Act of 2016, it was not contained within the specific chapters for direct taxes or indirect taxes. Instead, it was provided for in a separate Chapter VIII indicating that the Parliament had not explicitly categorized the equalization levy as direct tax. The massive expansion by the Finance Act of 2020 to include all "e-commerce operators" necessitates the classification of equalization levy either as a direct tax or an indirect tax to understand its implications. Introduced outside the scope of the IT Act, 1961 as an independent levy, the equalization levy is not a tax on the income of a person. The original distinction between direct and indirect taxes was introduced by Atkinson arguing that "…the essential aspect of the distinction [is] the fact that direct taxes may be adjusted to the individual characteristics of the taxpayer, whereas indirect taxes are levied on transactions irrespective of the circumstance of the buyer and seller".[139] Our design of domestic tax laws has been closely inspired from Atkinson's idea to draw distinctions based on adjustment to

[139] A.B. Atkinson, 'Optimal Taxation and the Direct versus Indirect Tax Controversy' (1977) 10 CJE 590-696 [*hereinafter* "Atkinson 1997"]; See A.B. Atkinson and J. E. Stiglitz, 'The Design of Tax Structure: Direct versus Indirect Taxation' (1976) 6 JPE 55-75.

individual characteristics.[140] Although equalization levy takes the *form* of a direct tax levied on consideration assumed to become a part of income, in substance it operates as an indirect tax for several reasons. Firstly, the equalization levy is charged on a consideration-basis, i.e., for each transaction in the provision of services or online sale of goods, without any regard to individual characteristics of the business.[141] Secondly, direct tax is based on "permanent facts" such as existence, possession or profession, but indirect tax hinges on the existence of intermittent facts such as the receipt of consideration for the supply of goods or services.[142] Thirdly and most importantly, the capability of being passed on to the ultimate consumer is central in indirect taxes.[143] The equalization levy fails in having its intended effect of a direct tax because it is levied on a consideration-basis in the hope that the financial burden will be passed on to the sellers by the buyers of specified services. It merely has the appearance of a tax on profit or income, but in reality, it is levied without any reference to the circumstances of the seller and can be passed on to the consumer when price increases. Therefore, the intrinsic nature of the levy is an indirect tax, though the form appears to be one of direct tax. At best it can be reasonably concluded that it is a quasi-levy which in substance is an indirect tax.

The Akhilesh Ranjan Committee Report classified equalization levy as a transaction tax akin to the Security Transaction Tax and Service Tax, both of which were transaction-based taxes.[144] The chargeable events for equalization levy are advertising services and e-commerce

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[140]Taxation systems around the world characterize indirect taxes as bound by the 'rule of uniformity, in contrast to direct taxes that are in line with the 'rule of apportionment'. See Erik M. Jensen, 'The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?' (1997) CLR 2334-2419.
[141]The Finance Act, 2020 (12 of 2020) s 153.
[142]Atkinson 1997 (n 139).
[143]See *Chhotabhai Jethabhai Patel and Co v The Union of India* AIR 1962 SC 1006; *Godfrey Phillips (I) Ltd. & anr v State of U.P.* (2005) 2 SCC 515.
[144]Akhilesh Ranjan Committee Report (n 12) 86.

supply or services.[145] The latter requires an e-commerce operator to engage in "online sale of goods" or "online provision of services".[146] The taxable event in cases of "online information and database access or retrieval services" under the Integrated Goods and Services Act of 2017 (IGST Act) is also 'supply' of goods or services.[147] Thus, there is a possibility that this transaction involving "supply of goods" or "provision of services" carried out online might be subject to both equalization levy and the goods and services tax (GST) for the same aspect of 'supply'. To draw a contrast, reference can be made to the levy of excise and sales tax on goods. Although both are taxes on goods, the chargeable event for excise tax is 'manufacture of goods' whereas for sales tax it is 'sale of goods'.[148] This distinction in the chargeable event is absent in case of equalization levy and GST, thereby presenting a case of two charges under two different enactments for the same chargeable event. While the Income Tax Act precludes the addition of any income subject to the equalization levy to the 'total income' of an assessee under that Act,[149] the GST Act makes no such exclusions to avoid double internal taxation. Moreover, the main motive of imposing the equalization levy was to provide an alternative way to recoup losses in taxes, in respect of the digital economy.[150] If the entire purpose was to find an indirect way to tax that event, that could not be taxed directly on income, the true nature of the equalization levy cannot be a direct tax on income.

[145]The Finance Act, 2020 (12 of 2020) s 153.
[146]ibid.
[147]The Integrated Goods and Services Act, 2017 (13 of 2017) s 2(17).
[148]See The Central Excise Tax, 1944 (1 of 1944) s 3 (the duties to be levied are specified in the Fourth Schedule and the taxable event is the 'manufacture of excisable goods); See Delhi Value Added Tax Act, 2004 (3 of 2005) s 3(2); Tamil Nadu Value Added Tax Act, 2006 (32 of 2006), s 3; The Karnataka Value Added Tax Act, 2003 (32 of 2004) s 3 (taxable event in all these cases is the event of 'sale' of goods).
[149]The Income Tax Act, 1961 (43 of 1961) s 10 (50).
[150]Akhilesh Ranjan Committee Report (n 12) 23-28.

Given that tax laws are subject to strict interpretation,[151] the anticipated effect must be provided with certainty. The disputed nature of the equalization levy coupled with its expansive scope warrants its classification as an indirect tax, to make the regulatory environment more predictable and certain. Though the classification of the equalization levy as a direct or indirect tax may not be of critical importance in domestic tax regulatory environment, it has implications in WTO Law. Direct taxes find place as permissible exceptions to commitments under the GATS, whereas indirect taxes cannot be invoked as exceptions.

B. Extraterritoriality of the Digital Taxes

The scope of the equalization levy also transcends the jurisdiction of the Indian State, to occasionally impinging on transactions that do not have sufficient territorial connection to India. This particular problem emerges in light of the fact that the nexus has been shifted from 'physical presence' to 'internet protocol address located in India', and transactions between two non-residents who use an internet protocol address located in India will also be subject to the equalization levy. Jurisdiction is a central element in the sovereignty of States under International Law.[152] In an increasing number of areas, States have overlapping jurisdictions,[153] including in cases of taxing the profits of MNEs. As co-equal actors, overlapping jurisdictions have conflict-

[151]*Cape Brandy Syndicate v I.R.C.* (1 KB 64, 71) (Rowlatt J.).

[152]For more discussion jurisdiction and sovereignty see among others *State, Sovereignty, and International Governance* (Gerard Kreijen and others (eds), OUP 2002); Peter Dietsch, 'Rethinking Sovereignty in International Fiscal Policy' (2011) 37 RIS 2107-120; John H. Jackson, 'Sovereignty-Modern: A New Approach to an Outdated Concept' (2003) 97 AJIL 782.

[153]For example, countries have overlapping areas of jurisdiction in matters pertaining to international taxation, environment, trade, criminal law, climate change, competition, data privacy. See Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, 2015) [*hereinafter* "Ryngaert 2015"].

generating potential,[154] if not peacefully agreed through mutually beneficial solutions. This is not a unique situation as DTAAs are also a form of legal instrument with international quality that help clarify rules in areas where countries have overlapping jurisdictions. To claim the power to legislate with respect to extra-territorial aspects or causes, that have no nexus with the territory over which the State has jurisdiction, would effectually result in a claim of dominion over foreign territories. Therefore, unilateral tax measures negate the principle of self- determination, peaceful co-existence of nations, and co-equal sovereignty of nation-states.

Extra-territorial jurisdiction is not automatically barred in international law, but the State seeking to exercise such jurisdiction outside its territory has to design a law that attributes and asserts sufficient nexus between the persons, properties or activities and its own territory.[155] In the case of interim measures for taxing digital companies, India could for example, establish nexus through effects on its jurisdiction.[156] However, the chosen test to determine reasonable nexus with India has to be clear and non-arbitrary, so as to avoid future litigation in the WTO. This paper shows that the extra-territorial operation of India's digital taxes creates a myriad of scenarios of legal uncertainty and more indeterminacy, reinforcing the potential of unilateral measures to generate conflicts.

[154]Dan E. Stigall, 'International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in US Domestic Law' (2012) 35 HICLR 323, 328; See *GVK Industries v Income Tax Officer* (2011) 4 SCC 36. "Such claims have, and invariably lead to, shattering of international peace, and consequently detrimental to the interests, welfare and security of the very nation-state, and its people, that the national legislature is charged with the responsibility for."
[155]Ryngaert 2015 (n 153) 7.
[156]For a discussion on effects based jurisdiction in international law see among others Cooreman, B.E.E.M., 'Addressing global environmental concerns through trade measures: extraterritoriality under WTO law from a comparative perspective' (June 2016) (Ph.D. Dissertation, Leiden University) (Leiden University Repository) ch 4 <http://hdl.handle.net/1887/40164> accessed 27 March 2021; Jason Coppel, 'A Hard Look at The Effects Doctrine of Jurisdiction in Public International Law' (1993) 6 LJIL 73 (1993).

Article 51 of the Constitution of India seeks to forward the goals of international peace and security by specifically, respecting "international and treaty obligations".[157] Articles 245(1) read with 245(2) of the Constitution of India states that *no law made* by the Parliament shall be deemed to be invalid solely on the ground of extra territorial operation.[158] Thus, a permissible limit has been drawn for the extent of extra-territorial operation.[159] The competence of the Parliament to make laws having extraterritorial operation has been recognised by a Constitutional Bench of the Supreme Court in *GVK Industries*,[160] where the judgement presses a requirement of substantial 'nexus' to India. The effects-based jurisdiction of state sovereignty has been summed up in the judgement by observing that "the Parliament's power to legislate with respect to aspects or causes that occur, arise or exist or may be expected, outside the territory of India" can be authorized by establishing a nexus.[161] This nexus has to delineate the extent of restraint in application of the law, and comprehensive form of construction of the law to show that it is not extra-territorial because it has a nexus with the territory of India.

The executive exercises discretion in the determination of the non-residents who have a business connection through SEP or are required to pay the equalization levy. If the law is not clear and precise in its scope, excessive discretion vested in the executive can lead to

[157]The Constitution of India, 1950 art 51.
[158]ibid arts 245(1), 245(2).
[159]See *Trustees Executors & Agency Co Ltd v Federal Commissioner of Taxation* (1933) 49 CLR 220; *Electronics Corporation of India v Commissioner of Income Tax*, AIR 1989 SC 1701 (CJ Pathak). "The provocation for the law must be found within India itself. Such a law may have extra-territorial operation in order to subserve the object, and *that object must be related to something in India*. It is inconceivable that a law should be made by parliament which has no relationship with anything in India." (emphasis added).
[160]See *GVK Industries v Income Tax Officer* (2011) 4 SCC 36 [*hereinafter* "GVK Industries"]; *Electronics Corporation of India Ltd v CIT* (1989) 183 ITR 44 (SC).
[161]GVK Industries (n 160).

arbitrary decision making.[162] Considering this position, we argue that the scope of the equalisation levy is overbroad and can extend to transactions which do not have sufficient nexus to India. The absence of such nexus itself can be an independent ground for challenging its validity before the constitutional courts of India.

In four distinct scenarios, the Finance Act of 2020 moves the 'physical presence' requirement to a nexus solely based on "internet protocol address located in India". Under Section 153(iv) of the Finance Act of 2020, equalization levy shall be charged at the rate of 2% of the consideration from e-commerce operators if a resident has bought a good or service through an internet protocol address located in India.[163] It can also be charged if consideration is received from a non-resident who accesses the advertisement, or if the consideration received for selling data collected from such a non-resident through an internet protocol address located in India.[164] These parameters have also been included in the same language, as Explanation 3A to Section 9 of the Income-tax Act as factors to establish "business connection" in India when advertisements, sale of goods or services, and sale of data are done through an IP address located in India.[165] Thus, the feature that establishes territorial link with the state is not just 'physical presence', but also includes 'internet protocol address located in India'. We argue that this shift in the nexus is extraterritorial because it can potentially involve transactions between two non-residents that have no territorial nexus with India other than the singular factor of having used an IP address located in India.

Using "IP address located in India" as the link could potentially include transactions between two non-residents for sale of

[162]See *Dwarka Prasad v State of Uttar Pradesh* (1954) SCR 803; *J.K. Agarwal v Haryana Seeds Development Corporation* AIR 1991 SC 1221; *Coimbatore District Bank v Employees Association* (2007) 4 SCC 669.
[163]The Finance Act, 2020 (12 of 2020) s 153(iv).
[164]ibid s 153(iv) (3).
[165]The Income Tax Act, 1961 (43 of 1961) Explanation 3A to s 9.

advertisements intended to target Indian customers. Unless a business decision made by a company specifically restricts access to the IP address located in India, non-residents accessing their advertisements through IP addresses located in India, can also become a 'link' to collect equalization levy. Furthermore, transactions between two non-residents for the sale of data collected from Indian residents or non-residents using IP address located in India, are also liable to pay equalization levy. In another scenario, a non-resident who engages in a transaction with a website (for e.g., to promote an advertisement) hosted in an Indian server may also have to pay an equalization levy to the Indian government.

Businesses that have data centres or servers located in India for financial advantages, infrastructure flexibility, speed, etc. would have to determine whether the IP addresses of their individual customers are located in India or not, to make a reasonable determination of their tax liabilities. Technology and privacy related challenges may arise in requesting for the IP addresses of all customers, to identify their locations. Given that India seeks to localize data by mandating the storage of a copy of data in a local server,[166] upon enforcement of the personal data law, many IP addresses may be located in India giving rise to an expanded scope of taxing rights. This can already be seen with companies making business decisions whether or not to build data centres in India. For example, Facebook and TikTok have been storing data from its Indian users in a server located in Singapore.[167] With the Personal Data Protection Bill of 2019 (PDP

[166]The Personal Data Protection Bill, 2019 (373 of 2019) s 33 [*hereinafter* "PDP Bill 2019"]. For discussion on the implications of personal data law on digital taxation measures See infra Part IV.D.

[167]Nour Al Ali, 'TikTok Says Indian Users' Data Located in Singapore Servers: DJ' (*Bloomberg Quint*, 3 July 2020) <https://www.bloombergquint.com/business/tiktok-says-indian-users-data-located-in-singapore-servers-dj> accessed 27 March 2021; 'Here's Why Facebook CEO Zuckerberg Has Fears About Localising Data' (*The Quint*, 29 April 2019) <https://www.thequint.com/tech-and-auto/tech-

Bill), there is a requirement for all companies to have a server located in India and consequently the personal data law expands the coverage of the equalization levy.

These considerations raise serious questions about the expansive scope of the equalization levy. Accordingly, using 'internet protocol address located in India' as the factor to establish territorial nexus would not be a sufficiently precise link to exercise jurisdiction. Further only exacerbating the problem is a lack of specific restraints in the exercise of a jurisdiction based on IP addresses.

C. The Incidence of Levy as "Online Sale of Goods"

The Finance Act of 2020 amended certain aspects of the equalization levy initially proposed in 2016. The statutory definition for equalization levy was expanded to include consideration received or receivable from "e-commerce supply or services".[168] Online sale of goods owned or facilitated by an e-commerce operator can be construed as "e-commerce supply or service".[169] Even when defining "e-commerce operators" under Section 153(ii)(A)(ca), it included persons who "own, operate, or manage" an electronic facility or platform, for "online sale of goods" or "online provision of services".[170] The term "online" is defined under Section 164(f) of the Finance Act of 2016 which makes reference to the internet as a medium for sale of goods or provision of services.[171]

The sale of movable property in India is governed under the Sale of Goods Act, 1930, which provides that the transfer of title in movable property by way of sale can only be effected by delivery of goods

news/facebook-mark-zuckerberg-data-localisation-concerns-india> accessed 27 March 2021.
[168]The Finance Act, 2020 (12 of 2020) s 153(ii)(B).
[169]ibid s 143(ii)(A)(cb).
[170]ibid s 153(ii)(A)(ca).
[171]ibid s 164(f).

from the seller to the buyer.[172] To that end, Section 19 of the Sale of Goods Act lays specific emphasis on the *time of transfer* of the specified goods, and consequently, the good passes when it is *intended to pass*.[173] Accordingly, the completion of a 'sale of good' is dependent on the intention of parties, terms of the contract, conduct and other relevant circumstances. In case there is no different intention, provisions contained between Sections 20 to 24 shall apply in order to determine intention and at the time at which property in goods passes to the buyer.[174]

The phrase 'online sale of goods' is unclear as it could be taken to mean both 'sale' of goods effected online, or a mere agreement to sell where the 'sale' aspect is only completed upon consequent delivery or transfer of title by delivery from seller to buyer. Undoubtedly, going by the literal interpretation of the phrase used, it is difficult to construe 'online sale of goods' to also include the plethora of online transactions in e-commerce that are only in the form of agreement to sell. Potential litigation could have arisen if the term was left undefined. However, the Finance Act of 2021 has provided a definition of online sale of goods and online provision of services, that includes elements of agreement to sell thereby resolving the issue.[175] The definition includes one or more of the following as an 'online activity': acceptance of offer for sale; or placing of purchase order; or acceptance of the purchase order; or payment of consideration; or supply of goods or provision of services, partly or wholly.[176] Firstly, the stated definitions expand the scope of the equalization levy to instances where although payment has been made online, but all other activities associated with the sale have been rendered physically. Previously, equalization levy targeted

[172]The Sale of Goods Act, 1930 (3 of 1930) s 5.
[173]ibid s 19.
[174]ibid s 24-25.
[175]The Finance Act 2021 (13 of 2021) s 171(a)(ii).
[176]ibid.

transactions that were arising out of "online sale of goods or online provision of services or both”.[177] Without the aid of the current definition, the ordinary meaning of this phrase lays bare that the sale of good or provision of service was supposed to be entirely online. The current definition expands the ordinary meaning to include sale of goods where one or more of the activities are conducted through an ‘online’ medium. This implies that the entire sales transaction need not be ‘online’ and it is enough if one or more parts of the transaction is online.

Secondly, inclusion of the aspect of an agreement to sell does not, in and of itself, provide clarity to the ‘sale’ aspect. The equalization levy has as its chargeable event ‘sale’, and the term ‘sale’ for the purposes of the Sale of Goods Act gets completed only upon delivery of the good and not mere acceptance of the offer for sale. Even though the equalization levy may be charged during the time when an offer for sale is accepted by a buyer who pays consideration, the sale itself is contingent and may or may not happen. In a scenario where the buyer cancels the order or the seller refuses to sell, the equalization levy would still be charged even though the taxable event of sale has not ultimately occurred. Certainly, the events of cancelling an order or refusing to sell are within their contractual abilities as it is still an “agreement to sell” until it is actually delivered.[178] Therefore, until the title in the goods has passed from the seller to the buyer, a mere payment of consideration cannot be conclusive proof of sale. Typically, in such cases e-commerce services and service suppliers offer for refunds and replacement of products, and the question of whether the equalization levy would also be refunded still remains. In any case, as a matter of principle, if the taxable event fails, it must follow that the charge of equalization levy also fails.

[177]ibid.
[178]The Sale of Goods Act, 1930 (3 of 1930) s 4.

International Law recognizes the freedom of contract, and particularly the right of business people "*to decide freely* to whom they will offer their goods or services and by whom they wish to be supplied, as well as the *possibility for them freely to agree on the terms of individual transactions*, which are the cornerstones of an open, market-oriented and competitive international economic order".[179] However, the intrinsic assumption behind the equalization levy is such that it presumes all agreements to be completed contracts, and does not freely allow the potential contingencies that the 'freedom of contract' allows. The equalization levy's terrain of operation assumes that consideration received for every "agreement to sell" constitutes a sale and can be taxed accordingly. Such an approach can create distortions in contractual freedom and international competitiveness.

D. Tax Implications of the Personal Data Protection Bill of 2019

Digital taxes need to be in a suitable data privacy regulatory environment, for it to not pose "difficult cases" of taxation. Some of these difficult cases arise due to inadequate or absence of an appropriate legal environment. India is only now gearing up to its own data privacy law,[180] and therefore users who use virtual private networks due to privacy concerns may escape their tax liabilities as the criterion of "IP address located in India" can easily be manipulated using other forms of technology developed for this purpose.[181] This is also the case when a transaction between two non-residents that does not cement any form of territorial nexus is also taxed solely for its link with an IP address located in India. Other difficult cases include users who frequently cross borders, or register

[179]UNIDROIT Principles of International Commercial Contracts 2016, art 1.1., <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016> accessed 27 March 2021.
[180]The Personal Data Protection Bill, 2019 (373 of 2019).
[181]Among other possible ways, a virtual private network or browsers such as 'Tor' can be easy loopholes to escape tax liability.

with a website or platform while traveling, or the IP address contradicts the intended destination of advertising.

Even before introducing the interim digital taxes, the judiciary had to decide on questions that involved the digital economy as an accessory to other businesses.[182] In India, the Income Tax Appellate Tribunal has ruled that hosting servers located in India is sufficient to infer the existence of a permanent establishment under Article 5 of the OECD Model Tax Convention.[183] Members of the OECD's Committee on Fiscal Affairs have agreed that a server can constitute a permanent establishment if it performs a "significant as well as an essential or core part of the business activity of the enterprise".[184] In other words, the maintenance of a server solely for preparatory or auxiliary work would not constitute a permanent establishment.[185] Therefore, in particular cases, the existence of a server itself can enable the source country with the power to tax. India has mandated the presence of servers of all businesses that deal with personal or in some cases non-personal data through two specific measures:

Firstly, the Reserve Bank of India (RBI) had mandated all payment system operators in the country to store payments related data in India as a "safety and security" measure.[186] However, most payment system operators centralize their servers for fraud monitoring or for serving as a back-up repository. Even otherwise, this Circular asks all payment system operators to have a local server in India and

[182]Electronic Commerce (n 98).

[183]See *ITO v Right Florists Pvt. Ltd.* [2013] 32 taxmann.com 99 (Income Tax Appellate Tribunal, Kolkata).

[184]OECD, 'OECD Countries Agree on the Interpretation of a Key Condition for Taxing Profits from Foreign E-Commerce Business' (9 January 2001) <https://www.oecd.org/ctp/treaties/oecdcountriesagreeontheinterpretationofakeyconditionfortaxingprofitsfromforeigne-commercebusiness.htm>.

[185]OECD Model Treaty (n 4) arts 5(4)(e)-(f).

[186]Reserve Bank of India, Storage of Payment System Data, RBI/2017-18/153 (2018), <https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=11244> accessed 27 March 2021.

disallows transaction with Indian customers through servers located elsewhere. The presence of a server implies a fixed place of business as a permanent establishment. Privacy concerns also arise in relation to this mandate as the requisite data includes "end-to-end transaction details/ information collected/ carried/ processed as part of the message/ payment instruction". Purposively, this could only mean transaction related data, but on a plain reading even customer identifications can fall under its net.

Secondly, Section 33 of the PDP Bill requires every entity processing "sensitive personal data"[187] or "critical personal data"[188] to ensure the storage of at least one local copy of data in a server located in India. In effect, it mandates every entity processing such categories of personal data to have a local server, that can be construed as a permanent establishment of a non-resident. The Bill's stringent requirements can impact consumer engagement in sectors which follow a data-driven approach (e.g., financial services) but such an inquiry into the costs of shifting to the PDP Bill framework is beyond the scope of this article. Additionally, the Draft National Policy on e-commerce also proposed that e-commerce websites and social media companies must store customer data in India through local servers. With much pressure from e-commerce players such as Amazon and Flipkart, data localization norms were kept out of the final policy.[189]

E. Legal Uncertainty caused by Unilateral Tax Levies

The central issue confronting unilateral digital taxes is not only because of its incongruence with international laws and the guiding principles given by OECD for the introduction of interim measures,

[187]PDP Bill 2019 (n 166) s 3(36).
[188]ibid Explanation to s 33. The expression "critical personal data" means such "personal data as may be notified by the Central Government to be the critical personal data."
[189]Asit Ranjan Mishra, 'Data storage rules out of e-commerce policy' (*Live Mint*, 26 June 2019) <https://www.livemint.com/politics/policy/data-storage-rules-out-of-e-commerce-policy-1561488393145.html> accessed 27 March 2021.

but also for the 'legal uncertainty' it causes. The indeterminacy of digital taxes can be seen both in the wide-scope of interim measures introduced by countries ('the design problem') and the OECD's part in contributing to such indeterminacy ('the selectivity problem').

Laws formulated as interim measures are expected to be in compliance with some core principles of international tax that are often reiterated in OECD Reports – "neutrality, efficiency, certainty and simplicity, effectiveness and fairness, flexibility and sustainability, and proportionality".[190] In order to fulfil them any interim measure to address tax challenges arising out of digitalization has to be (1) temporary (2) targeted, (3) minimise double-taxation, (4) minimise impact on start-ups, business creation and small businesses more generally, and (5) minimise cost and complexity.[191] Digital taxes that do not try to account for these factors will suffer a 'design problem' and can be the subject of disputes on its scope, extra-territoriality, and interoperability with other laws. Although India's digital taxes are temporary, they are not as targeted as possible and include even businesses that only pose low risk. As such its expansive scope can also potentially be struck down for being extraterritorial as they lack the requisite territorial nexus to the country. Tax laws are not subject to purposive interpretation,[192] and therefore the law has to be precise and clear, so as to bolster compliance and administration. Non-resident companies have to make business decisions to factor in the costs of compliance and make any changes for tax planning. In other words, even an interim measure has to provide planning opportunities for businesses. However, if the compliance with an interim-measure involves significant costs and stunts business activity, it can make certain businesses (and smaller ones more generally) economically unviable. This can already be seen with price

[190]See 1998 Electronic Commerce Report (n 28).
[191]2018 Interim Report (n 63) 180.
[192]See Text to (n 159).

increases of large companies such as Google[193] and Apple[194] to reflect the costs of new digital in France and India respectively, and it is only a matter of time before small businesses respond.

The legal uncertainty surrounding digital tax has only risen with years of (in)action from the OECD on the effects of digitalization on collection of tax. Having begun its work on e-commerce in 1997 and nearly twenty-five years now, there have been no conclusive recommendations. Unilateral actions taken by countries such as India and France have been informed by the options laid in the 2015 Final Report of the OECD, though the Report itself did not recommend moving forward with any of them as an interim measure considering their possible negative effects of raising "systemic issues" in international tax.[195] However, since the presented three options – equalization levy, significant economic presence test, and withholding tax, were the first concrete selections explored, countries began to consider them as possible interim measures unilaterally. In a way, the long inaction coupled with the increasing profit margins of digital services that were evading tax liabilities, has pushed countries to resort to unilateral digital taxes. This presented a potential space for countries to double tax the same transaction, asserting conflicting rights to tax. The latest Pillar One blueprint has completely done away with the three options replacing it with a technically detailed version with clearer rules for profit reallocation and nexus. It has also proposed a solution to eliminate double taxation, which involves both identifying the paying entities and methods to eliminate double

[193]'Google flags higher ad rates in France, Spain after digital tax' (*Live Mint*, 5 March 2021) <https://www.livemint.com/companies/news/google-flags-higher-ad-rates-in-france-spain-after-digital-tax-11614963626833.html> accessed 27 March 2021.

[194]Shomik Sen Bhattacherjee, 'Apple Will Increase App Store Prices in India To Reflect 2% Equalization Levy', (*Mashable*, October 2020) <https://in.mashable.com/tech/17918/apple-will-increase-app-store-prices-in-india-to-reflect-2-equalization-levy> accessed 27 March 2021.

[195]Action Plan (n 44) 13; 2015 Final Report (n 7) paras 340, 376.

taxation. Approaches have been considered including a marketing and distribution profits safe harbour which adjusts the quantum of Amount A allocated to eligible market jurisdictions in specific circumstances, and a domestic business exemption.[196]

Moreover, the authoritative value of the OECD Commentaries and associated reports is at best disputed. Their relevance has been debated by scholars,[197] and the OECD's Committee on Fiscal Affairs for its part stated that updated commentaries are not relevant to the interpretation or application of previously concluded treaties.[198] Others view that updated commentaries can constitute "subsequent practice" under Article 31(3)(b) of the Vienna Convention on the Law of Treaties (VCLT) when it clarifies any ambiguity in the provisions.[199] In India, there are varying views on the preferred course of action in cases where the DTAA has not defined a term. Section 90(3) of the Income-tax Act of 1961 specifies that any undefined term in a DTAA shall have the meaning assigned to it by 'notification' issued for the purpose by the Government.[200] The Supreme Court of India clarified that if a term is not defined in a DTAA, resort could also be made to the domestic tax law.[201] Judicial approach towards using OECD commentaries and reports as interpretive aids have

[196] Pillar One Blueprint (n 67) 121.

[197] For more discussion on the authoritative value of the OECD's work in international tax, among others see *The legal status of the OECD commentaries - Volume 1* (Sjoerd Douma and Frank Engelen (eds), IBFD 2008); Hugh J. Ault, 'Reflections on the role of the OECD in developing international tax norms' (2008) 34 BJIL 757; Michael Lang and Florian Brugger, 'The role of the OECD Commentary in tax treaty interpretation' (2008) 23 ATF 95 (2008) [*Hereinafter* "Lang and Brugger"]; Ulf Linderfalk and Maria Hilling, 'The Use of OECD Commentaries as Interpretative Aids-The Static/Ambulatory–Approaches Debate Considered from the Perspective of International Law' (2015) 1 NTJ 34-59.

[198] OECD, 'Commentaries on the Articles of the Model Tax Convention' (2005) <https://www.oecd.org/berlin/publikationen/43324465.pdf> accessed 27 March 2021.

[199] Lang and Brugger (n 197).

[200] The Income Tax Act, 1961 (43 of 1961) s 90(3).

[201] *CIT v P.V.A.L. Kulandagan Chettiar* 267 ITR 654 (SC).

sometimes been found useful,[202] and sometimes "inappropriate".[203] In most cases they do feature in judgements because tax payers or tax authorities alike, have only preferred to refer to the updated OECD commentaries when it is supportive of their claims.[204] This selectivity is also seen in using OECD commentaries and reports as the basis for new legislations. While the 2015 Final Report did not particularly make any recommendations, the three simple and clean options presented were enticing as an interim measure to countries. In terms of actual implementation however, they present legal uncertainty and distorts international trade and its core values of predictability and stability.

F. Indeterminacy in digital taxes can affect international competitiveness

Interim digital taxes that are causing legal uncertainty not only have the potential of leading to double-taxation, but they can also affect international competitiveness. A measure that operates as a "disguised restriction on international trade" modifies the conditions of competition in favour of domestic services or service suppliers.[205] Increasing trade related to the digital economy necessitates that any interim tax measures can also significantly impact trade and competitiveness. International competitiveness has been varyingly defined by the OECD, the World Economic Forum and the tax policy

[202]See *UOI v Azadi Bachao Andolan* 263 ITR 706 (SC); *CIT v Vishakhapatnam Port Trust* 144 ITR 146 (AP); *Motorola Inc v DCIT* 95 ITD 269 (Del); *Metchem Canada Inc* 100 ITD 251 (Mum Trib).

[203]*See CIT v S.R.M. Firm & Others* 208 ITR 400 (Mad); *SNC Lavalin / Acres Inc v ACIT* 15 SOT 1 (Delhi ITAT); *CIT v P.V.A.L. Kulandagan Chettiar* 267 ITR 654 (SC).

[204]In *UOI v Azadi Bachao Andolan*, one of the central justifications offered was that the OECD commentaries "were in support of the view" of the bench on the interpretation of Article 4 of the Indo-Mauritius DTAC. In contrast, the Madras High Court in *CIT v S.R.M. Firm & Others* opined that the OECD commentaries "cannot also afford a safe or reliable guide or aid for such construction."

[205]*Argentina – Goods and Services* (n 117) 6.103.

debates in countries.[206] The indicators developed to assess the "What" and "How" of competitiveness largely remain the same, highlighting the need for suitable (1) policies and regulations, (2) institution, (3) infrastructure and (4) social and knowledge infrastructure[207] to increase innovation and productivity. On this basis, basic factors that any interim tax measure has to account for are disproportionate burden in the form of concealed protection, double-taxation of a broad range of digital services, and compliance costs.

The Akhilesh Ranjan Committee Report that forms the basis of these new digital taxes does not really have as its intention a temporary measure that can replace the physical presence requirements for 'high risk' digital services. It states in its Report that the equalization levy could motivate businesses to establish permanent establishments in India by establishing an office or a server, and thereby fall outside the scope of equalization levy.[208] In this sense, the equalization levy functions as a negative externality for business models that choose not to have a PE in India. Whether or not businesses choose to have a permanent establishment is purely a commercial decision and can form parts of its strategy for tax-planning. Compelling them to establish PE by imposing a burdensome levy for having no physical presence is coercively interfering with that business decision and the competitive conditions in that sector. This approach disregards the place of small businesses in the digital services sector as its design

[206]Mattine Durand and Claude Giorno, 'Indicators of International Competitiveness: Conceptual Aspects and Evaluation' (OECD, 1998) <http://www.oecd.org/economy/outlook/33841783.pdf> accessed 27 March 2021; Donald J. Marles, 'Taxes and International Competitiveness' (*CRS Report for Congress*, 11 March 2018) <https://www.everycrsreport.com/files/20080311_RS22445_959c591702353b4e28ea93d35f2b5dd5e8ac1ddf.pdf> accessed 27 March 2021; WEF, 'The Case for Trade and Competitiveness' (September 2015) <http://www3.weforum.org/docs/WEF_GAC_Competitiveness_2105.pdf> accessed 27 March 2021, 10 [*hereinafter* "WEF on Competitiveness"].
[207]See WEF on Competitiveness (n 206).
[208]Akhilesh Ranjan Committee Report (n 12) 101.

does not account for all businesses in the digital economy *equally and consistently*, and rather targets the entire sector as monopolistic rents of large MNEs.

As Chang-Fa Lo argues the 'disguised restriction on international trade' requirement in the exemptions, is similar to the national treatment obligation.[209] He relies on the Appellate Body Reports of Korea – Alcoholic Beverages and Japan – Alcoholic Beverages that state, "The broad and fundamental purpose of Article III [of the GATT] is to avoid protectionism in the application of internal tax and regulatory measures. ... Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products. ... Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products."[210]

Accordingly, any concealed restriction can prove to be burdensome as equalization levy, for example, is charged on consideration-basis and not on the profits. Even though, *prima facie,* the equalization levy does not violate its MFN or NT obligations, the domestic tax law structure is not as burdensome as the new tax measures. India cannot equate the equalization levy to the "Income from Profits and Gains of Business or Profession" that domestic services or service suppliers are subjected to.[211] In international tax there exists a difference in principle between taxes imposed on revenues and profits, in which the former exacerbates tax burdens by imposing blunt levies. A tax levied

[209]Chang-Fa Lo, 'The Proper Interpretation of "Disguised Restriction on International Trade" under the WTO: The Need to Look at the Protective Effect' (2013) 4 JIDS 111.

[210]Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WTO Doc WT/DS75/AB/R, WT/DS84/AB/R (adopted 17 February 1999) para 119; Appellate Body Report, 'Japan – Taxes on Alcoholic Beverages' 16 WTO Doc WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted 1 November 1996) para 97.

[211]The Income Tax Act, 1961 (43 of 1961) s 28.

on consideration-basis is particularly unsuited for the digital economy as most businesses tend to have low-or zero-margin profits, although value creation occurs through other means by data and user participation.[212] In contrast, a domestic entity engaging in digital services is only paying taxes on its income or profits. Even in cases where it suffers loss, the domestic tax law exempts such entities from paying taxes and even allows for setting off losses against future taxable amounts.[213] On the contrary, without any consideration to the individual characteristics of the businesses and its performance, all advertising services and e-commerce operators are expected to comply with the new digital taxes.

Furthermore, the provision has been expanded to include a broad range of digital services, as it tries to include the many services that come under the definition of "e-commerce operators". The definition attracts the vast expanse of entities that sell or facilitate online sale of goods or online provision of services. Taxability based on usage of IP address located in India makes the digital taxes succumb to double-taxation. The OECD urges countries to only impose targeted measures in order to avoid double-taxation. A measure is targeted, only if it uses definitive and precise nexus rules and also draws exemptions for all unique cases to avoid unintended effects. India's digital taxes have been hurriedly introduced with very weak nexus rules, that can open the floodgate for future litigation.

MNEs usually have to pay taxes in multiple jurisdictions, and any double counting is usually resolved by mutual agreement in a DTAA. A company offering digital services in India, will be paying income tax to country of residence and export taxes, if any. It will also be paying customs duties in India, if they are applicable on the good or service. IGST and equalization levy are hinged on the same chargeable event of "online sale of goods" or "online provision of

[212]2014 Deliverable (n 2) ch 4.
[213]The Income Tax Act, 1961 (43 of 1961) s 72.

services" thereby causing a cascading effect. An unclear tax framework can disincentivize both business activities and investments in India.

Finally, the costs of complying with new laws also impacts international competitiveness and the OECD for its part, requires the compliance costs for interim tax measures to be least burdensome.[214] A combined reading of the new digital taxes and other domestic laws or rules requiring local servers, provides a picture of the increased costs of compliance. Compliance costs may also be higher than the amount of tax paid in some cases, making it an inefficient alternative merely burdening non-resident entities with an uncertain and onerous tax regulatory environment.

V. CONCLUSION: IS THERE A BETTER WAY FOR INTERIM DIGITAL TAXES?

The previous chapter detailed six ways in which India's new digital taxes can operate as a "disguised restriction on international trade" in an arbitrary and unjustifiably discriminatory manner. The bottom-line condition for any interim tax is to strictly comply with the core international tax principles spelt out by the OECD such as neutrality and efficiency, not just in form but also in substance. It needs no mention that countries have not reached a consensus on the merit or the need for interim digital tax measures, as it is commonly recognized that they will give rise to risks and adverse consequences irrespective of any threshold limit.[215]

The OECD expects all interim tax measures to be targeted to avoid the risk of double-taxation. In its current form India's digital tax

[214] 2018 Interim Report (n 63) 189.
[215] ibid ch 6.

measures have a very wide scope resulting in extra-territorial operation of the law. A weak territorial link of "internet protocol address located in India" inevitably falls foul to technological manipulation or the limits of the technology itself. Although the link of an IP address is a compellingly simple solution to establish territorial link, it neither targets nor avoids potential cases of extra-territoriality and double-taxation. Therefore, other options could be explored which do not completely rely on a technical parameter. It could include, for example, a clear case of significant digital presence through user base and profitability.

To minimize the impact on start-ups and small businesses, the tax has to be simple and categorically target only "high risk" services. The OECD prescribes setting a gross revenue threshold that operates as a bright-line test for companies to decide whether they are in or out of the tax provision. India has set its threshold at one lakh rupees of aggregate consideration amounts in the previous year. The threshold of one lakh rupees is extremely low and can expose an unusually large swath of non-resident small businesses and start-ups seeking to do business in India. The current threshold limit must be lifted to a more meaningful amount that minimizes the impact of the taxes on small businesses generally. In case of a low threshold, India could consider including another provision that holistically assesses the global annual turnover to evaluate the ability of the entity to absorb the tax or losses suffered in any given year. Such a provision can work in close conjunction with the threshold limit by exempting start-ups that do not enjoy a profit margin that allows absorption of costs such as taxes, although they are above the threshold limit.

As we have shown, the compliance costs of the digital tax measures are prohibitively expensive, especially because their scope is expansive enough to include small businesses. The OECD recommends that a temporary measure should try and minimize compliance costs to the *minimum extent* possible. The digital tax

measures read in conjunction with the data localization measures proposed by India, make it appear that virtually all companies are required to have servers located in India which automatically makes all transactions liable for payment of equalization levy. Put another way, mandatory presence of a server could be construed to constitute PE and consequently liable for taxation under the DTAAs.

A wobbly framework of justification for introducing interim digital tax measures that run the risk of hindering international competitiveness, could be avoided early than to let it run its course. As the OECD puts it, "Taxes, once introduced, are often difficult to repeal and given the time that may be needed to develop and implement any interim measure, this raises the question whether it is worth introducing a completely new set of rules and related administrative procedures which may apply only for a limited period of time".[216] Among the two measures, the SEP test as a nexus to determine territorial nexus is less distortive and can easily synchronize with the current framework of taxes for a temporary duration. The only trouble left to address is the difficulty of renegotiating the various tax treaties signed with countries. For this reason, India could possibly renegotiate treaties with those markets that have a larger share in the digital services market.

The Pillar One Blueprint has provided a framework for reallocating taxing rights and ensuring that Multi-National Entities that operate as a group are treated as one taxable unit. This change in optic from a single-entity approach to MNE-wise reflects the reality of business models today. Moreover, Pillar One as one its primary features has a group revenue-based threshold, which makes it a favourable multilateral solution. As long as the quantum of revenue distributed among various countries from an MNE's group revenue is fair and equitable, the multilateral solution may be viewed positively by

[216]ibid 179.

majority of the stakeholders. The counterfactual scenario of the Inclusive Framework members not achieving consensus will result in various countries taking unilateral tax measures, resulting in a negative impact on international competitiveness.

Nonetheless, it would have saved both administrative time and compliance costs if India and other countries alike, wait until a global solution is reached. Any poorly designed interim digital tax measure is bound to give rise to future litigation. The countries hurrying into various interim measures are not to bear the blame alone, as the OECD's inaction has also contributed to the long-term indeterminacy surrounding tax issues in the digital economy. Concerted action by both States and the OECD is required to conclude discussions and update relevant rules quickly.