ANALYSIS OF UNILATERAL DIGITAL TAX MEASURES IN DEVELOPING AND EMERGING ECONOMIES USING NIGERIA AS A CASE STUDY: LOOKING BEYOND THE "DIGITAL TAX EXTREMES" IN INTERNATIONAL TAX LAW AND POLICY

by

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DEDICATION

- To all tax practitioners and researchers who have shaped our tax history over the years.

- To the Schulich School of Law at Dalhousie University, for constantly providing a conducive environment for revolutionary graduate legal research and scholarship.

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Abstract

The emergence of digital businesses has disrupted corporate income tax rules in international tax law and policy, which are based on taxable physical presence within a jurisdiction. Digital businesses have little to no physical presence in source countries, which impedes the source countries' ability to tax them. I argue that stakeholders recognize the need to establish new global rules for the allocation of taxing rights in a globalized and digitalized economy. The point of difference lies in the approaches proposed for achieving this required change. I argue that these proposals represent two unacceptable "digital tax extremes": global consensus and unilateralism. Relying largely on the theories of neorealism in international relations and rational pragmatism, I contend that African developing countries need to look beyond the *Digital Tax Extremes* if they wish to succeed in their digital tax drive. I consequently propose an alternative digital tax model for developing and emerging economies.

LIST OF ABBREVIATIONS USED

ADS	Automated Digital Services
ALP	Arm's Length Principle
ATAF	African Tax Administration Forum
AU	African Union
BOJ	Best of Judgment
BEPS	Base Erosion and Profit Shifting
CITA	Companies Income Tax Act (Nigeria)
CIT	Companies Income Tax
COVID-19	Corona Virus
DST	Digital Services Tax
DSTA	Digital Services Tax Act (Canada)
DSTR	Digital Services Tax Regulations (Canada)
ECOWAS	Economic Community of West African States
ETR	Effective Tax Rate
EU	European Union
FIRS	Federal Inland Revenue Service
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GloBE	Global Anti-Base Erosion
ICJ	International Court of Justice
IIR	Income Inclusion Rule
JV	Joint Venture
LFN	Laws of the Federation of Nigeria
LLM	Master of Laws

MFN	Most-Favoured Nation
MLC	Draft Multilateral Convention to Implement Amount A of Pillar One published by the OECD on October 11, 2023
MNEs	Multinational Enterprises
NRCs	Non-Resident Companies
ODTMDEE	Onyeabor's Digital Tax Model for Developing and Emerging Economies
OECD	Organization for Economic Cooperation and Development
PE	Permanent Establishment
PhD	Doctor of Philosophy
QDMTT	Qualified Domestic Minimum Top-Up Tax
RIC	Reasonable Impairment Compromise
SCN	Supreme Court of Nigeria
SDGs	Sustainable Development Goals
SRPC	Strategic Reasonable Political Compromise
STTR	Subject to Tax Rule
TRIPS	Agreement on Trade-related aspects of Intellectual Property Rights
TWAIL	Third World Approach to International Law
OAU	Organization of African Unity
UK	United Kingdom
UN	United Nations
UPE	Ultimate Parent Entity
US	United States of America
UTPR	Under-Taxed Payments Rule
WHT	Withholding Tax
WTO	World Trade Organization

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Chapter 1

INTRODUCTION

Prologue

> "*I find it pretty ironic that tax officials and organizations that are conducting 80% of their meetings online are still hesitant to equate digital presence with physical presence when it comes to source country taxation. Having said that, source countries do need to respect current treaties until renegotiated or terminated. Unilaterally overriding a treaty is also not done.*"[1]

1.1 Background, Research Questions, and Thesis Roadmap

My central research questions are: **(i)** are the existing proposals made by various stakeholders for addressing the tax challenges of the digital economy ideal for, or at the very least acceptable to, developing countries; and **(ii)** if not, what alternative options are best suited to achieving the digital tax objectives of developing countries such as Nigeria, within the framework of international tax law and policy?

To effectively answer these research questions, I start by recognizing that the concept of sovereignty in international law ordinarily suggests that countries have the right to enact and implement within their own national borders, any laws and policies they deem fit on all relevant

[1] Seema Kejriwal Jariwala (She/Her) (International Tax & Transfer Pricing expert and Partner at BMR Legal Advocates, Mumbai) [posted on her LinkedIn page, on January 15, 2024].

matters, including taxation. However, globalization of trade necessitated the development of international tax law and policy[2] to curtail this absolute taxation rights of sovereign states for the purpose of avoiding incidences of double taxation on cross-border trade. This development was aimed at facilitating the free flow of international trade and by extension, improving international relations amongst countries. The basis for allocation of taxing rights in the international tax system is physical presence[3]: A non-resident entity must have some degree of physical presence within a foreign country to be taxable. This principle of international tax is represented in the Permanent Establishment ("**PE**") rules contained in the model tax treaties of both the United Nations ("**UN**") and the Organization for Economic Cooperation and Development ("**OECD**"). It is also contained in the PE rules of various existing bilateral double tax avoidance treaties between countries, such

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[2] The term "international tax law and policy" is used interchangeably with the terms "international tax regime" and "international tax system" in this work. The phrase "international tax regime" is a common feature of international tax scholarship and it is often used alternatively with "international tax system". See generally, Okanga Ogbu Okanga, "Disabusing the Tax Aid Narrative: What Inter-national Tax Equity Really Means for "Poor" Countries and How to (Re)Frame It" (2022), online (blog): Schulich Law Scholars (Schulich School of Law at Dalhousie University) PhD Dissertations – Theses and Dissertations <"Disabusing the Tax Aid Narrative: What Inter-national Tax Equity Reall" by Okanga Ogbu Okanga (dal.ca)> (accessed 27 January 2024). See also, Richard M. Bird, "Are Global Taxes Feasible?" (2018) 25 Int'l Tax Pub Fin 1372; Ana Paula Dorado, "The OECD Unified Approach and the New International Tax System: A Half-Way Solution" (2020) 48:1 Intertax 3. See further, Reuven Avi-Yonah, *International Tax as international Law: An Analysis of the International Tax Regime* (Cambridge, United Kingdom: Cambridge University Press, 2007) at 1, as represented in Okanga Ogbu Okanga, *ibid*: ["This book has a thesis: that a coherent international tax regime exists, embodied in both the tax treaty network and in domestic laws, and that it forms a significant part of international law (both treaty-based and customary). The practical implication is that countries are not free to adopt any international tax rules they please, but rather operate in the context of the regime, which changes in the same ways international law changes over time"]. Reuven Avi-Yonah, *ibid* (at pp. 8–130), as again represented in Okanga Ogbu Okanga, *ibid*, further contends that the "international tax regime comprises" two elements: the single tax principle and the benefits principle. The single tax principle suggests that income should be taxed once, and just once (either at residence or source), while the benefits principle suggests that passive income should be taxed in the country of residence while active income should be taxed in the country of source. In terms of terminology, Diane Ring (as represented in Okanga Ogbu Okanga, *ibid*) takes a more pluralistic view of international tax governance. She opines that there is not one "international tax regime", but rather various regimes, one of which is the double taxation regime. See Diane Ring, "International Tax Relations: Theory and Implications" (2007) 60:2 Tax L Rev 83. Okanga notes that it is also common for scholars to state "international tax order", with the concept of a system or regime seemingly implicit. See, for instance, Allison Christians, "What's Up: BEPS and the New International Tax Order" (2016) 6 BYU L Rev 1603; Adam S Michel, "The Treasury Should Disengage from the OECD Digital Tax Process" (2019) 3445 Grover, Hermann Centre for Federal Budget Backgrounder. However, unlike Okanga, I prefer the term "international tax law and policy", which I use interchangeably with the terms "international tax regime" and "international tax system" throughout this thesis. My preference for the term "international tax law and policy" over the terms "international tax system" and "international tax regime" is mainly informed by my acknowledgment of the broad legal and policy framework (as largely determined by international politics) that governs contemporary international tax concerns.

[3] Jude Odinkonigbo & Emmanuel Onyeabor, "Nigeria's Finance Act 2019 and the Significant Economic Presence Concept: Prospects and Challenges" (2020/2021) 20:1 Uniben Law Journal 1.

as that between Nigeria and Canada. This principle is why prior to the Finance Act 2019 physical presence was the central nexus for income taxation of non-resident companies in Nigeria. Taxable physical presence was established for such companies if they executed a turnkey project, engaged in fictitious transactions with related parties, or had a dependent agent or fixed base of business in the country.[4] Profits derived by these entities from digital activities in Nigeria were not taxable due to the absence of a taxable physical presence in the country.[5]

The reliance on physical presence as the basis for allocation of taxing rights in international tax law and policy was initially not a problem. In fact, it made logical sense at the time of its inception in the early 20th Century.[6] It was practically impossible for non-resident entities to do business and earn income from foreign countries without having some degree of physical presence within those countries and it was difficult to enforce tax liabilities where the taxpayer had no physical presence.[7] However, globalization and digitalization of the economy[8] has made obsolete the current basis for allocation of taxing rights in international tax law and policy. Concerns range from the taxability of digital businesses within the international tax system to digital businesses' payment of their fair share of taxes in source countries where the income-generating economic activities occur.[9] Times

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[4] See section 13(2) of the Companies Income Tax Act, Cap. C21 Laws of the Federation of Nigeria 2004 (prior to the enactment of the Finance Act 2019).

[5] Jude Odinkonigbo & Emmanuel Onyeabor, *supra* note 3.

[6] Emmanuel Onyeabor, "Towards a United Nations Tax Convention: Prospects and Challenges for Developing Economies" (12 December 2023), online (blog): *Afronomics* <https://www.afronomicslaw.org/index.php/category/analysis/towards-united-nations-tax-convention-prospects-and-challenges-developing> (accessed 15 December 2023).

[7] Ibid.

[8] In a broad sense, the digital economy can be defined as "all activities that use digitized data", which would encompass, in essence, the entire modern economy. More narrowly defined, the digital economy is comprised of "online platforms, and activities that owe their existence to such platforms." The three most common features of digital businesses are cross-jurisdictional scale without mass, the heavy reliance on intangible assets, and the importance of data, user participation, and network effects. See Katherine E. Karnosh, "The Application of International Tax Treaties to Digital Services Taxes" (2021) 21:2 Chicago Journal of International Law 8 513-547 <https://chicagounbound.uchicago.edu/cjil/vol21/iss2/8> (accessed 1 April 2024).

[9] Irma Johanna Mosquera Valderrama, "Trade digitalization and taxation", in Julien Chaisse & Cristian Rodriguez-Chiffelle, *The Elgar Companion to the World Trade Organisation* (Cheltenham, United Kingdom: Edward Elgar Publishing Ltd., 2023) online: <https://www.e-elgar.com/shop/usd/the-elgar-companion-to-the-world-trade-organization-9781800882850.html> (accessed 27 January 2024).

have changed. Physical presence is no longer a meaningful proxy for the provision of conditions that enable the earning of economic returns. Put another way, it is possible for non-resident entities to actively do business and earn millions of dollars in profits or income from countries in which they have no form of physical presence, but where the relevant country provides conditions that enable the earning of that profit.[10] This has led to increased Base Erosion and Profit Shifting ("**BEPS**") activities, where multinationals shift their profits from source countries with higher tax rates to so-called tax havens with lower or zero tax rates, simply by manipulating the legal or other basis required to justify taxation (or more accurately, nontaxation). The result is that entities can operate and do business in the digital economy of developing source countries without paying any taxes to such countries, even when those countries provide the required economic conditions, while repatriating their profits and paying taxes to their developed host countries.[11]

The OECD launched its Inclusive Framework on BEPS to address this problem. The project aims to resolve (among other things) the global tax challenges arising from the proliferation of digital business models. It further aims to achieve a global consensus on digital tax matters. The OECD is yet to achieve this global consensus. A recent clash with the UN regarding global tax leadership rights may further delay this consensus.[12] The OECD Inclusive Framework on BEPS sought to achieve its objectives by introducing the two-pillar approach to resolving the tax challenges of globalization and digitalization of the economy. These approaches were fine-tuned over time and culminated in the release of a new multilateral convention (alongside accompanying handbooks and explanatory notes) to address the tax challenges of economic globalization and digitalization on October 11, 2023. Key takeaways of this development are as follows:

[10] Irma Johanna Mosquera Valderrama, *supra* note 9.
[11] Ibid.
[12] This will be addressed further below.

- Pillar 1: The text of the new multilateral convention released by the OECD/G20 Inclusive Framework on BEPS updates the international tax framework to co-ordinate a reallocation of taxing rights to market jurisdictions, improve tax certainty, and remove unilateral digital services taxes.

- Pillar 2: The new handbook on minimum tax implementation released by the OECD/G20 Inclusive Framework on BEPS aims to assist governments as they consider moving forward with the OECD's proposed global minimum tax rules, by providing an overview of the key provisions of the applicable proposed rules and the factors to be considered in assessing implementation options.

On February 19, 2024, an updated Pillar 1 – Amount B report[13] was published by OECD/G20 Inclusive Framework on BEPS. The report provides a simplified and streamlined approach to applying the arm's length principle to baseline marketing and distribution activities. Content from the report has been incorporated into the OECD Transfer Pricing Guidelines, along with conforming changes to the Commentary on Article 25 of the OECD Model Tax Convention. This approach aims to address transfer pricing disputes regarding baseline marketing and distribution arrangements which may involve administrative challenges for tax administrations, and result in a compliance burden for taxpayers, especially across low-capacity jurisdictions.[14]

However, throughout the evolution of the OECD BEPS project, it was consistently recognized that

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[13] OECD, "Pillar One - Amount B: Inclusive Framework on BEPS" (2024), online (blog): OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris <https://doi.org/10.1787/21ea168b-en> (accessed 19 February 2024).
[14] Ibid.

the two-pillar approach did not satisfactorily address the tax challenges of globalization and digitalization of the economy.[15] This is especially true for developing economies as the two-pillar approach does not favour source countries. There were consequently calls by the South Centre[16] for the world to look beyond the two-pillar solution advocated by the OECD.[17] On its part, the African Tax Administration Forum ("**ATAF**")[18] called for[19] the implementation of unilateral Digital Services Tax ("**DST**") measures by African developing (source) countries.[20] The goals of this work include circumventing the need for global consensus and asserting Africa's autonomy.

Meanwhile, these realities of globalization and digitalization of the economy had informed Nigeria's radical reform of its corporate income tax regime based on guidelines, proposals, and recommendations published by the OECD. This led to a unilateral taxation of the digital activities of non-resident companies with "significant economic presence" in Nigeria under the Finance Act 2019, which took effect on January 13, 2020. Further tax reforms in the Finance Act 2021 (effective December 31, 2021) introduced digital tax assessment of non-resident companies based

[15] Reuven Avi-Yonah, "Comment on Picciotto et al, Beyond the Two Pillar Proposals: A Simplified Approach for Taxing Multinationals" (16 November 2023), unpublished commentary posted on the author's LinkedIn page on November 16, 2023).

[16] The South Centre is an intergovernmental organization of developing countries that helps developing countries to combine their efforts and expertise to promote their common interests in the international arena. It conducts policy-oriented research on key policy development issues, and supports developing countries to effectively participate in international negotiating processes that are relevant to the achievement of the Sustainable Development Goals (SDGs). The South Centre promotes the unity of the Global South in such processes while recognizing the diversity of national interests and priorities.

[17] Sol Picciotto et al, "Beyond the Two Pillar Proposals: A Simplified Approach for Taxing Multinationals" (26 October 2023), online (blog): 6 Tax Cooperation Policy Brief (South Centre) <https://taxinitiative.southcentre.int/> (accessed 25 November 2023).

[18] ATAF is a network of African tax administrations that aims to improve tax systems in Africa through exchanges, knowledge dissemination, capacity development and active contribution to the regional and global tax agenda. ATAF strives to build efficient and effective tax administrations in Africa to become the leader on African tax matters, enhance economic development and improve the living standards of the people of Africa.

[19] ATAF, "ATAF Suggested Approaches to Drafting Domestic Minimum Top-Up Tax Legislation" (4 October 2023), online (blog): African Tax Administration Forum <https://events.ataftax.org/index.php?page=documents&func=view&document_id=191> (accessed 27 January 2024).

[20] ATAF, "Technical Review of the Draft Article 12B United Nations Model Tax Convention" (October 2020), online (blog): African Tax Administration Forum <https://events.ataftax.org/includes/preview.php?file_id=81&language=en_US#:~:text=The%20draft%20Article%2012B%20states,by%20the%20business's%20profitability%20ratio> (accessed 27 January 2024).

on deemed turnover. Graduated corporate income tax rates with exemptions for 'small companies' was also introduced, with pertinent tax competition concerns. Also, the *significant economic presence* concept in Nigeria's unilateral digital tax regime leaves much to be desired.

Enforcement challenges associated with Nigeria's unilateral digital tax regime include difficulties regarding the proper attribution of profits to the digital activities of non-resident companies in the country. In addition to the enforcement challenges associated with Nigeria's unilateral digital tax regime, certain political and international trade concerns may adversely impact tax competition and commitment to treaty obligations in the country. Certain key trade partners (especially the United States of America) of developing (source) countries like Nigeria are averse to unilateral digital tax measures that affect their economy. They have threatened to take retaliatory measures if such unilateral digital tax measures are implemented. What is more, there is a risk that Double Tax Avoidance Agreements made by Nigeria with other African countries and developed countries such as Canada, may be breached by Nigeria's unilateral digital tax regime. Whether such breach would result in an international trade dispute actionable at the World Trade Organization ("**WTO**") dispute settlement forum remains debatable.

As noted above, the UN's recent vote to assume tax leadership role in the formulation of global tax policies may result in a tax clash with the OECD. This could slow down progress on the OECD's endeavour to establish uniform measures for resolution of global digital tax challenges. The Africa Group (led by Nigeria) argued that a shift of international tax policy formulation rights away from the OECD to the UN will guarantee equal participation in global tax policy formulation for developing countries. This argument is questionable because tax follows the money and the OECD countries that oppose the shift represent a higher share of the global economy, which could pose equal representation difficulties for developing and emerging economies at the UN. This

notwithstanding, the UN tax resolution of November 22, 2023, is a significant development that can be used to achieve an alternative digital tax model for developing and emerging economies. It may be prudent for Nigeria to reconsider its unilateral digital tax regime with a view to addressing the relevant tax competition, international trade relations, tax justice, constitutional issues, and treaty commitment concerns raised thereby. This will allow Nigeria to benefit from collegial digital tax efforts that are more sustainable in terms of both *process* and *substance*.

My thesis considers the implications of unilateral digital tax measures in developing and emerging economies using Nigeria as a case study, with a view to identifying appropriate and sustainable options (in terms of both *process* and *substance*) for asserting the digital taxing rights of developing and emerging economies within the framework of international tax law and policy. This will help developing and emerging economies like Nigeria to pragmatically achieve their digital tax objectives and better align their digital tax measures with international best practices and relevant treaty commitments. This in turn will allow them to increase government expenditures on projects directly related to economic expansion initiatives, such as education, human capital empowerment, and infrastructural development, while maintaining diplomatic relationships that are critical to their national and economic development.

To be clear, while I made a general observation that the acceptability of digital taxation is linked to the source country providing the conditions for the earning of the digital income, the core claims of my thesis do not speak to the normative basis for digital taxation by source countries. My argument is that the restriction (in international tax law and policy) of source countries' taxation rights to physical presence was tenable in the past due to the difficulty of actively doing business in, and earning large-scale income from, a foreign country without having any form of physical presence in that country. That restriction is, however, no longer tenable today as digitalization has

now made it possible to remotely do business in, and earn large-scale active business income from, a foreign country without having any physical presence in the country. This means that it is now necessary to redefine PE rules in international tax law and policy to recognize 'digital presence' as an acceptable component of PE. I further argue that while stakeholders seem to agree on the need for a change in the allocation of taxing rights in a digital economy, they differ on the approach for achieving this required change. My thesis does not seek to determine or critique the normative basis for source countries' taxation of the digital activities of non-resident companies in their territory. It rather focuses on identifying the appropriate process for exercising a source country's digital taxing rights in international tax law and policy - where the normative basis for the exercise of that right is assumed to already exist.

I start my argument from the premise that, save for few exceptions like the United States of America ("**US**"), stakeholders seem to agree that the basis for allocation of taxing rights in international tax law and policy needs to change. The key point of difference is in the approach proposed by various stakeholders for achieving this required change in the global allocation of taxing rights to account for the peculiarities of the digital economy. I contend that the existing proposals for addressing digital tax challenges represent two unacceptable distinct extremes. The first of these extremes is hinged on "global consensus",[21] which is impracticable and favours wealthy host countries to the detriment of low-income source countries like Nigeria in terms of both *process* and *substance*. The second extreme identified in my thesis is unilateralism, which violates both existing bilateral tax treaties and the international tax principle of administrability, and further socio-politico-economically hurts developing countries more than it helps them. I

[21] The phrase "global consensus" is a coinage referring to the digital tax efforts of the OECD Inclusive Framework on BEPS, for the purposes of this thesis. I collectively refer to the OECD's digital tax efforts as "global consensus" for the purposes of this thesis - as opposed to unilateralism - to the extent that the OECD Inclusive Framework technically involves over 145 countries. My view is that digital tax measures that arise from the efforts of the OECD Inclusive Framework may be loosely referred to as "global consensus" digital tax measures.

collectively refer to these extremes in my thesis as the "*Digital Tax Extremes*" based on the contrasting extremities they share, that is, global consensus or unilateralism without considering any balanced or middle-point approach to digital taxation.

I examine the potential implications of the *Digital Tax Extremes* in terms of both *process* and *substance* – highlighting the relevant tax competition, international trade relations, tax justice, constitutional issues, and treaty commitment concerns raised for developing countries such as Nigeria. I rely largely on the theories of neorealism in international relations and rational pragmatism, and draw richly on the concepts of tax policy, reasonableness, and tax jurisdiction; to contend that African developing countries need to look beyond the *Digital Tax Extremes* if they wish to succeed in their digital tax drive. I then propose an alternative digital tax model for developing countries styled the "*Onyeabor's Digital Tax Model for Developing and Emerging Economies*" ("**ODTMDEE**"). ODTMDEE is a three-phased digital tax model hinged on four key premises. First, African developing and emerging economies, as the underdogs of the international tax regime, cannot reasonably expect developed economies represented by OECD – who largely benefit from the status quo at Africa's expense – to midwife any meaningful global digital tax consensus that will work in Africa's favour. Second, the cold reality that African developing and emerging economies are separately incapable (socio-politico-economically) to drive and successfully implement unilateral digital tax measures. Third, the understanding that international tax law and policy cannot be successfully divorced from international politics. (I argue that international tax law and policy *is in fact* international politics at play.) Finally, I opine that African developing and emerging (source) economies can only achieve their digital tax objectives through "*strategic reasonable political compromise*" with developed (host) economies.

My concept of Strategic Reasonable Political Compromise ("**SRPC**") in this thesis draws partially

from Okanga's concept of "Reasonable Impairment Compromise" ("**RIC**") proposed in his Doctor of Philosophy (PhD) thesis at Dalhousie University – Schulich School of Law, as a suitable normative/evaluative framework for inter-national tax equity.[22] (Okanga Ogbu Okanga is a Tax Associate at Osler, Hoskin & Harcourt LLP in Toronto, and a Master of Laws (LLM)/PhD alumnus of the Schulich School of Law at Dalhousie University.) The concept of RIC, as proposed by Okanga, claims that: **(i)** a state's right to tax is an inherent attribute of its sovereignty; **(ii)** international tax regimes are not strictly technical regimes but are, instead, products of political compromise that overlay/impair the exercise of inherent tax jurisdiction; and **(iii)** the question of whether a particular regime/compromise is equitable (fair) is really a question of reasonableness.[23] Therefore, in the words of Okanga, to measure the fairness of a given compromise/regime, it is apposite to focus on the degree (severity) of impairment.[24] Okanga concludes that only a compromise that impairs the exercise of tax jurisdiction to a "reasonable" extent can be deemed to be equitable.[25]

My concept of SRPC, however, differs substantially from Okanga's concept of RIC in that it is not hinged on (re)framing the equity principle of tax policy. SRPC is rather focused on a set of defined practical steps for achieving recognition of 'digital presence' as a key component of PE for harmonized digital taxation purposes in international tax law and policy without: **(a)** jeopardizing the international relations of African developing and emerging (source) economies with their developed (host) country trade partners; or **(b)** compromising Africa's socio-politico-economic autonomy in the negotiation process. SRPC is hinged on rational pragmatism rather than equity. Also, unlike Okanga's concept of RIC, my concept of SRPC is focused on the tax policy

[22] Okanga Ogbu Okanga, *supra* note 2.
[23] Ibid.
[24] Ibid.
[25] Ibid.

principles of administrability and efficiency. Finally, my SRPC concept draws largely on the theories of rational pragmatism and neorealism in international relations to contend that Africa's digital tax strategy must deliberately shift away from unilateralism to multilateralism, bilateralism, or a plurilateral approach at the very least. In doing this, African developing and emerging economies must learn to appeal to the self-interest (mutual benefit approach) as opposed to the mercy (victim mentality or tax aid-sourcing approach) of developed economies, in their digital tax negotiations.

My argument for rational pragmatism in the development of digital tax measures does not seek to diminish the importance of equity or fairness in the allocation of digital taxing rights between source and host countries in international tax law and policy. I reckon that there is already so much literature focusing on equitable or fair allocation of digital taxing rights, with very little if any literature that is focused on removing the practical impediments to the implementation of such equitable and fair allocation of digital taxing rights. My contribution to literature in this thesis is that rational pragmatism is as important as equity or fairness in setting and attaining the digital taxation goals of source countries – especially for developing and emerging economies like Nigeria. To my mind, it makes no practical sense to expend time and resources in developing unilateral digital tax measures that are unenforceable by the implementing country because they do not have the support of the host countries involved.

To this end, ODTMDEE represents a "strategic reasonable political compromise" or block regional approach that seeks to successfully achieve Africa's digital tax objectives in terms of both *process* and *substance*. ODTMDEE starts its phase one (*process 1*) with Nigeria - as the "Giant of Africa", leading a charge for development of an Africa-friendly (harmonized) digital tax framework in international tax law and policy, which expands to the Economic Community of West African

States ("**ECOWAS**"), moves up to the African Union ("**AU**"), and ends at the steps of the UN – forcing the developed (host) countries (represented by the OECD) to the negotiating table. Phase two of ODTMDE (*substance*) proposes a redrafting of existing OECD and UN Model Tax Treaties to recognize a special definition of "significant economic presence" for digital tax purposes as one of the tests for determining the taxable presence of a non-resident entity within a contracting state under the PE rules specified in the said model tax treaties. Stage three of ODTMDE (*process 2*) proposes a reflection of the updated PE rules in African developing and emerging countries' existing bilateral tax treaties with other countries, such as the double tax avoidance treaties between Nigeria and developed countries like Canada. I contend that while developing countries may not necessarily have more say in global tax policy formulation if the reins are shifted from the OECD to the UN, the UN tax resolution of November 22, 2023, has paved a unique (albeit inelegant) pathway to implementing ODTMDEE. To this end, I show why the UN tax resolution of November 22, 2023, may not achieve Africa's bid for increased participation in global tax policy formulation if ODTMDEE is not implemented in its entirety.

In framing ODTMDEE, I contend that the OECD two-pillar rules are not the best approach (in terms of both *process* and *substance*) to resolving the tax challenges presented by the digital economy – especially from the perspective of developing countries like Nigeria. I further contend that while the OECD two-pillar approach may leave much to be desired, enacting unilateral digital tax measures is not the answer for developing source countries as the approach hurts them politico-economically (in terms of *process*) and sometimes socio-economically (in terms of *substance*). Strategic multilateral, bilateral, or at the very least plurilateral[26] approaches are better. It is

[26] In international relations, multilateralism refers to an alliance of multiple countries pursuing a common goal. Multilateralism is based on the principles of inclusivity, equality, and cooperation, and aims to foster a more peaceful, prosperous, and sustainable world. Multilateralism is a process of organizing relations between groups of three or more states. Beyond that basic quantitative aspect, multilateralism is generally considered to comprise certain qualitative elements or principles that shape the character of the arrangement or institution. Those principles are an

practically impossible to effectively tax an entity that has no form of physical presence in a source country without the cooperation of the entity's host country. Globalization has ensured that no country – especially developing and emerging economies – can act unilaterally on critical global issues such as digital taxation without risking severe international consequences, both politically and socio-economically.

1.2 Thesis Structure

My thesis is divided into five chapters. Chapter 1 deals with introductory matters, sets out the research agenda, provides an overview of the tax challenges presented by the globalized and digitalized economy, and summarizes the theoretical framework of, conceptual bases for, and methodological approach to, my graduate research work. Chapter 2 begins the framing of my "*Digital Tax Extremes*" concept, which is central to the core claims of my thesis, including a detailed discussion of western multilateral approaches towards finding a global consensus solution to digital tax challenges such as the OECD two-pillar approach, the proposed introduction of Article 12B to the UN model tax treaty, ATAF and South Centre proposed models for tackling digital tax challenges, and the UN tax resolution of November 22, 2023, which seeks to establish a framework tax convention for addressing the tax challenges of the globalized and digitalized economy (amongst other things).

Chapter 3 completes the framing of my "*Digital Tax Extremes*" concept, by providing a detailed

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indivisibility of interests among participants, a commitment to diffuse reciprocity, and a system of dispute settlement intended to enforce a particular mode of behaviour. Plurilateralism represents a departure from the inclusive nature of multilateralism, involving select groups of countries pursuing specific objectives outside the framework of universal participation. See Ferid Belhaj, "The Shift from Multilateralism to Plurilateralism: A Challenge for the Bretton Woods Institutions and the UN as they Turn 80" (May 2024) Policy Brief, online (blog): Policy Centre for the New South <https://www.policycenter.ma/sites/default/files/2024-05/PB_26_24%20%28Ferid%20Belhaj%29.pdf> (accessed 8 August 2024).

doctrinal overview of Nigeria's unilateral digital tax regime vis-à-vis Canada's unilateral DST measure, which took effect on June 28, 2024, including an overview of approaches adopted by other developed countries such as France and the US. The aim is to provide a doctrinal analysis of how developing and developed countries have addressed (or proposed to address) digital tax challenges at national levels. Chapter 3 further discusses the relevant tax competition, international trade relations, tax justice, constitutional issues, and treaty commitment concerns raised by the *Digital Tax Extremes* in developing and emerging economies such as Nigeria, within the framework of international tax law and policy. Chapter 4 frames my concept of SRPC, which forms the basis of my ODTMDEE proposal for effectively achieving the digital tax objectives of developing and emerging economies such as Nigeria. Chapter 5 concludes by summarizing the discussion and undertakes a detailed framing of my ODTMDEE proposal, including suggestions regarding a workable pathway towards achieving my ODTMDEE proposal. It also considers the likely impact of international tax policymaking at the UN.

1.3 Methodological Approach and Theoretical Framework

Methodology refers to the strategies adopted in a research work that support answering the research questions in a coherent and structured manner.[27] It is what one actually does to enhance their knowledge and test the thesis of their research. It contemplates the principles and procedures of logical thought process that guide the actualization of the writer's research goals.[28] I adopt a variety of methodologies and theoretical approaches in my thesis. Specifically, I adopt doctrinal,

[27] Robert Cryer et al, *Research Methodologies in EU and International Law* (Oxford, United Kingdom: Hart Publishing Ltd., 2011) 5. See also W J Kamba, "Comparative Law: A Theoretical Framework" (1974) 23:3 The International Law and Comparative Law Quarterly 486.
[28] Monty Sutrisna, "Research Methodology in Doctoral Research: Understanding the Meaning of Conducting Qualitative Research", in Ross A, ed, Proceedings of the Association of Researchers in Construction Management (ARCOM) Doctoral Workshop UK) 51.

theoretical, and socio-legal (fundamental) research methods in my work. Below I briefly describe how I apply each of these methods to arrive at my core claims in this thesis.

1.3.1 *Doctrinal research method*

Doctrinal research relates to the formulation of legal doctrines through the analysis of applicable legal rules.[29] It analyzes authoritative legal texts, which may be primary or secondary sources of law,[30] with a view to establishing the scope and legal nature of the relevant subject.[31] Doctrinal scholarship entails a critical conceptual analysis of legislation and case law to reveal a statement of the law relevant to the research.[32] It further reviews relevant literature to resolve questions regarding the "why" and the "what" of the research.[33]

A significant portion of my thesis relies on the doctrinal research method. I use doctrinal analysis to provide conceptual clarifications that are relevant to the ongoing conversations on equitable reallocation of taxing rights among source and host countries with respect to taxation of the digital economy. In terms of the legal and regulatory framework, I analyze the relevant international tax policy statements, proposals, suggestions, guidelines, and draft model and multilateral tax conventions and treaties prepared by the OECD, the UN, the South Centre, and the ATAF – which are central to the international tax issues that are relevant to the subject of my thesis. I also employ doctrinal analysis to critically review Nigeria's unilateral digital tax regime under Nigerian tax

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[29] Terry Hutchinson & Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research" (2012) 17:1 Deakin L Rev 83.
[30] Ibid.
[31] Ibid.
[32] Terry Hutchinson, "The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law" (2015) 8:3 Erasmus L Rev 130.
[33] John H. Farrar, *Legal Reasoning* (Minnesota, USA: Thomson Reuters, 2010) 92, quoting Lord Diplock in *Dorset Yacht v The Home Office* [970] AC 1004.

statutes[34] and policy statements of the Federal Inland Revenue Service ("**FIRS**"). I do the same for Canada's unilateral DST measure which took effect on June 28, 2024.

I further use doctrinal analysis to review double tax avoidance treaties executed between Nigeria and developed countries such as Canada, including relevant international jurisprudence, with a view to analyzing how unilateral digital tax measures in developing countries like Nigeria may raise concerns regarding their commitment to treaty obligations owed to their developed treaty partners such as Canada. I also use doctrinal analysis to review certain rights-related provisions,[35] including relevant international jurisprudence, with a view to analyzing how unilateral digital tax measures in developing and emerging economies such as Nigeria may raise constitutional issues. I further review relevant international news content and cross-border trade advisories issued by developed countries like the US, with a view to analyzing the international trade implications of unilateral digital tax measures for developing and emerging economies.

I analyze the works of international tax law and policy experts and organizations who have attempted to shape the conversation on how the OECD's proposed two-pillar approach to resolving the tax challenges of the digital economy, may or may not be ideal for developing countries. I also analyze works addressing why low-income countries should either push for certain recommended improvements to the OECD two-pillar approach or look beyond the said two-pillar approach in their search for lasting solutions to the tax challenges presented by the digital economy. This doctrinal analysis of relevant literature shows the significant divergence of opinions on these

[34] Companies Income Tax Act (as amended), Cap. C21 Laws of the Federation of Nigeria ("**LFN**") 2004 (as amended) ("**CITA**"); Income Tax (Significant Economic Presence) Order 2020; and various relevant circulars issued by the FIRS.
[35] Constitution of the Federal Republic of Nigeria 1999 (as amended) (the "**Nigerian Constitution**") and the African Charter on Human and People's Rights (Ratification and Enforcement) Act, Cap. A9 LFN 2004 (the "**African Charter**").

issues, not only in terms of the pros and cons of the OECD's two-pillar approach to resolving the tax challenges of the digital economy, but in terms of the appropriate alternative to be adopted by developing countries in exploiting the tax potential of the digital economy. This lays the groundwork for my framing of both the "*Digital Tax Extremes*" concept and the recommended ODTMDEE solution.

1.3.2 *Socio-legal (Fundamental) research method*

Socio-legal research method has no agreed definition.[36] This notwithstanding, Sarah Blandy observes that in North America, a wide range of disciplines including economics, psychology, political science, social history, and anthropology have enhanced *non-doctrinal research*.[37] In this regard, Harry Arthurs and Annie Bunting note that legal academics tend to define socio-legal scholarship negatively, that is, scholarship that is *not* doctrinal.[38] Social scientists and humanists, on the other hand, may adopt a more positive definition, to the effect that socio-legal research investigates legal institutions, processes, cultures, texts, experiences, and outcomes from a variety of external perspectives.[39]

For the purposes of this thesis, I use an interdisciplinary approach to legal research which uses historical, theoretical, and comparative analysis to investigate the place of a legal concept or problem in the social, political, economic, and cultural life of a people.[40] In this regard,

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[36] Sarah Blandy, "Socio-legal approaches to property law research" (2014) 3(3) Property Law Review, 166-175, online: ISSN 1838-3858 <https://eprints.whiterose.ac.uk/100288/9/Socio-legal%20for%20special%20issueFINAL.pdf> (accessed 11 February 2024).
[37] Ibid. See also David Kennedy & William W. Fisher III (eds), *The Canon of American Legal Thought* (Princeton NJ, USA: Princeton University Press, 2006), as cited in Sarah Blandy, *ibid*.
[38] Harry Arthurs & Annie Bunting, "Socio-legal Scholarship in Canada: A Review of the Field" (December 2014) 41:4 Journal of Law and Society (Wiley on behalf of Cardiff University) 487-499, online: <https://www.jstor.org/stable/43862401> (accessed 10 January 2024).
[39] Ibid.
[40] Ibid. See also Sarah Blandy, *ibid* note 36.

fundamental research is the theoretical (as opposed to empirical) aspect of socio-legal research, which aims to secure a deeper understanding of law as a social phenomenon by determining the law's historical, philosophical, linguistic, economic, social, or political implications.[41] This kind of research proceeds from the intellectual perspective that the causes and effects of the law require scrutiny as well.[42] Fundamental research is characterized by its rejection of code, case, and statute as the whole and the exclusive subject of legal analysis.[43] In other words, it is *non-doctrinal* in that it holds that "black letter law" is only a part of law but does not in fact constitute its whole. Relevant socio-politico-economic factors must be considered as well.

I use the socio-legal (fundamental) research method to undertake a historical socio-politico-economic analysis of the evolution of taxing rights allocation in international tax law and policy, which produced the existing rules that have been made redundant by technological advancement, and how this analysis can shape the reallocation of taxing rights in today's digital economy. The aim of this analysis is to show how the social, political, and economic realities of the past shaped the international tax regime and why that regime is no longer valid in today's social, political, and economic reality. The analysis also shows how social, political, and economic realities have shaped both the international tax regime and the relationship between developed and developing countries. This will lay the basis for my doctrinal analysis of contemporary global and unilateral efforts to resolve the tax challenges of the digital economy. It will also lay the basis for my proposal of ODTMDEE as a viable alternative to existing digital tax initiatives.

This approach grounds my analysis of unilateral digital tax measures in developing and emerging

[41] Consultative Group on Research and Education in Law, Law, and Learning: Report to the Social Sciences and the Humanities Research Council of Canada (Information Division of the Social Sciences and Humanities Research Council of Canada, 1983) cited in Terry Hutchinson, *supra* note 32.
[42] Ibid.
[43] Ibid.

economies, and how the socio-politico-economic and cultural realities of developing and emerging economies impact the efficiency and administrability of such unilateral digital tax measures within the framework of international tax law and policy. The approach also forms the basis for my reliance on the theories of rational pragmatism and neorealism in international relations, including the concepts of tax policy, reasonableness, and tax jurisdiction, to contend that African developing and emerging economies need to look beyond the *Digital Tax Extremes* if they wish to succeed in their digital tax drive. Having done this, the groundwork for my SRPC concept is laid. The SRPC concept draws largely on classical strategy in modern warfare, rational pragmatism, and neorealism in international relations to contend that Africa's digital tax strategy must deliberately shift away from unilateralism to multilateralism, bilateralism, or a plurilateral approach at the very least. In doing this, African developing and emerging economies must learn to appeal to the self-interest (mutual benefit approach) as opposed to the mercy (victim mentality or tax aid-sourcing approach) of developed economies, in their digital tax negotiations. The analysis of classical strategy in modern warfare employed in the formulation of my SRPC concept draws extensively on classical writings relating to human psychology, political science, social history, and human behaviour. This sets the stage for my ODTMDEE proposal for addressing digital tax challenges in developing and emerging economies.

1.3.3 ***Theoretical research method and theoretical framework of my thesis***

Theory is the active process of self-consciously making explicit, and reflectively interrogating: **(a)** the underlying presumptions; **(b)** the methodological assumptions; **(c)** the definitional boundaries; **(d)** the procedural norms; **(e)** the criteria for validity; and **(f)** the preferred justifications for any or

all of these in relation to a social or intellectual phenomenon.[44] Theory aids in constructing intellectual history, which entails the systematic study and criticism of the heritage of legal thought and critical study of individual thinkers' works.[45] In this regard, scholars of legal theory reflect on the underlying values in law and make certain assumptions about the nature of knowledge, language, law, or society.[46] In other words, legal theory seeks to explicitly detail the underlying assumptions about law in order to provide a hypothesis that we may use to evaluate past, present, or future events, and if necessary, recast the hypotheses.[47] Theoretical research fosters a complete understanding of legal principles, their conceptual bases, and an appreciation of the combined effects of various rules and procedures that touch on a particular activity area.[48]

My research thesis employs various theories to present its arguments and core claims. Most notably, I rely largely on the theories of neorealism in international relations and rational pragmatism, and draw from the concepts of tax policy, reasonableness, and tax jurisdiction, to contend that African developing countries need to look beyond the *Digital Tax Extremes* if they wish to succeed in their digital tax drive. I also rely on these concepts and the theory of rational pragmatism to propose my ODTMDEE solution. I have highlighted below the basis on which these concepts and the theory of rational pragmatism are employed in my research work.

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[44] Richard Devlin, "The *Charter* and Anglophone Legal Theory" (1997-1998) 4:1 Rev Const. Stud. 19.
[45] Ibid.
[46] Terry Hutchinson & Nigel Duncan, *supra*, note 28. See also H. W. Arthurs (Harry William), *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group in Research and Education in Law* (Ottawa: Social Sciences and Humanities Research Council of Canada, 1983) 68.
[47] Terry Hutchinson & Nigel Duncan, *supra*, note 28.
[48] Dennis Pearce, Enid Campbell & Don Harding ('Pearce Committee'), Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission (Australian Government Publishing Service, 1987) cited in Terry Hutchinson, Researching and Writing in Law (Reuters Thomson, 3rd ed, 2010) 7.

- ***Theory of rational pragmatism***

The theory of rational pragmatism holds that a proposition is reasonable or acceptable if it works satisfactorily, that the meaning of a proposition is to be found in the practical consequences of its acceptance, and that impractical ideas are unreasonable and should consequently be rejected.[49] Rational pragmatism is built from the position that the appropriate criterion for the appraisal of the truth, significance, or validity of a proposition is its empirical and practical applicability – where practice is broadly conceived as to include theoretical inquiry but not to make its demands the final and exclusive measure of validity.[50] Only propositions that can be shown to have a reference to experience, more particularly to the situation in which an interested organism interacts with its relevant environment, have a genuine meaning, and only ideas that justify themselves in use – the specific use for which they were fashioned – are certifiably valid.[51]

In this regard, the rationality or reasonability of a proposition is tested against the practical results of its application. If it is practicable, then it is rational and should be accepted. However, if it is impracticable then it is irrational and should be rejected. Also, if the cost of application outweighs its benefits, then a proposition is irrational. It is only rational where the benefit of its application outweighs the cost of implementing the proposition. Put differently, the merit of a proposition is tested against the practical consequences of its implementation. The proposition is bad if the practical consequences of its implementation result in a net loss when tested against the benefits

[49] IEP, "Pragmatism", online (blog): Internet Encyclopedia of Philosophy <https://iep.utm.edu/pragmati/> (accessed 3 April 2024).
[50] Arthur E. Murphy & Marcus G. Singer, "Pragmatism and the Context of Rationality" (1993) 29:2 Transactions of the Charles S. Peirce Society (Indiana University Press) 123, online: <https://www.jstor.org/stable/40320410> (accessed 3 April 2024).
[51] Ibid.

(if any) that it provides. This is why the policy approach to rational pragmatism holds that it is irrational to issue threats that would be costly for the issuer to execute.[52]

I apply the theory of rational pragmatism to contend that it is irrational or unreasonable for developing and emerging (source) economies to enact unilateral digital tax measures that are either: **(i)** unenforceable due to non-cooperation by relevant developed host countries; or **(ii)** cost inefficient in terms of the socio-politico-economic cost of its implementation. In other words, unilateral digital tax measures are irrational and unreasonable simply because they are impracticable – especially for developing and emerging (source) economies like Nigeria. In making this argument, I draw richly from the concepts of tax policy, tax jurisdiction, and reasonableness to support my conclusions. I have set out further below an overview of how I apply these concepts to my research.

- ***Neorealist theory of international relations***

There are several iterations or theories of international relations and none of them is unanimously accepted. However, international relations as a discipline seems to have developed in response to the horrors of the First World War.[53] Many members of the first 'school' or 'theory' of international relations maintained that war was partly the result of 'international anarchy' and partly the result of misunderstandings, miscalculations, and recklessness on the part of politicians who had lost control of events in 1914.[54] The 'idealists' argued that a more peaceful world order

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[52] Claire Oakes Finkelstein, "Pragmatic Rationality and Risk" (2013), online (blog): All Faculty Scholarship (Penn Carey Law – Legal Scholarship Repository) 1538 <https://doi.org/10.1086/670757> (accessed 3 April 2024).
[53] Scott Burchill et al, *Theories of International Relations* (London, United Kingdom: Palgrave Macmillan, 2005) Third Edition.
[54] Ibid.

could be created by making foreign policy elites accountable to public opinion and by democratizing international relations.[55] Hence the purpose of international relations in the early years of the discipline was to change the world for the better by removing the blight of war.[56]

Over time, the discipline of international relations has grown to encompass, amongst other things: **(i)** 'foreign policy analyses' for the purpose of achieving better 'crisis management'; and **(ii)** 'international interdependence' wherein liberal internationalists identify the expansion of international trade as a crucial level of analysis.[57] Liberal theories of interdependence and the later 'neo-liberal institutionalist' analysis of international regimes argued that the economic and technological unification of the human race required new forms of international cooperation. To those influenced by the socialist tradition, however, international interdependence was a misnomer. The reality was a system of global dominance and dependence which divided the world between 'core' and 'periphery'. The phrase, 'the inter-paradigm debate' was used in the 1970s and 1980s to show that an early consensus about the nature of the discipline (which was always incomplete) had been replaced by a broad spectrum of contending approaches, a condition that survives to this day. Only some of these approaches (neo-realism being by far the most important) continue to regard the international system as a unique 'anarchic' domain which can be analysed in isolation from social and economic developments within and across societies. The influence of other disciplines and cognate fields is now pronounced in the subject, and many strands of international relations theory deny that the subject has a distinctive subject matter or can proceed without borrowing heavily from languages of inquiry in other fields of investigation, such as the importation of various ideas from social and political theory.[58]

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[55] Scott Burchill et al, *supra* note 53.
[56] Ibid.
[57] Ibid.
[58] Ibid.

My conception of international relations for the purposes of this thesis is that interactions amongst sovereign states, and the state of the international legal regime which regulates inter-state relationship, is determined by political and economic power dynamics. Indeed, it has been opined, and I agree, that it is an indisputable reality of international relations that states are not and have never been equal, and that the international tax regime was birthed – and is maintained – in that state of structural inequality.[59] Ring identifies four evaluative perspectives or theories of international relations analysis – neorealism, neoliberalism,[60] pluralism,[61] and cognitivism[62] – noting that these perspectives or theories of international relations form part of the background for the formation of international regimes.[63] It is further inferred that each of these major threads or theories of international relations relies on a primary explanatory variable for behaviour and outcomes in the international context.[64] My thesis focuses on the neorealist theory of international relations.

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[59] Okanga Ogbu Okanga, *supra* note 2. See also Diane Ring, "International Tax Relations: Theory and Implications" (2007) 60:2 Tax L Rev 83.
[60] According to Ring, neoliberalists regard states' self-interest, more than their power and craving for relative gain, as the primary driver of states' engagement on the international stage. They view a state's pursuit of national self-interest within a market-oriented ecosystem as a dominant factor in shaping international relations and in determining how successful international institutions can be in directing and modifying international behaviours. Here, the pursuit of absolute gains (that is, both states are better off) is more important than the pursuit of relative gains (measured in comparison to other states' success).
[61] Ring also highlights the emergence of "pluralism", a gap-filler framework which illuminates and analyses the role of non-state actors such as individuals, bureaucracies, and non-governmental organizations in global decision-makings.
[62] Ring notes that the cognitivists – critics of neorealism and neoliberalism – treat knowledge and information as critical to the shaping of international regimes. Those with information, knowledge, and ideas, and who determine what we value and think, practically determine much of the outcome. This is because states create their identities and determine their interests based on the predominant beliefs held by state actors. Therefore, changes in knowledge and belief systems can trigger changes in policy. Attention should thus be focused on how knowledge is distributed and how it shapes the views of decision-makers.
[63] See Okanga Ogbu Okanga, *supra* note 2. See also Diane Ring, *supra* note 59.
[64] Ibid.

Neorealists view power as the driving force behind states' decisions, behaviour, and interactions on the world stage.[65] Central to a state's engagement on the world stage is its desire to achieve relative gains over other states; and the state, being a rational actor, will exert its (economic, political, and military) power to achieve preferred ends, regardless of the distributional consequences for other states.[66]

I apply the neorealist theory of international relations to argue in my thesis that central to developed countries' engagement on the world stage is their desire to achieve relative gains over other states – especially developing and emerging economies. And the developed countries, being rational actors, will exert their economic and political power to achieve their preferred ends in the allocation of digital taxing rights in international tax law and policy, regardless of the distributional consequences for other countries – especially developing and emerging (source) economies. This lays the basis for one of the rationales of my ODTMDEE proposal which holds that African developing countries, as the underdogs of the international tax regime, cannot reasonably expect developed host countries – who largely benefit from the status quo at Africa's expense – to midwife any meaningful global digital tax consensus that will work in Africa's favour.

Accordingly, it is unlikely that international institutions like the OECD (or its so-called Inclusive Framework which is in fact *not* inclusive) will be successful in directing and modifying international behaviours relating to the equitable allocation of digital taxing rights in international tax law and policy. African developing and emerging economies must recognise that the pursuit of absolute gains for the key benefit of the small club of developed countries that make up the membership of the OECD is more important to the OECD (however much it seeks to deny this

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[65] See Okanga Ogbu Okanga, *supra* note 2. See also Diane Ring, *supra* note 59.
[66] Ibid.

fact) than the pursuit of relative gains (measured in comparison to other countries' digital tax aspirations). This forms the basis for my argument that OECD's two-pillar approach is not ideal for developing and emerging economies.

Hence the inclusion of developing countries in OECD's so-called Inclusive Framework without admitting them into actual membership of the OECD is in fact a power move designed to shape international opinion on digital tax reform initiatives. (This fortifies the belief in some quarters that the OECD's two-pillar proposals may not be ideal but remains the best option for resolving the tax challenges of the digital economy.) The OECD (without any external push mobilised by developing and emerging economies) will never shape the allocation of digital taxing rights in a manner that equitably serves the interest of developing and emerging economies. OECD serves and will continue to serve the socio-politico-economic interest of the developed countries that make up its membership. I consequently argue that the UN tax resolution of November 22, 2023, while not ideal, has paved a pathway to achieving phase one (*process 1*) of ODTMDEE and that the UN tax resolution may not achieve Africa's bid for increased participation in global tax policy formulation if ODTMDEE is not implemented in its entirety.

This lays the basis for the *global consensus* arm of the *Digital Tax Extremes* concept in my thesis and the strategy/political compromise aspects of my SRPC concept which forms the core of my ODTMDEE proposal for achieving African developing and emerging economies' digital tax objectives without: **(a)** jeopardizing the international relations of African developing countries with their developed trade partners; or **(b)** compromising Africa's socio-politico-economic autonomy in the negotiation process.

1.4 Conceptual bases of the research

In this portion of the first chapter, I set out some basic framework and concepts that will animate the rest of my thesis. These are the reasonableness and tax jurisdiction concepts, plus tax policy as a distinct area of study and practice. This framework and conceptual background provide the orientation to my thesis and aim to show how my thesis contributes to the body of knowledge regarding stakeholders' approach to resolving the tax challenges of the digital economy and how this impacts the socio-politico-economic position of developing and emerging economies in the global arena within the framework of international tax law and policy. The framework and conceptual analysis also show how elements of my thesis align to project my core claims and how the thesis design and methodology meets the rigorous research standards of a study that is hinged on international tax law and policy.

1.4.1 *Tax policy as a distinct area of study and practice*

Tax policy may be viewed as the general principles which guide the management of the tax system in a state, towards the attainment of that state's tax objectives.[67] While there is no uniform definition of what constitutes "tax policy", it generally contemplates the study of how taxes ought to look, as well as how taxes actually develop in the light of real world socio-politico-economic considerations, and how taxes operate on the ground: that is, how they are administered and how taxpayers respond to their imposition and implementation with compliance, avoidance, or evasion techniques.[68]

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[67] Okanga Ogbu Okanga, *supra* note 2.

[68] LSE, "Tax Theory", online (blog): London School of Economics and Political Science <https://www.lse.ac.uk/law/research/tax/sub-tax-theory#:~:text=This%20approach%20includes%20studying%20how,imposition%20with%20compliance%2C%20avoidance%20or> (accessed 30 January 2024).

Tax policy concept essentially answers the question: *why* and *how* do we tax? Taxation involves the compulsory transfer of resources among members of society.[69] Tax policy is concerned with how societies carry out taxation.[70] While this is a technical and legal question, it is inevitably a political, social, and cultural one as well.[71] Hence to study tax policy is to engage simultaneously with the existential philosophical foundations of taxation: *why* and *how* societies tax.[72] Speaking broadly on *why* we tax, tax policy theory posits *state-building*,[73] *internal management*,[74] and *negotiated expansion*[75] as the three broad goals of taxation.[76] In deconstructing *how* we should tax, the tax policy concept provides a framework for examining the concepts of *equity*,[77] *efficiency*,[78] and *administrative capacity*[79] as the three guiding principles for tax policy analysis.[80]

[69] Allison Christians, "Introduction to Tax Policy Theory" (2018), online (blog): SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3186791> (accessed 11 January 2024).
[70] Ibid.
[71] Ibid.
[72] Ibid.
[73] Ibid. Allison Christians notes that societies use taxation to establish control over a physical territory and a people, and to pay for the cost of governance, amongst other things.
[74] Ibid. Once control is established, governments typically use taxation to both benefit and constrain the people they govern. Allison Christians refers to these functions as *internal management* to imply that taxation is generally used to manage affairs within the society and amongst its membership. Governments undertake internal management by pooling and allocating the resources within their domains – that is, the resources over which they have successfully exerted control via state-building.
[75] Societies typically use taxation to access resources or control behaviors beyond their immediate control: what Allison Christians refers to as the goal of negotiated expansion. Tax policy scholarship has only rarely touched on the idea of negotiated expansion as a goal of taxation, but the concept has gained more attention in recent years. See generally Allison Christians, *ibid* note 69.
[76] Ibid.
[77] Ibid. Equity suggests that people should be treated fairly. Equity and fairness may be treated as cognates in tax policy – they are essentially interchangeable in practice, and they are typically defined in the same manner. At its core, the concept that taxes should be allocated in an equitable or fair manner should be interpreted to mean that taxation is, at its base, a distributional question. Equity in tax policy involves two theories: the benefits theory (taxes should match services received) and the ability to pay theory (taxes should match individual capacity).
[78] Ibid. The principle of economic efficiency suggests that tax should not distort economic outcomes. The principle of economic efficiency is therefore sometimes referred to as "neutrality."
[79] Ibid. The principle of administrative capacity suggests that societies ought to be able to enforce the tax systems they create. A common capacity argument is that governments should not undertake administratively difficult taxes if they are under-resourced, because they will not be able to administer the tax equally across society.
[80] Ibid.

Tax policy as a distinct area of study and practice recognizes that tax jurisdiction is constrained by the administrative or practical limits of state capability to enforce taxation.[81] A state's competence to tax is an amalgam of economic, political, and administrative realities.[82] Hence, in theory, a state is expected to only impose taxes that it is economically, politically, and administratively capable of enforcing. This is the bedrock of administrability as an evaluative criterion of international tax. The negotiated expansion goal of tax policy envisages that in an international society of states in which lawmaking is state-based (controlled by national governments) but economic activity is globalized and consequently cross-border, each state's tax regime choices necessarily stand in relation to those of others.[83] Consequently, national governments use taxation strategically to achieve goals that only materialize because of economic interdependence among states. Accordingly, national governments negotiate how their own tax system interacts with that of other jurisdictions with an express aim: to create socio-politico-economic advantages and disadvantages within (or from) the international society of states.[84] Tax policy observers typically refer to this as *tax competition*.[85]

Tax policy is generally state-based or domestic in scope. However, international tax law and policy aims to shape or curtail national tax policy in matters that have cross-border significance. My thesis focuses on the interaction between national tax policy and international tax law and policy. My thesis draws on the insights of tax policy analysis, to contend that it is counterproductive for developing and emerging economies such as Nigeria to enact unilateral digital tax measures if they lack the socio-politico-economic capacity to implement such measures. This forms part of the basis of my formulation of the *Digital Tax Extremes* concept in my thesis, where I contend that

[81] Okanga Ogbu Okanga, *supra* note 2.
[82] Ibid.
[83] Allison Christians, *supra* note 69.
[84] Ibid.
[85] Ibid.

unilateralism violates both existing bilateral tax treaties and fails to meet the international tax evaluative criterion of administrability. It further hurts developing countries - largely politically and economically in terms of *process* (and, in some cases, socio-economically in terms of *substance* as well) much more than it helps them. This is also true for global consensus which I believe is impracticable and favours wealthy host countries to the detriment of low-income source countries like Nigeria in terms of both *process* and *substance*.

I further draw on the tax policy concept to recognize in my research thesis that given the technological realities of the digitalized economy, societies must now use taxation to establish control not only over their physical territories and their people, but also over their digital territories. The design of their tax policy must be such that the inherent rights of the sovereign state to exercise tax control over its physical territory extends necessarily to its *digital territory*. This forms a basis for the design of phase two of ODTMDEE (*substance*) proposing a redrafting of existing OECD and UN Model Tax Treaties to recognize a special definition of "significant economic presence" for digital tax purposes as one of the tests for determining the taxable presence of a non-resident entity within a contracting state under the PE rules specified in the said model tax treaties. It also features in stage three of ODTMDEE (*process 2*) proposing a reflection of the updated PE rules in African developing countries' existing bilateral tax treaties with developed countries, such as the double tax avoidance treaty between Nigeria and Canada.

1.4.2 *Tax jurisdiction concept*

John A. Swain (Professor Emeritus of Taxation at the James E. Rogers College of Law at the University of Arizona) rightly notes that one of the most contentious issues in state taxation is the

reach of the state's jurisdiction to tax net income.[86] The failure to resolve this issue is a leading cause of the recent dramatic decline in state corporate income tax revenues[87] in this globalized and digitalized economy – especially for developing and emerging (source) economies. Key causative factors include the shift from mercantile to a largely digital service economy, increased capital mobility, electronic commerce, the proliferation of digital business models, and the mainstreaming of aggressive tax planning techniques spiritedly promoted by multinational tax consulting firms. These forces allow multinational corporations to actively do business and earn millions of dollars in revenue from countries in which they have little or no form of taxable physical presence.[88] Thus the traditional markers of nexus to tax in the international tax regime – such as physical presence – are absent.[89] The international tax regime does not seem to support the notion that mere economic presence of a non-resident entity is sufficient ground for a state to assert its income tax jurisdiction.[90]

Tax jurisdiction as a concept is nebulous and does not lend itself to any generally accepted definition or description. However, it seems tenable that the jurisdiction to tax necessarily contemplates three broad categories: **(i)**, prescriptive/legislative jurisdiction – that is, the power of any state to enact valid legislation imposing taxes[91] within its territory; **(ii)** adjudicative jurisdiction; and **(iii)** enforcement jurisdiction. My research thesis focuses on prescriptive/legislative jurisdiction and enforcement jurisdiction. Both have been intimately linked in the past because of the "revenue rule" under which, traditionally, one state would not assist in

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[86] John A. Swain, "State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective" (2003) 45 Wm. & Mary L. Rev. 319, online: <https://scholarship.law.wm.edu/wmlr/vol45/iss1/5> (accessed 13 February 2024).
[87] Ibid.
[88] Ibid.
[89] Ibid.
[90] John A. Swain, *supra* note 86.
[91] Philip Baker, "Some Thoughts on Jurisdiction and Nexus" (April 2020), online (blog): Field Tax <https://www.fieldtax.com/wp-content/uploads/2020/04/Philip-Baker-Some-Thoughts-on-Jurisdiction-and-Nexus.pdf> (accessed 13 February 2024).

the collection of taxes due to another state.[92] Enforcement jurisdiction was consequently limited to the territory of the state imposing the tax.[93] This meant that taxes could only be collected if the taxpayer was physically present in the jurisdiction, or the taxpayer owned property located in the territory or derived income sourced from the territory of the collecting country.[94] Thus, prescriptive/legislative jurisdiction was limited by the territorial scope of enforcement jurisdiction.[95]

However, the "revenue rule" is now subject to widespread exceptions, with the result that a state may now enlist the assistance of other states to collect taxes owed to it by a person resident outside its physical borders.[96] Hence prescriptive/legislative jurisdiction is now very distinct from enforcement jurisdiction. The scope of and conditions for both categories of tax jurisdiction are not necessarily the same. Enforcement jurisdiction may in the future remain largely territorial, but with a growing (yet ancillary) extra-territorial element through arrangements involving international assistance in the collection of taxes. On the other hand, prescriptive/legislative jurisdiction is no longer limited by the consequences of the revenue rule.[97]

I assume for the purposes of my research thesis that a nexus with a state (duly recognized in international tax law and policy) is required for the exercise of prescriptive/legislative jurisdiction. Some tax scholars have expressed the view that there are no limitations on the tax jurisdiction of a state (though some of those tax scholars do accept that the practicalities of enforcement often require a nexus).[98] Others contend that tax treaties (bilateral, multilateral, or plurilateral) are not

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[92] Philip Baker, *supra* note 91.
[93] Ibid.
[94] Ibid.
[95] Ibid.
[96] Ibid.
[97] Ibid.
[98] Ibid.

necessary for the exercise of tax jurisdiction by a state – not even for the purpose of avoidance of double taxation on cross-border trade. States may unilaterally employ tools such as tax credits and deductions to address double taxation concerns on cross-border trade within their borders.[99] I categorically reject these views in my research thesis. I adopt the view aptly expressed by Stjepan Gadžo, an Assistant Professor of International Tax and Public Finance Law at the Faculty of Law of the University of Rijeka, that the exercise of taxing powers by a state is only lawful in international tax law and policy where there is a "tax nexus" or a qualifying connection between the taxing state and a particular set of facts relevant for taxation.[100]

Respectfully drawing from the Philip Baker's work on tax jurisdiction, my thesis identifies some of the current issues which raise, or may raise, questions of the exercise of prescriptive/legislative jurisdiction by a state in tax matters, and therefore give rise to theoretical analysis of the requirement for tax nexus in international tax law and policy.[101] I observe (as did Philip Baker) that the net result of globalization and digitalization of the economy is that several (source) countries are now making new claims to tax jurisdiction, which were not made previously, and which test the limits of prescriptive/legislative jurisdiction.[102] A good example of this development is the recent clamour of source countries to tax the economic activities of digital businesses.

While I recognize the *equitable* right of source countries to tax digital businesses, I argue that the international tax regime does not admit the exercise of prescriptive/legislative jurisdiction on digital tax matters by source countries because "significant economic presence" and other iterations of digital presence are not recognized tax nexus factors in international tax law and

[99] Philip Baker, *supra* note 91.
[100] Ibid.
[101] Ibid.
[102] Ibid.

policy. As such, the exercise of enforcement jurisdiction by source states in respect of unilateral digital tax measures would not only be impracticable but also illegitimate within the framework of international tax law and policy. Allocation of taxing rights in the international tax regime would have to be altered to recognize economic nexus as a basis for the legitimate exercise of tax jurisdiction by a source country over non-resident digital businesses operating within its economy.

I consequently argue in my thesis that both Nigeria's unilateral digital tax regime and Canada's unilateral DST measure violate the PE provisions of the Nigeria-Canada Double Tax Avoidance Treaty (the "**Treaty**"). I reason that the income taxing rights of contracting states under the Treaty are hinged on the taxable physical presence of a non-resident entity within the contracting state. The tests for determining taxable physical presence within a contracting state are contained in the PE rules set out in the Treaty. These PE rules do not recognize digital presence as a valid basis for the exercise of tax jurisdiction by a contracting state party. States are bound by their treaty commitments and cannot validly rely on their domestic law to circumvent treaty obligations. I contend that the reciprocal wrongful conduct of the parties to a treaty does not automatically terminate or warrant the termination of the treaty. It also does not excuse or validate the reciprocal wrongful conduct of the parties in breach of the treaty. Only bilateral and multilateral tax arrangements that recognize digital presence as part of a PE will allow source countries to tax non-resident digital companies without unilaterally overriding or breaching treaty provisions.

To address the tax challenges presented by the digital economy, my thesis proposes in its ODTMDEE solution, a redrafting of the Treaty (and other relevant bilateral tax treaties, including the UN and OECD model tax conventions) to recognize "significant economic presence" as one of the tests for determining the taxable presence of a non-resident entity within a contracting state under the PE rules specified in the treaties. My thesis also proposes (in its ODTMDEE solution) a

robust definition of what constitutes "significant economic presence" for digital tax purposes under the applicable treaties. These proposals, if implemented, will enable developing and emerging (source) economies to implement digital tax measures without breaching the existing bilateral tax treaty commitments in international tax law and policy.

1.4.3 *Reasonableness concept*

"Reasonableness" is a nebulous concept in law. It is not susceptible to any generally acceptable definition. However, the concept of reasonableness is generally conceived as a technical and functional concept in law.[103] Consequently, a digital tax measure is only reasonable if it is functional to the state implementing the digital tax measure.[104] If it is not functional to the state implementing the digital tax measure, then it is unreasonable.[105] As a technical functional concept, reasonableness embodies attributes of relativity, adaptability, rationality, flexibility, and pragmatism.[106] It displaces resort to the rigidity of legal texts and the illogic of sentiments.[107] For instance, what constituted a reasonable threshold for PE in the past – a compromise threshold that source countries were willing to accept – may not meet such standards today considering the digital transformation of economic activities.[108] Reasonableness is adaptable to such changes.[109] As such, the PE rules of the international tax regime are unreasonable in that they are still reliant on physical presence for allocation of taxing rights in a digital economy that has enabled non-resident entities to do business in countries where they have no form of physical presence.

[103] Okanga Ogbu Okanga, *supra* note 2.
[104] Ibid.
[105] Ibid.
[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] Ibid.

The above notwithstanding, the *Digital Tax Extremes* is unreasonable and should be rejected by developing and emerging economies because it promotes: **(i)** global consensus, which is impracticable and favours wealthy host countries to the detriment of low-income source countries like Nigeria in terms of both *process* and *substance*; and **(ii)** unilateralism, which violates both existing bilateral tax treaties and the international tax principles of administrability and efficiency, thereby socio-politico-economically hurting developing countries much more than it helps them. Hence, I contend that African developing (source) countries can only achieve their digital tax objectives through "*strategic reasonable political compromise*" with developed (host) countries as contemplated in my ODTMDEE solution to the digital tax challenges faced by developing and emerging economies.

My conception of reasonableness for the purposes of this thesis is based on rational pragmatism. By this I mean that in testing the reasonability of a digital tax measure, I am guided more by rational practical considerations rather than by utopian ideals. I argue that developing countries, in their pursuit of equitable digital taxing rights in the international tax system, must adopt an approach that evaluates tax theories and the measures they propose in terms of the probable success of their practical application. I propose the approach of dealing with the problem of social inequality in the allocation of taxing rights between developed host countries and developing source countries in the international tax system, in a sensible manner that suits the socio-politico-economic realities of African developing countries within the framework of international tax law and policy; rather than by following the bandwagon-effect-fixed theories, ideas, or rules represented by the *Digital Tax Extremes*. My ODTMDEE solution to developing countries' digital tax challenges is based on rational practical solutions rather than on idealistic and unrealistic theories that only serve the purpose of straining international relations between African developing countries and their developed cross-border trade partners.

As a rational pragmatist, the underlying bases for my conception of reasonableness are logic, balance, and rationality. The key element of my conception of reasonableness is *rationality*. I therefore attempt a definition of '*rationality*' for the purposes of my research thesis notwithstanding its nebulousness. When we say that a decision or measure is irrational, we simply mean that the decision or measure defies logic. This begs the question *why* the decision or measure defied logic in the first place. To answer this question in my research thesis, I draw on Denis Galligan's conception of '*rationality*'[110], which holds that rationality is relative and "requires that decisions be made *for reasons which are rational in terms of our understanding of the world*".[111] (Dennis Galligan is a Professor of Socio-Legal Studies at the University of Oxford, United Kingdom.)

In this regard, a decision or measure is unreasonable if it is irrational. A decision or measure is irrational if it is illogical in the sense that it fails to take account of practical realities in the world in which it is to be applied. In other words, if – on the evaluation of the merits, the decision or measure is impracticable, then it is unreasonable. I draw inspiration from a Canadian judicial statement of reasonableness, which holds that a statement regarding the reasonability or otherwise of a decision is "*a statement about the logical relationship between the grounds of the decision and premises thought by the court to be true*".[112]

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[110] Paul Daly, "The Analytical Structure of Reasonableness Review" (2012), online (blog): A Theory of Deference in Administrative Law: Basis, Application, and Scope (Cambridge University Press) CanLII <https://www.canlii.org/en/commentary/doc/2016CanLIIDocs273> (accessed 14 February 2024).
[111] Denis Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford, United Kingdom: Clarendon, 1986), p. 5. The same point applies to the sliding scale developed by the English courts in respect of judicial review for alleged breaches of legitimate expectations. See *R (Begbie) v Department of Education and Employment* [1999] EWCA Civ 2100; [2000] 1 WLR 1115, 1129-1131, *per* Laws LJ. Guidance in determining what constitutes *Wednesbury* unreasonableness, remains necessary.
[112] *Canadian Association of Industrial, Mechanical and Allied Workers, Local 14 v Paccar of Canada* [1989] 2 SCR 983 at 1018, per Sopinka J.

Applying these concepts to my research, I determine the reasonability of a digital tax measure by considering its rational practical effect(s) on the socio-politico-economic standing of developing countries within the framework of international tax law and policy. Does the measure allow African developing (source) countries to achieve their digital tax objectives without: **(a)** jeopardizing international relations with their developed (host) country trade partners; or **(b)** compromising their socio-politico-economic autonomy in the negotiation process? The test applied is whether, on an objective analysis, the relevant digital tax measure is both logical and rationally practicable (or administrable) within the framework of international tax law and policy.

As a rational pragmatist, I recognize the equitable right of developing (source) countries to exercise tax jurisdiction over economic activities conducted by digital businesses within their digital economy. I however perceive as unreasonable any digital tax measure implemented without reference to applicable international tax law and policy concerns. The reason being that such measures are not socio-politico-economically functional to the implementing country – especially for developing countries. Logic necessarily dictates that national governments cannot act unilaterally on crucial global matters like digital taxation without risking the adverse reaction of other countries – some of which may be key trade partners. The test should always be that of objectivity, balance, logic, and rationality. On a cost-benefit analysis, does the revenue that may be derived from a relevant digital tax measure exceed the socio-politico-economic cost of its implementation? If the objective answer to this question is affirmative, then the measure is reasonable. However, if the objective answer to the question is negative, then the measure is unreasonable and should be abandoned.

In formulating my conception of reasonableness, I draw inspiration from Okanga's RIC concept which requires a trifactor analysis of any international tax compromise that apportions taxing rights between states.[113] Okanga opines that through such analysis we can ascertain whether a compromise can be deemed reasonable – and therefore equitable – to the states involved.[114] The three questions constituting the RIC test proposed by Okanga are: **(i)** is there a normative basis for a state to tax; **(ii)** does a relevant compromise impair tax jurisdiction; and **(iii)** is the relevant impairment reasonable in the circumstances?[115] Okanga opines that the test is progressive, which means that we move from stage to stage and should stop at any stage of the analysis if the outcome turns negative.[116] Thus, if it is found that there is no basis to tax, the analysis ends there. If we find that the state has a basis to tax, we can proceed to the next step, and so on.[117]

While I agree with the logical flow of the questions constituting the RIC test propounded by Okanga, I disagree with the outcome. Unlike the RIC test, I do not (in my thesis) equate reasonability with equity. I contend that a digital tax measure may be *unreasonable* notwithstanding that it is *equitable*. I equate reasonability with *rational pragmatism*. Cold logic, rationality, balance, and practicability. I argue that while equity in international tax may be *rational idealism*, it is not *logically practicable* within the framework of international tax law and policy. I argue that for a digital tax measure to be reasonable, it must be *rationally pragmatic*. Put differently, it must be *balanced* in that it must be both *rational* and *logically practicable*, that is, it must produce workable results. Any *imbalanced* digital tax measure – whether in favour of or against developing countries – is unreasonable. This is why my thesis rejects the *Digital Tax Extremes* because it is *imbalanced*, impracticable, and therefore unreasonable. The *Digital Tax*

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[113] Okanga Ogbu Okanga, *supra* note 2.
[114] Ibid.
[115] Ibid.
[116] Ibid.
[117] Ibid.

Extremes consists of two extremes: *global consensus* (which seems to favour developed OECD host countries to the detriment of developing source countries) and *unilateralism*, which seems to favour developing source countries to the detriment of developed host countries. Both extremes are *impracticable* to the extent that they are *imbalanced* and are therefore unreasonable. Hence my proposition of ODTMDEE as a *balanced, practicable* solution for Africa.

1.5 Research Limitations

The limitation to my research is that my work draws substantially on the doctrinal approach to legal research, which has the limitations of being limited in scope, biased in favour of the law as it is rather than as it ought to be, is characterized by a lack of empirical evidence, and generally does not give much room for originality. I attempt to close this gap by drawing substantially on the socio-legal research method which allows for interdisciplinary analysis in legal research. I also apply the theoretical research method which allows me to circumvent the lack of originality in doctrinal research and substantially introduce originality to my work. Another limitation to my research is that I do not engage in a Third World Approach to International Law ("**TWAIL**") analysis despite the fact that my work focuses on unilateral digital tax measures in developing and emerging economies. My reason for not engaging in a TWAIL analysis is that a core TWAIL analysis may reject the arguments canvassed in my work and endorse unilateral digital tax measures in developing and emerging economies. My work, however, does not advocate for unilateralism – it rather calls for a balanced and more practicable shift away from both unilateralism and the global consensus approaches to digital taxation. For this reason, I do not engage in a TWAIL analysis in research thesis as I reasonably believe that such analysis will not be functional to the core claims of my work.

CHAPTER 2

DIGITAL TAX EXTREMES – GLOBAL CONSENSUS

2.1 Overview

Globalization has caused an increase in the cross-border trade of goods and services across several jurisdictions. With goods and services being produced with inputs from various countries there are ever-more possible claims to tax by each of these countries.[118] Should taxation occur in the country in which the multinational enterprise is resident, the source country or countries in which the income is generated, or some combination?[119] As the global economy has become increasingly digitalized, many multinational enterprises headquartered in one country (mostly developed countries) provide digital services to consumers situated in other countries (mostly developing countries) without any physical presence in those countries for tax purposes. This situation gives rise to the question of the proper allocation of taxing rights relating to the digital services provided.[120] It is especially relevant in today's socio-politico-economic landscape to determine and assess appropriate measures for dealing with the tax challenges that digital business models have created. This assessment is necessary because source countries are increasingly clamoring for taxing rights over the activities of non-resident entities in their digital economy. This has resulted in trade conflicts between source and host countries – with some source countries opting for unilateral digital tax measures.

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[118] Adnan Sose et al, "Taxation of the Digital Economy" (2023), online (blog): South Centre/Geneva Graduate Institute <https://www.southcentre.int/wp-content/uploads/2023/11/SC_IHEID_report_Taxation-of-the-Digital-Economy_EN.pdf> (accessed 13 March 13 2024).
[119] Ibid.
[120] Ibid.

These trade conflicts arise from the fact that the boundaries between digital and traditional business models are vanishing as firms increasingly digitalize their business models.[121] Besides the consensus on the fact that ring-fencing the digital economy is not possible, scholars and politicians agree on two defining features of digitalization. First, it leads to the global sale of goods and services without requiring a physical presence, that is, a subsidiary or a Permanent Establishment ("**PE**"), in the market country. Second, digital businesses rely on intangible assets, such as patents, (user) data or algorithms, and economies of scale.[122] As the traditional income tax system links taxing rights mainly to physical nexus, including a legal seat, market jurisdictions do not participate in the taxation of profits derived without such local nexus. Given the increasing importance of digital business models and associated profits, the tax policy debate has centered around whether the traditional allocation of taxing rights can stand the test of time.[123]

In this chapter I analyze the various digital tax measures that have been proposed by stakeholders and attempt a modest determination of their propriety within the framework of international tax law and policy. To do this, I first examine (within the context of my *Digital Tax Extremes* concept) the digital tax measures that have been adopted by stakeholders with a view to assessing their suitability for developing and emerging economies. My *Digital Tax Extremes* concept consists of two key elements: *global consensus* and *unilateralism*. I conclude that both elements are impracticable. Consequently, they are unreasonable and constitute ineffective approaches towards realizing the digital tax objectives of both developed and developing economies. In this chapter I focus on the *global consensus* element of the *Digital Tax Extremes* concept, which is central to the core claims of my thesis. I discuss in detail the various western multilateral approaches towards

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[121] Jost Heckemeyer et al, "The Digital Economy, Global Tax Reforms and Developing Countries – An Evaluation of Pillar I and Art. 12B UN Model" (2024), online (blog): <https://ssrn.com/abstract=4776415> (accessed 16 April 2024).
[122] Ibid.
[123] Ibid.

finding a global consensus solution to digital tax challenges. These include the two-pillar approach proposed by the Organization for Economic Cooperation and Development ("**OECD**"); the proposed introduction of Article 12B to the United Nations ("**UN**") model tax treaty; and the African Tax Administration Forum ("**ATAF**")'s and South Centre's proposed models for tackling digital tax challenges. I also discuss the UN tax resolution of November 22, 2023, which seeks to establish a framework tax convention for addressing the tax challenges of the digital economy (amongst other things).

ATAF is a network of African tax administrations that aims to improve tax systems in Africa through exchanges, knowledge dissemination, capacity development and active contribution to the regional and global tax agenda. ATAF strives to build efficient and effective tax administrations in Africa to become the leader on African tax matters, enhance economic development and improve the living standards of the people of Africa. The South Centre is an intergovernmental organization of developing countries that helps developing countries to combine their efforts and expertise to promote their common interests in the international arena. It conducts policy-oriented research on key policy development issues, and supports developing countries to effectively participate in international negotiating processes that are relevant to the achievement of the Sustainable Development Goals (SDGs). The South Centre promotes the unity of the Global South in such processes while recognizing the diversity of national interests and priorities.

This chapter is divided into three parts. Following this overview of the chapter in part 2.1, I extensively discuss (in part 2.2) the various western multilateral approaches towards finding a global consensus solution to digital tax challenges. These include the two-pillar approach proposed by the OECD and the proposed introduction of Article 12B to the UN model tax treaty. Finally, I analyze (in part 2.3) the ATAF's and South Centre's proposed models for tackling digital

tax challenges. I also discuss the UN tax resolution of November 22, 2023, which seeks to establish a framework tax convention for addressing the tax challenges of the digital economy. In summary, this chapter:

1. Offers a brief description of the challenge of increased globalization and digitalization to conventional taxing rights allocation;
2. Sets out what the Base Erosion and Profit Shifting ("**BEPS**") project entailed – with a description section on both pillars;
3. Reviews the response of countries to the proposal (and its failure to be implemented to date), including the rise of unilateral initiatives;
4. Describes the resultant rise of an approach proffered by the UN;
5. Explores alternative proposals from the South Centre and ATAF; and
6. Offers my view on why all these options are not ideal.

My objective in this chapter is to show that the global consensus approach to digital taxation is impracticable and favours wealthy host countries to the detriment of low-income source countries like Nigeria in terms of both *process* and *substance*. I further aim to show that the global consensus approach to digital taxation is impracticable because it is politically impossible to achieve global consensus on such a controversial matter as digital taxation.

2.2 Western Multilateral Approaches Towards Finding a Global Consensus Solution

At the international level, deliberations regarding the appropriate allocation of taxing rights related to the digital economy have been ongoing on two separate fronts: the OECD and the UN Tax

Committee arena.[124] On the one hand, the OECD deliberations produced the popular but controversial two-pillar solution.[125] The UN Tax Committee deliberations, on the other hand, produced the less popular but nonetheless controversial solution contained in the proposed Article 12B of the UN Model Tax Convention.[126] These proposals (if and when implemented) have the potential to rewrite international tax law and policy rules regulating the allocation of taxing rights amongst source and host countries in digitalized cross-border transactions.[127]

Perhaps, recognizing the fact that most European Union ("**EU**") member countries are likewise OECD members, the EU has not proffered any markedly separate solution to the tax challenges presented by globalization and the digital economy, but has rather sought to establish uniform rules for efficient application of the OECD two-pillar solutions across the EU member countries. Giant strides have been made in this regard with implementation on most points set for 2024. These strides made by the EU are not the focus of this thesis as they are regional and not relevant to my core claims.

The OECD two-pillar solutions are relevant. They are relevant because they have been widely criticized for not sufficiently addressing the tax challenges presented by the globalized and digitalized economy – especially for developing countries.[128] This underscores the relevance of

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[124] Adnan Sose et al, *supra* note 118.
[125] Ibid.
[126] ATAF, "Technical Review of the Draft Article 12B United Nations Model Tax Convention" (October 2020), online (blog): African Tax Administration Forum<https://events.ataftax.org/includes/preview.php?file_id=81&language=en_US#:~:text=The%20draft%20Article%2012B%20states,by%20the%20business's%20profitability%20ratio> (accessed 24 November 2023).
[127] Adnan Sose et al, *ibid* note 118.
[128] Reuven Avi-Yonah, "Comment on Picciotto et al, Beyond the Two Pillar Proposals: A Simplified Approach for Taxing Multinationals" (16 November 2023), unpublished commentary posted on the author's LinkedIn page on 16 November 2023.

the South Centre's call for the world to look beyond the two-pillar solutions proposed by OECD.[129] It further underscores the relevance of the ATAF's view that the Article 12B (UN Model Tax Convention) solution may be helpful to African developing countries if certain recommended reforms are made to the proposal.[130] This is also true for ATAF's recent policy brief publication highlighting options for taxing digital firms in Africa. The brief expanded ATAF's proposals for addressing the tax challenges of the digital economy.[131] Consequently, I discuss these proposals in detail below.

2.2.1 *The OECD's response to the adoption of unilateral digital tax measures by some countries*

Base Erosion and Profit Shifting ("**BEPS**") problems arise due to the existence of gaps or loopholes in international tax law and policy rules. The OECD recognized this problem in its Action 1 BEPS proposal, designed to address the tax challenges of globalization and digitalization of the economy.[132] Some source countries like France, India, and Nigeria sought to address this problem by adopting unilateral digital tax measures. This sparked trade conflicts with the host countries (such as the United States of America ("**US**")) of the digital businesses involved. The OECD/G20 Inclusive Framework consequently prioritized Action 1 in its BEPS project with a view to galvanizing a global consensus on uniform measures for addressing the tax challenges presented by globalization and the digitalized economy. This was OECD's response to the

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[129] Sol Picciotto et al, "Beyond the Two Pillar Proposals: A Simplified Approach for Taxing Multinationals" (26 October 2023), online (blog) 6 Tax Cooperation Policy Brief (South Centre) <https://taxinitiative.southcentre.int/> (accessed 25 November 2023).

[130] ATAF, *supra* note 126.

[131] ATAF, "Taxing Digital Firms in Africa" (January 2024), online (blog): ATAF Policy Brief Series <https://events.ataftax.org/includes/preview.php?file_id=232&language=en_US> (accessed 2 April 2024).

[132] Jude Odinkonigbo & Emmanuel Onyeabor, "Nigeria's Finance Act 2019 and the Significant Economic Presence concept: Prospects and Challenges" (2020/2021) 20:1 Uniben Law Journal 1.

adoption of unilateral digital tax measures by some source countries. The OECD has so far been unsuccessful at achieving a global consensus on digital taxation.[133]

OECD has also struggled to reach a consensus amongst its members on uniform measures for addressing the tax challenges presented by globalization and digitalization of the economy. On June 17, 2020, the *Financial Times* review reported that the US had suspended the OECD-led talks with European countries on developing a global framework for taxation of digital incomes.[134] The US Treasury Secretary at the time, Mr. Steven Mnuchin, had communicated this fact in a letter to the UK, Spain, France, and Italy.[135] The US demanded that all negotiations be suspended until after the Corona virus (COVID-19) pandemic that was ravaging the world at the time had passed. It warned that any country that unilaterally imposed digital taxes on American multinational technology and big data companies like Apple and Google would face retaliatory measures (such as trade sanctions) from the US.[136]

In response, the EU Commissioner for Economy at the time, Paolo Gentiloni, stated that Europe would proceed with a proposal for uniform digital taxation within the EU after the end of 2020, despite the US' threat.[137] The EU did not live up to this promise until 2023. It was believed that the EU may have feared retaliatory measures from the US, especially following the then US Treasury Secretary's (Janet Yellen) opposition of the EU's plan to impose digital taxes on US

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[133] Jude Odinkonigbo & Emmanuel Onyeabor, *supra* note 132.
[134] Sam Fleming, et al, "US Upends Global Digital Tax Plans After Pulling out of Talks with Europe" (17 June 2020) *Financial Times*, online (blog): https://www.ft.com/content/1ac26225-c5dc-48fa-84bd-b61e1f4a3d94 (accessed November 24, 2023).
[135] Ibid.
[136] Ibid.
[137] Sam Morgan, "Europe to Push Ahead with Digital Tax Despite US 'Threats'" (18 June 2020), online (blog): Euractiv.com with Reuters
<https://www.euractiv.com/section/economy-jobs/news/europe-to-push-ahead-with-digital-tax-despite-us-threats/>
(accessed 25 November 2023).

companies in 2021.[138] However, the delay may have had nothing to do with fear of retaliatory measures from the US. It may have been rather caused by the EU's reported shift of the implementation of its digital tax policy to 2023 – with the hope of finalizing the relevant bill before the end of 2022[139] and possibly reaching a consensus with the US in that regard.[140] As of March 23, 2021, Austria, France, Hungary, Italy, Poland, Spain, Turkey, and the United Kingdom ("**UK**") had started the implementation of their respective Digital Services Tax ("**DST**") rules.[141] Belgium, Czechia, and Slovakia had also published their DST proposals for enactment as DST laws.[142] Equally, Latvia, Norway, and Slovenia had either officially announced or shown intentions to implement DST on non-resident technology and big data companies.[143]

With the US' threat of retaliatory measures and Europe's insistence on proceeding with its plan for digital taxation, it seemed that the stage had been set for a global trade war.[144] The OECD Inclusive Framework on BEPS attempted to solve this problem by proposing a two-pillar approach designed to address the tax challenges of the globalized and digitalized of the economy. However, the effort was criticized on the basis that it was dominated by the G20 countries, especially the US and EU member countries, and that despite its expansion to an "inclusive framework" of over 140 countries, it continued to represent primarily the interests of the developed world.[145] As of December 2023, the OECD two-pillar rule had only been partially welcomed by a group of OECD

[138] Raf Casert, "EU puts Digital Levy Plans on Hold in Face of US Criticism" (12 July 2021), online (blog): AP News <https://apnews.com/article/europe-business-technology-government-and-politics-g-20-summit-7cc795c044ded60de3cf43038c8bb851> (accessed 25 November 2023).
[139] Elke Asen, "What European OECD Countries are Doing about Digital Services Taxes" (22 November 2021) online (blog): Tax Foundation <https://taxfoundation.org/data/all/eu/digital-tax-europe-2020/> (accessed 26 November 2023).
[140] Ibid.
[141] Jude Odinkonigbo & Emmanuel Onyeabor, *supra* note 132.
[142] Ibid.
[143] Ibid.
[144] Ibid.
[145] Reuven Avi-Yonah, "Toward a More Inclusive International Tax Regime? Reflections on a UN Framework Convention" (November 24, 2023), unpublished draft commentary posted on the author's LinkedIn page on 24 November 2023.

countries (mostly EU countries) with proposed significant modifications to suit local peculiarities and a plan to commence phased implementation of mostly the Pillar 2 approach from January 2024. Not much has changed in this regard as of June 2, 2024. While the US continues to oppose OECD's two-pillar approach for several reasons – especially Pillar 1, most developing countries like Nigeria rejected the proposals outright as not being in the best interest of low-income jurisdictions. The US' reasons for opposition mostly relate to arguments around alleged discrimination against US big tech companies and inefficiency of implementation. While the specifics of these reasons are not relevant to the subject of this thesis, brief details are provided below.

I provide below a synopsis of the OECD two-pillar rules, to assess its utility (if any) to addressing the tax challenges of the digitalized economy in developing countries like Nigeria.

- **Pillar 1**

Concerns have been raised over the past years that the existing international tax system does not properly capture the impact of globalization and digitalization of the economy.[146] Under the current international tax rules, multinationals generally pay corporate income tax where production occurs rather than where consumers or, specifically for the digital sector, users are located.[147] Hence the contention that through the digital economy, businesses (implicitly) derive income from users abroad but are not subject to corporate income tax in the source country due to the absence

[146] Daniel Bunn & Elke Asen, "What European Countries are Doing about Digital Services Taxes" (9 August 2022), online (blog): Tax Foundation <https://taxfoundation.org/data/all/eu/digital-tax-europe-2022/> (accessed 26 November 2023).
[147] Ibid.

of physical presence within the source country.[148]

To address these concerns, the OECD Inclusive Framework on BEPS proposed the two-pillar approach which evolved over time culminating in the new multilateral convention (alongside accompanying handbooks and explanatory notes) released by the OECD on October 11, 2023, to address the tax challenges of the globalized and digitalized economy. These documents are connected to the OECD two-pillar proposal. Pillar 1 seeks to change where large multinational companies pay taxes on their profits.[149] The text reflects the consensus achieved so far amongst OECD/G20 Inclusive Framework of BEPS members on the technical architecture of Amount A, with different views on a handful of specific items noted in footnotes by a small number of jurisdictions who are constructively engaging to resolve differences. The current proposal would broadly require some of the world's largest multinational businesses (which are mostly American digital giants or big data companies) to pay some of their income taxes where their consumers are located. This proposal is referred to as the Pillar 1 proposal[150] which is still undergoing negotiation and is unlikely to achieve global consensus or completion any time soon. 'Consumers' here loosely refers to users (for subscription-based digital services) and advertisers (for big data advertisement services).

In contrast to the residence-based allocation of taxing rights in the international tax system, the Pillar 1 approach would allocate a share of profits from where the largest multinationals are currently being taxed (which are mostly developed countries such as the US) to the jurisdictions

[148] Daniel Bunn & Elke Asen, *supra* note 146.
[149] Daniel Bunn, "Five Takeaways from the New Pillar One Documents" (18 October 2023), online (blog): Tax Foundation <https://taxfoundation.org/blog/pillar-one-us-treasury-consultation/#:~:text=In%20contrast%20to%20this%20production,their%20final%20customers%20are%20located> (accessed 27 November 2023).
[150] Ibid.

where their final customers are located (which are mostly developing countries such as Nigeria). This, however, does not mean that the Pillar 1 approach favours developing countries. Indeed, I show further below that the Pillar 1 approach does not favour developing countries. Pillar 1 is fated to fail for many reasons relating to the complexity of its technical rules and the rather intriguing international politics of its implementation process.

Pillar 1 consists of two key elements: Amount A and Amount B. Amount A aims to reallocate a portion of the profits of the largest 100 or so multinationals to the jurisdictions they operate in.[151] The allocation of a share of profits from the host countries to the source countries under Pillar 1 (Amount A) will be done through a set of technical rules that require companies to do their best to determine where the end users of their products are located.[152] Where a company is selling an intermediary good to another business, they will be expected under the Pillar 1 (Amount A) rule to determine (to the best of their ability) where their products are purchased by consumers.[153]

The first key point to note is that Amount A will affect very few companies. In general, only companies or groups of companies that have revenue of more than 20 billion Euros and a pre-tax profit margin of more than 10% in a relevant accounting period are subject to Pillar 1. Where a company is within the scope of Pillar 1, there will be significant and administrative obligations – at least initially – to gather the information required for the Amount A calculation. Multinationals that are within the scope of Amount A will have to: **(i)** identify if they are in-scope in terms of the revenue and pre-tax profit margin specified above; **(ii)** determine if segmentation would apply[154];

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[151] Lee Hadnum, "Pillar One: Summary", online (blog): OECDPillars in Association with ORBITAX<https://oecdpillars.com/pillar_one/pillar-one-summary-2/> (accessed 27 November 2023).
[152] Ibid.
[153] Ibid.
[154] Under Annex C, Section 4 of the draft Multilateral Convention to Implement Amount A of Pillar One published by the OECD on October 11, 2023 ("**MLC**"), segmentation can apply where a multinational enterprise group has revenues that exceed the 20 billion Euros threshold, but does not meet the profit margin test (that is, its pre-tax profit

and **(iii)** determine excluded or exempt entities.[155] They must also source their revenue, calculate adjusted profits, compute the applicable profit reallocation, calculate the applicable marketing and distribution profits safe harbor, and eliminate double taxation by applying the relevant double tax elimination provisions contained in Article 11 of the Multilateral Convention to Implement Amount A of Pillar One published by the OECD on October 11, 2023 ("**MLC**").

The technicalities of these approaches and how they operate are not relevant to the subject of this thesis. However, it is relevant to note that these approaches are inordinately technical, have never truly been tested before in international tax law and policy, and have been aptly described to jointly consist of a policy "*that works in theory and may have a slight chance to work in practice*".[156]

As noted earlier above, the MLC to implement Amount A of Pillar 1 was published by the OECD on October 11, 2023. It requires ratification by 30 States accounting for at least 60% of the ultimate parent entities of multinational enterprises initially expected to be in-scope for Amount A. Once these minimum conditions are met, the states that have ratified can decide when the MLC will enter into force. It is expected that the MLC should enter into force by 2025, to allow for the domestic consultation, legislative, and administrative processes applicable in each jurisdiction.[157]

Amount B is separate from Amount A and relates to the application of the arm's length basis to in-country baseline marketing and distribution activities. It provides a fixed return for baseline

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margin is less than 10%). In this case a segment of the group disclosed in the consolidated financial accounts of the Ultimate Parent Entity ("**UPE**") can be a 'covered segment'. A covered segment is subject to the Amount A rules (with some adjustments) irrespective of the fact that the multinational enterprise group may not be subject to Amount A.

[155] Excluded entities are defined in Articles 1.5.1 and 1.5.2 of the OECD Model Rules and include government entities, international organizations, non-profit organizations, pension funds, investment funds that are a UPE, and real estate investment vehicles that are a UPE. Excluded entities are excluded from the scope of Amount A.

[156] Daniel Bunn & Elke Asen, *supra* note 146.

[157] Lee Hadnum, *supra* note 151.

marketing and distribution activities that is intended to deliver a similar outcome to the arm's length basis. Its purpose is to simplify transfer pricing rules for both multinational groups and relevant tax authorities.[158] Although details on the application of Amount B were provided in the October 2020 Blueprint, the July 2021 Statement issued by the OECD stated that Amount B is being revisited and redrafted. On December 8, 2022, the OECD published a consultation document on Amount B of Pillar 1. It describes the broad operation of Amount B and seeks public input on several aspects of the proposed rules. The consultation ran until January 25, 2023, and the OECD issued further Amount B rules on July 17, 2023.[159] Having launched further documentation on Amount B of Pillar 1 on July 17, 2023, with a public consultation that lasted until September 1, 2023, negotiations on Amount B were expected to be completed by the end of 2023. The OECD/G20 Inclusive Framework planned to approve a final report on Amount B of Pillar 1 and incorporate key content into the OECD Transfer Pricing Guidelines by January 2024.[160]

However, it was not until February 19, 2024, that an updated Pillar 1 – Amount B report[161] was published by the OECD/G20 Inclusive Framework on BEPS. The report provides a simplified and streamlined approach to applying the arm's length principle to baseline marketing and distribution activities. Content from the report has been incorporated into the OECD Transfer Pricing Guidelines, along with conforming changes to the Commentary on Article 25 of the OECD Model Tax Convention. This approach aims to address transfer pricing disputes regarding baseline marketing and distribution arrangements which may involve administrative challenges for tax administrations, and result in a compliance burden for taxpayers, especially across low-capacity

[158] Lee Hadnum, *supra* note 151.
[158] Ibid.
[159] Ibid.
[160] Ibid.
[161] OECD, "Pillar One - Amount B: Inclusive Framework on BEPS" (2024), online (blog): OECD/G20 Base Erosion and Profit Shifting Project (Paris, France: OECD Publishing) <https://doi.org/10.1787/21ea168b-en> (accessed 19 February 2024).

jurisdictions.[162]

Implementation of Amount A and Amount B is likely to require amendments to both domestic laws and relevant tax treaties to which the implementing countries are members. This will be a tall order. The French economic minister is reported to have said on February 20, 2023, that implementation of Amount A of Pillar 1 is being blocked by countries such as the US, Saudi Arabia, and India, and that it is time for a "European solution" for greater alignment of corporate tax policies between EU member states (that is, the implementation of a European Digital Levy).[163] It is noteworthy that on April 29, 2023, the EU Parliament adopted a resolution on OECD negotiations, the tax residency of digital companies, and a possible European digital tax. This has however now been put on hold pending implementation of the OECD two-pillar solution.[164] The details of this EU arrangement are not relevant to the subject matter of this thesis.

One hundred thirty-eight (138) countries and jurisdictions have also agreed in the Outcome Statement published by the OECD on October 11, 2023, to not impose any new DSTs (or relevant similar measures) on any company before December 31, 2024, or the entry into force of the MLC if earlier, provided the signature of the MLC has made sufficient progress by the end of the year.[165] I will show much further below how Canada's unilateral DST measure may breach this agreement if implemented.

[162] OECD, *supra* note 161.
[163] Ibid.
[164] Ibid.
[165] Ibid.

- **Pillar 2**

Pillar 2 evolved as part of the OECD's BEPS initiative. As noted earlier above, a key part of the OECD/G20 BEPS project is addressing the tax challenges arising from globalization and digitalization of the economy. In October 2021, over 135 jurisdictions joined a ground-breaking plan – the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy. This plan sought to update key elements of the international tax system which is no longer fit for purpose in a globalized and digitalized economy. The Global Anti-Base Erosion ("**GloBE**") Rules and the Subject to Tax Rule ("**STTR**") are key components of Pillar 2, which seeks to ensure that multinational enterprises pay a minimum level of tax on the income arising in each of the jurisdictions where they operate. More specifically, the STTR is a treaty-based rule that protects the right of developing Inclusive Framework members to tax certain intra-group payments, where these are subject to a nominal corporate income tax that is below the minimum tax rate.[166]

While Pillar 2 consists of the GloBE Rules and the STTR, the GloBE Rules are the main Pillar 2 rules. They apply a 15% minimum corporate income tax rate on the foreign profits of in-scope multinationals.[167] The STTR, on the other hand, is effectively a treaty override provision. It allows a source country to tax the gross amount of interest, royalties, and a defined list of other payments received by a connected company, up to a globally agreed 9% minimum tax rate, even if a relevant tax treaty only permits the source country to impose Withholding Tax ("**WHT**") on the payment

[166] OECD, "Tax Challenges Arising from the Digitalisation of the Economy – Subject to Tax Rule (Pillar Two)" (2023), online (blog): Inclusive Framework on BEPS <https://www.oecd-ilibrary.org/taxation/tax-challenges-arising-from-the-digitalisation-of-the-economy-subject-to-tax-rule-pillar-two_9afd6856-en> (accessed 4 December 2023).
[167] Lee Hadnum, "Pillar Two GloBE Rules: Summary", online (blog): OECDPillars in Association with ORBITAX <https://oecdpillars.com/pillar-tab/overview/> (accessed 27 November 2023).

at a rate below 9% or allocates exclusive taxing rights over the payment to the recipient's host country. Where a country applies a tax rate on the receipt of relevant payments that is less than the globally agreed 9% minimum tax rate, the payer jurisdiction has the right to "top up" the tax payable with a WHT. For example, if a jurisdiction applied a tax rate of 5% for royalty receipts, the payer's jurisdiction could collect a top-up tax of 4% on the payment.[168]

The STTR, as a treaty-based rule, can only be implemented through bilateral negotiations and amendments to individual treaties or as part of a multilateral convention. The 2021 Statements provide that members of the OECD Inclusive Framework on BEPS that apply nominal corporate income tax rates below the STTR minimum rate will implement the STTR into their bilateral treaties with developing country members of the OECD Inclusive Framework when requested to do so. Very little detail has been released on the STTR to date. A model treaty provision to give effect to the STTR was released in a report issued by the OECD on October 11, 2023, together with an accompanying commentary explaining the purpose and operation of the STTR.[169]

As stated above, the intention of the GloBE Rules is to ensure that multinationals are subject to tax on their profits at a minimum 15% tax rate. It aims to end the so-called 'race-to-the bottom' with countries competing on tax rates to obtain inward investment. The GloBE Rules operate by calculating the Effective Tax Rate ("**ETR**") of the relevant multinational in the countries it operates in, and then compares this with the 15% minimum tax rate. If the ETR is less than the 15% minimum tax rate, additional tax (referred to as top-up tax) may be payable. If the ETR is 15% or above, there is no additional tax. A key element of the GloBE Rules is the jurisdictional blending approach. The OECD considered two main approaches to calculating the ETR: a global

[168] Lee Hadnum, *supra* note 167.
[169] Ibid.

blending approach, or a jurisdictional blending approach. It chose the latter. A global blending approach would have blended all the profits and losses of a multinational entity, internationally. The jurisdictional blending approach simply blends the profits and losses on a jurisdictional basis. Global blending would have significantly narrowed the scope of the GloBE Rules. Nevertheless, jurisdictional blending means that the fact that a multinational has a low-taxed entity in a jurisdiction does not necessarily mean that the ETR for the jurisdiction would be less than 15%. The actual application of the GloBE Rules is more complex than this simple description.[170] However, the minute details are not relevant to the subject matter of this thesis and will not be elaborated.

In applying the GloBE Rules, the first step is to determine if the relevant multinational is in-scope. In other words, a multinational group entity needs to first determine whether it is subject to the GloBE Rules. In general, multinational groups with revenue exceeding 750 million Euros are within scope. However, not all group entities are subject to the GloBE Rules. Excluded Entities are not subject to the ETR calculation or top-up tax liabilities. If a group is in-scope, it also needs to determine where its subsidiaries are located for the purposes of the GloBE Rules.[171]

The next step to is determine the ETR calculation. The broad operation of the GloBE Rules is to simply calculate the ETR and compare it to the 15% global minimum tax rate. However, to do this, the model GloBE Rules apply a series of separate rules to adjust the financial results of the multinational entity's subsidiaries. This is because the starting point of the GloBE Rules is the financial accounts of the relevant multinational. The tax figure used to calculate the ETR for instance is not based on the tax payable in that jurisdiction in its corporate income tax return, but

[170] Lee Hadnum, *supra* note 167.
[171] Ibid.

the tax expense in the financial accounts. The GloBE Rules then adjust this figure before it can be used in the GloBE ETR calculation (referred to as 'Adjusted Covered Taxes'). Similar principles also apply to calculating GloBE income. It is noteworthy that Article 4.4 of the model Pillar 2 GloBE Rules adopts deferred tax accounting to address timing differences when calculating covered taxes paid by an entity. It does this to prevent a multinational from incurring top-up tax in a year due to a low effective tax rate (ETR), where the income or expense may simply be taxed or deductible in a different period. The GloBE Rules simply take the current tax expense and deferred tax expense from the financial accounts and adjusts them for efficiency.[172]

Once the GloBE ETR is calculated, if this is less than the 15% global minimum tax rate, the amount of top-up tax needs to be calculated. The top-up tax percentage (that is, the amount by which the ETR is less than 15%) is multiplied by GloBE income for the relevant jurisdiction after a deduction for the Substance-Based Income Exclusion. This is a reduction in the GloBE profits based on the amount of tangible assets and payroll costs in a jurisdiction. The amount of top-up tax payable is then reduced by any Qualified Domestic Minimum Top-Up Tax ("**QDMTT**"). A QDMTT is a domestic minimum tax that operates in a similar way to the GloBE Rules. Many jurisdictions are likely to implement a QDMTT to ensure that they retain taxing rights over any low-taxed profits of entities in their jurisdiction.[173]

If, after all this, there is top-up tax payable, then the next question is who is liable to pay the tax? The analysis above has established that the top-up tax calculation is based on a jurisdictional approach. This ordinarily suggests that the top-up tax would be paid to that jurisdiction. However, that is not how the GloBE Rules work. As noted above, the GloBE Rules are not only designed to

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[172] Lee Hadnum, *supra* note 167.
[173] Ibid.

subject multinationals to 15% minimum tax. They are also partly designed to end the so called 'race to the bottom' with states competing on inward investment by offering lower rates of corporate income tax via tax credits and tax incentives.[174] In order words, the GloBE Rules are designed to eliminate harmful tax competition amongst countries.

The GloBE Rules allocate top-up tax to jurisdictions using two main rules: Income Inclusion Rule and Under-Taxed Payments Rule. The Income Inclusion Rule is the primary method of accounting for top-up tax under Pillar 2. The general rule is that an Ultimate Parent Entity ("**UPE**") is required to apply the Income Inclusion Rule ("**IIR**") where it owns an ownership interest in a low-taxed constituent entity at any time during a fiscal year. In this case, the UPE accounts for the top-up tax in its jurisdiction, provided that the jurisdiction applies an IIR. If it does not, then the right to account for the tax flows down to the group to the next parent entity where there is an IIR. Special rules apply to certain intermediate parent entities and the partially owned parent companies. The Under-Taxed Payments Rule ("**UTPR**") operates as a backstop to the IIR so that if the top-up tax is not wholly allocated under an IIR (like where there is no IIR in the jurisdiction), the liability to account for the top-up tax falls on the group entities based on a ratio determined relative to the number of employees and the value of tangible assets in their jurisdiction.[175]

The model GloBE Rules include specific provisions to deal with situations that may result in inaccurate ETRs and top-up tax if the general rules are applied. These mainly apply to investment funds, joint ventures and other split ownership situations, and group reconstructions. In many cases these seek to reconcile the domestic tax treatment of these entities with the GloBE Rules and ensure that any impact on the top-up tax calculation does not hinder the application of the GloBE Rules.

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[174] Lee Hadnum, *supra* note 167.
[175] Ibid.

For example, under the general GloBE Rules, a multinational's share of the income of a Joint Venture ("**JV**") that it did not control would not be brought into account because the JV is not consolidated on a line-by-line basis as required by Article 1.2 of the OECD model GloBE Rules. Therefore, there is a separate rule for JVs to address this point.[176]

The OECD model GloBE Rules apply all the above principles (and more). They are split into a series of Articles. Article 1 addresses the scope of the rules (that is, which multinational groups are subject to the rules). Article 2 provides for the IIR and the UTPR, including who pays the top-up tax (and where). Article 3 deals with the calculation of GloBE income (that is, taking the financial accounting profit or loss and adjusting it for GloBE income purposes). Article 4 specifies the basis for calculating adjusted covered taxes (that is, the tax figure used in the ETR calculation). Article 5 governs the calculation of the ETR and the relevant top-up tax. Article 6 provides special rules for corporate reconstructions. Article 7 contains special rules for investment funds and other special regimes. Article 8 deals with administrative rules. Article 9 deals with certain transitional rules. Article 10 is the definition section of the OECD model GloBE Rules.[177] In terms of a very broad overview, the operation of the GloBE Rules is as follows[178]:

(i) Identify whether the multinational group is within the scope of the Pillar Two GloBE rules.

(ii) Identify entities (including PEs) that the multinational group has in a jurisdiction.

(iii) Ascertain the type of entity (for instance, a constituent entity, a PE, a tax transparent entity, a reverse hybrid entity, a hybrid entity, investment entity, etc.).

(iv) Calculate the profits of those entities for Pillar 2 purposes (referred to as GloBE income).

(v) Consider the de-minimis rule.

[176] Lee Hadnum, *supra* note 167.
[177] Ibid.
[178] Ibid.

(vi) Consider the transitional country-by-country safe harbour.

(vii) Calculate the taxes that relate to those profits for Pillar 2 purposes (referred to as Adjusted Covered Taxes) taking account of the allocation rules. Calculate the taxes and profits per jurisdiction using a jurisdictional approach (note that this does not apply to investment entities or minority-owned entities/groups).

(viii) Calculate the Pillar 2 GloBE ETR for the jurisdiction by dividing the total taxes by the total profits.

(ix) If the Pillar 2 GloBE ETR is less than 15%, subtract the ETR from 15% to determine the top-up tax rate.

(x) Deduct the substance-based income exclusion from GloBE income (unless an election is made not to do so). This is effectively 5% (increased under transitional rules) of tangible assets and payroll costs in the jurisdiction (referred to as excess profits).

(xi) Apply the top-up tax rate to excess profits.

(xii) Add any additional tax.

(xiii) Deduct any qualifying domestic minimum top-up tax.

(xiv) Attribute the top-up tax to the entities in the jurisdiction.

(xv) Apply the income inclusion rule (IIR) or undertaxed payments rule.

- **Negatives of the OECD two-pillar approach**

The key shortfall of the two-pillar approach that makes it uniquely unsuited for developing economies such as Nigeria is that the two pillars are extremely technical and potentially too costly and complex to implement.[179] Specifically, Pillar 1 revenue threshold of 20 billion Euros is not

[179] Julie McCarthy, "A bad deal for development: Assessing the impacts of the new inclusive framework tax deal on low- and middle-income countries" (May 2022), online (blog): Brookings Global Working Paper #174 – Brookings

pragmatic and consequently unreasonable and unfair for low-income countries because only very few (if any) multinationals operating in the digital economy of developing countries would be caught and taxable by these countries. While there is a plan to eventually lower the Pillar 1 threshold from 20 billion Euros to 10 billion Euros, I believe that the reduced threshold (when and if it happens) would still not be pragmatic for low-income countries. The threshold of 20 billion Euros is generally high for everyone (developed and developing countries alike). This is why there are conversations regarding its reduction in the first place. My argument, however, is that even if the proposed reduction of the threshold to 10 billion Euros is not too high for developed economies, it will definitely be too high for developing and emerging economies like Nigeria. While I agree that there should be a threshold, my argument is the threshold should be set with the economic realities of low-income countries in mind; otherwise, it would be unrealistic and difficult to implement – at least in developing and emerging economies like Nigeria.

Additional broader challenges of Pillar 1 which are relevant but not specific to developing and emerging economies are the non-likelihood of achieving a global consensus on the proposal and the political impracticability of adopting the MLC. Not all countries in the OECD/G20 Inclusive Framework agree on Pillar 1 as several countries have expressed objections to the draft proposal for its implementation. This is a problem because it demonstrates that the OECD is yet to achieve a global consensus on Pillar 1. Perhaps, a bigger problem is that the MLC cannot be adopted without US support. This political impracticability of implementation means that even if Pillar 1 was pragmatically a good idea for developing and emerging economies (which it is not), the practical likelihood of its implementation is politically negligible.

Centre for Sustainable Development <https://www.brookings.edu/wp-content/uploads/2022/05/Tax-and-Bad-Deal-for-Development_Final.pdf> (accessed 2 June 2024).

The draft MLC proposes a points system to determine whether a critical mass of jurisdictions has agreed to the treaty. The entry into force provisions require 30 ratifications and approval by jurisdictions representing a total of 600 points or more. The US has been assigned 486 points, and there are 999 points available. There is no path to achieving 600 points without US approval, and the US Constitution requires 67 votes in the US Senate to ratify a treaty. This appears to be a rather unlikely outcome at this juncture.[180] In any case, the US has reasons to veto the MLC as it has consistently expressed reservations towards the implementation of Pillar 1. Indeed, on December 5, 2023, the US Council for International Business issued a statement by email to the US Treasury Department in respect of Pillar 1, and the MLC, wherein it expressed very strong reservations regarding the current architecture of Amount A which it considers to be particularly harmful to the interests of American technology and big data companies.

As noted earlier above, the OECD two-pillar approach are considered adverse to the best interests of developing countries such as Nigeria. They are believed to primarily represent the interests of advanced economies. This is mostly true of the Pillar 1 rule, because it is very limited in scope. The total amount that could be raised by applying the Pillar 1 rule is only about US$15 billion annually, which is a small fraction of the profit of a single large multinational entity. Also, most of the revenue goes to the richest countries – especially the US. In addition, the US gets the veto described above, which makes the success of Pillar 1 highly unlikely.[181]

The result of Pillar 1 may be a proliferation of unilateral DSTs adopted by different countries in an uncoordinated fashion.[182] This could lead to avoidable trade disputes amongst otherwise

[180] Daniel Bunn, *supra* note 149.
[181] Reuven Avi-Yonah, *supra*, note 145.
[182] Ibid.

friendly countries. Indeed, the US Senate Committee on Finance had on October 10, 2023, issued a statement to the United States Trade Representative in which it criticized Canada's unilateral DST measure which took effect on June 28, 2024. The US described Canada's DST measure as a "*discriminatory*" tax policy "*that targets American businesses*". It further issued a subtle warning stating that "*the strong economic relationship between the United States and Canada… will become immensely challenging… if Canada subjects innovative American companies to arbitrary discrimination without facing any consequences*".[183]

OECD's Pillar 2 BEPS rule is believed to be a bit better than Pillar 1.[184] This belief is hinged on the analysis that the combination of the IIR and the UTPR means that for most developing countries, the rational response would be to adopt a QDMTT. This would raise revenue while constraining the ability of multinationals to pit developing countries against one another. The drawback to Pillar 2, however, is that the rate is too low and the inclusion of the Substance Based Income Exclusion rule, and of refundable credits, thereunder, means that unhealthy tax competition amongst developing countries could continue.[185]

OECD's two-pillar proposal does not effectively resolve the tax challenges of the digital economy for developing countries. This has led to calls for looking beyond the two-pillar approach. Having considered OECD's two-pillar proposal, I now proceed (in part II(B) below) to discuss the Article 12B proposal and other related efforts at the UN. My analysis will highlight the implications of the UN efforts for developing countries' digital tax objectives.

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[183] Emmanuel Onyeabor, "Towards a United Nations Tax Convention: Prospects and Challenges for Developing Economies" (12 December 2023), online (blog): Afronomicslaw <Towards a United Nations Tax Convention: Prospects and Challenges for Developing Economies | Afronomicslaw> (accessed 2 June 2024).
[184] Ibid.
[185] Ibid.

2.2.2 The United Nations' Approach

On November 22, 2023, the Economic and Financial Committee of the UN General Assembly adopted a resolution to begin the process of establishing a framework tax convention by a landslide majority of 125 to 48 (with 9 abstentions).[186] This historic development is expected to completely change how global tax rules are decided. It is also expected that the UN framework tax convention, when established, could shift decision-making in global tax policy formulation away from the OECD to the UN.[187]

The UN tax resolution was championed by the Africa Group and led by Nigeria to start an inter-governmental process to negotiate a new UN framework convention on international tax cooperation. Its adoption by the UN is believed to be a major win for developing countries and the global fight for tax justice. It is noteworthy that in the 78 years' existence of the UN, there has never been a universal or broadly inclusive forum for global coordination on international tax matters.[188] International tax law and policy formulation has been largely led by the OECD and the G20 countries for the past 60 years. This situation was considered inequitable by developing countries who seek greater control over their economic destiny.[189]

The OECD is a small club of 38 (mostly developed) countries where power and influence are

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[186] Emmanuel Onyeabor, *supra* note 183. See also Mark Bou Mansour, "UN adopts plans for historic tax reform" (22 November 2023), online (blog): Tax Justice Network (Press Office) <UN adopts plans for historic tax reform - Tax Justice Network> (accessed 24 November 2023).
[187] Rasmus Corlin Christensen, "Between revolution and rhetoric: the UN vote and the future of international tax cooperation" (2024) 1 BTR 2.
[188] Diego Alexander Foss & Bonnie Berry, "New UN Resolution on tax cooperation a promising step towards a fairer international financial system" (18 January 2023), online (blog): relief-web <https://reliefweb.int/report/world/new-un-resolution-tax-cooperation-promising-step-towards-fairer-international-financial-system> (accessed 24 November 2023).
[189] Ibid.

primarily held by wealthy nations and where low-income countries are traditionally excluded from decision-making.[190] As noted earlier above, the OECD Inclusive Framework on BEPS – a collaboration of about 140 countries established to address the tax challenges of the digital economy – did not provide satisfactory participation for developing countries. The two-pillar approach to resolving the tax challenges of the digital economy – proposed by the OECD – left much to be desired. Both solutions – especially the Pillar 1 approach – are believed to not be in the best interest of developing countries. Hence the Africa Group's agitation for a UN tax convention that will shift global tax policy formulation rights away from the OECD to the UN.[191] Highlights of how the two-pillar rules are problematic for developing countries has been provided above.

The Africa Group (led by Nigeria) believe that the UN will be more representative of developing countries than the OECD. This sentiment seems to be supported by the remarkable results of the UN tax resolution vote. The resolution was opposed by 48 countries (largely OECD members and developed nations) including Canada, Australia, US, UK, and all the EU member countries. Nine countries abstained from voting on the UN tax resolution, including OECD members like Iceland, Mexico, Norway, and Turkey.[192] Notwithstanding this powerful opposition, the UN tax resolution was adopted by a majority of 125 countries (largely developing and emerging economies) including Nigeria, China, Russia, South Africa, and other developing countries.[193] The voting split is instructive of the underlying fractures in international relations that led to the vote. While the resolution entails a series of procedural and institutional decisions, the crux of the matter is a

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[190] Diego Alexander Foss & Bonnie Berry, *supra* note 188.
[191] Ibid.
[192] Rasmus Corlin Christensen, *supra* note 187.
[193] I however reasonably believe that Russia and China do not qualify as either developing or emerging economies. While there is debate on their economic status, it is believed that both countries, especially Russia, qualify as developed economies.

dissatisfaction with existing governance arrangements at the OECD and their economic and legal outcomes.[194]

I have argued elsewhere that while the proposed UN framework tax convention may provide a broader forum for increased conversations between developed and developing countries on international cooperation in tax matters, it may not be the magic wand of equal participation in global tax policy formulation hoped for by developing and emerging economies.[195] Nevertheless, the adoption of the UN tax resolution is indeed a very significant development in the international tax law and policy space that will form the basis of very engaging conversations going forward::

> [T]he likelihood that an outcome at the UN might resemble the practices and preferences of lower-income countries is higher because there is no requirement to reach a consensus. At the [Inclusive Framework], the consensus requirement means that proposals anticipating lower-income countries' interests are likely to be watered down: 'The view is that the OECD secretariat is listening to developing countries, but the big countries are not, and are ploughing on regardless', said one interviewee (international organization). The drawback of majority decision making is that powerful countries cannot be compelled to abide by a decision with which they disagree.[196]

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[194] Rasmus Corlin Christensen, *supra* note 187.

[195] Emmanuel Onyeabor, *supra* note 183.

[196] Rasmus Corlin Christensen, *supra* note 187. See also Rasmus Corlin Christensen, Martin Hearson & Tovony Randriamanalina, "At the Table, Off the Menu? Assessing the Participation of Lower-Income Countries in Global Tax Negotiations" (December 2020) Working Paper 115, online (blog): International Center for Tax and Development (ICTD) <https://www.ictd.ac/publication/at-table-off-menu-assessing-participation-lower-income-countries-global-tax-negotiations/> (accessed 2 August 2024). See further Martin Hearson, Rasmus Corlin Christensen and Tovony Randriamanalina, "Developing Influence: The Power of 'the Rest' in Global Tax Governance" (2023) 30 Review of International Political Economy 841.

Rasmus Corlin Christensen further observed that while the UN tax resolution was hailed by tax campaigners as a "historic victory" and by developing countries as the realization of a "decades-long fight of Global South countries", the vote also drew harsh criticism from opponents.[197] The OECD Secretary General, Mathias Cormann, issued a statement on November 22, 2023, defending the OECD's "record of achieving consensus-based solutions to address tax evasion and avoidance, stabilize the international tax system and support developing countries", while Benjamin Angel, the head of direct taxation at the European Commission's tax directorate, indicated that the UN tax resolution might be a "giant waste of time".[198] Quoting Philip Baker,[199] Christensen notes that while it is "tempting" to identify the UN tax resolution as "the dawning of a new era in international tax cooperation", substantively, however, the resolution suggests no particular legal or policy content of a UN framework tax convention (itself a broad template legal instrument with contents to be determined) which imposes very limited commitments onto countries.[200] So, the project could yet prove to be no more than rhetoric. As Baker further writes, the UN vote is merely the latest in a long-running struggle, tracing back "almost 100 years", between developing and developed nations, and between different organizing fora, for control over the right to define new international tax rules.[201] As such, jumping to conclusions is alluring; yet to understand the significance of the UN role and, importantly, its implications for future global tax policy-making, requires an understanding of how we got here, and how the UN tax resolution might reflect or impose change in established ways of rule-making in international tax law and policy.[202]

The OECD's leadership on global tax coordination came under threat following the successful UN

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[197] Christensen, Hearson and Randriamanalina, *supra* note 196.
[198] Ibid.
[199] Philip Baker, "United Nations General Assembly Resolution on the Promotion of Inclusive and Effective International Tax Cooperation at the United Nations" (2023) 1 BTR 20.
[200] Rasmus Corlin Christensen, *supra* note 187.
[201] Ibid.
[202] Ibid.

tax resolution vote.[203] The UN tax resolution arguably has the potential of marking the beginning of a truly inclusive international tax regime.[204] It is also possible that the proposed UN framework tax convention may improve on the inadequacies of OECD's two-pillar BEPS rules.[205] The African Union is reported to have welcomed the vote as a "a beacon of hope" that would "facilitate the access of much needed financial resources".[206] This reaction is not surprising. Developing (mostly African) countries had lamented for years that they were unable to influence discussions on global tax cooperation at the OECD, where the rules for cross-border taxation are generally considered and formulated.[207] The UN tax resolution proposed by Nigeria had been backed by mostly developing and emerging economies due to their frustration at not being heard at the OECD level.[208]

KPMG global tax policy leader, Grant Wardell Johnson, is reported to have said that although the OECD two-pillar BEPS approach was backed by the G20 group of economic powers and had aimed for a global consensus, the UN tax resolution is likely to result in increased cooperation on tax matters between the UN and the OECD.[209] The extent to which this prediction will prove true remains open to question.[210] Recent reports of the International Monetary Fund show that developing (mostly African) countries are in huge debt. These debts are owed mostly to developed countries. Low-income countries have also struggled to recover from the financial crisis occasioned by the COVID-19 (Corona Virus) pandemic of 2020 and beyond. The situation is

[203] Leigh Thomas, "UN vote challenges OECD global tax leadership" (23 November 2023), online (blog): Reuters (World) <https://www.reuters.com/world/un-vote-challenges-oecd-global-tax-leadership-2023-11-23/> (accessed 25 November 2023).
[204] Reuven Avi-Yonah, *supra* note 145.
[205] Leigh Thomas, *supra* note 203.
[206] Ibid.
[207] Ibid.
[208] Ibid.
[209] Ibid.
[210] Ibid.

worsened by the climate crisis and the increasing number of armed conflicts across the globe.[211] The UN tax resolution vote is timely in that it arguably has the potential to facilitate sustained international tax cooperation through inclusive, inter-governmental negotiations at the UN.[212] International tax reforms designed to protect the tax base of source countries from the BEPS activities of multinationals may provide the much-needed financial freedom required for developing and emerging economies to break free of neocolonialism. It goes without saying that economic freedom comes with political and social freedom.[213]

These prospects are, however, not without challenges. While the UN tax resolution may have succeeded, the proposed UN framework tax convention may be unable to overcome the united opposition of the OECD – most of whose members voted against it.[214] Accordingly, the UN framework tax convention may not achieve the results hoped for by developing countries. This is more so because many developing (mostly African) countries are indebted to developed countries and powerful multinationals. They sometimes rely on developed countries and multinationals for humanitarian aid. This economic reliance on the developed world may be exploited by developed countries (who are mostly OECD members) and powerful multinationals (most of whom benefit from the existing international tax regime) to influence the votes of some developing countries at the UN.

In addition, assuming the UN framework tax convention overcomes the united opposition of the OECD, there remains the question of expertise. The UN is a much larger organization focused on several projects with human rights, world peace, and climate action at the forefront. The OECD is

[211] Leigh Thomas, *supra* note 203.
[212] Ibid.
[213] Ibid.
[214] Reuven Avi-Yonah, *supra* note 145.

a smaller entity with international tax law and policy formulation as its primary purpose for the past 60 years. In other words, while the UN may be the proverbial Jack of many trades and master of none – at least not of international taxation; the OECD is the Jack of a primary trade – international taxation – and an arguable master of that trade. This is so notwithstanding the fact that the OECD does a couple of other things in addition to tax. There is thus a legitimate concern that the quality of international tax law and policy rules may suffer if the reins of global tax policy formulation are shifted from the OECD to the UN.[215]

Meanwhile, prior to the adoption of the UN tax resolution on November 22, 2023, the UN Committee of Experts on International Cooperation in Tax Matters (the "**UN Tax Committee**") had released a proposal by one of its drafting groups for an additional provision (Article 12B) in the UN Model Tax Convention and accompanying Commentary that has been in the works. The proposal aims to deal with certain aspects of the taxation of a digitalized economy.[216] Article 12B of the UN Model Tax Convention aims to address concerns relating to the tax challenges of digitalization of the economy. The proposal is ultimately aimed at redistributing taxing rights to market jurisdictions.[217]

Just like OECD's Pillar 1 model, the UN's Article 12B reallocates taxing rights from residence countries to market jurisdictions based on newly designed nexus rules independent of physical presence. However, their definition of a "market jurisdiction" is not necessarily congruent.[218] OECD's Pillar 1 proposal employs net taxation on excess profits and allocates taxing rights multilaterally among jurisdictions through revenue-sourcing rules. These rules determine which

[215] Emmanuel Onyeabor, *supra* note 183.
[216] ATAF, *supra* note 126.
[217] Jost Heckemeyer et al, *supra* note 121.
[218] Ibid.

country is considered a market jurisdiction depending on the relevant multinational's business model and considering the place where the final customer uses the final good or service. In contrast, the UN proposal stipulates a bilateral reallocation of taxing rights on Automated Digital Services ("**ADS**") profits between two countries via a tax treaty containing a provision in line with Article 12B. It redistributes tax revenues from the residence country of the ADS provider to the country where the payment for the ADS originates. The latter is deemed to be the market jurisdiction. Taxes are either levied on a gross basis on ADS-related payments or – upon election of the ADS provider – on a net basis. Net taxation is applied on a simplified calculated profit share and avoids taxation of substance. However, the applicability of net taxation remains unclear as the market jurisdiction requires information on the profitability of the overall group.[219] In contrast to OECD's Pillar 1 model, the place of taxation following the UN's Article 12B does not depend on the relevant multinational's business model but on the pricing model of the respective ADS provider. For multinationals with physical nexus in various countries, channeling ADS payments to jurisdictions without Article 12B provision in its tax treaties provides a simple tax planning mechanism to circumvent the application of the new taxing right.[220]

Unlike OECD's Pillar 1, UN's Article 12B only applies if no taxing right previously exists, either through physical nexus or through WHTs. If the ADS provider has a physical nexus in the jurisdiction where the ADS payment originates, the existing taxing right under Article 7 of the UN Model Tax Convention (taxation of business profits) takes precedence. Since the UN Articles 7 and 12B are mutually exclusive in one jurisdiction, the relief of double taxation is always granted by the jurisdiction with the physical nexus. This approach is more pragmatic than Pillar 1 Amount A and facilitated by the bilateral application of Article 12B.

[219] Jost Heckemeyer et al, *supra* note 121.
[220] Ibid.

Hence broadly speaking, the draft Article 12B provision would allow the source jurisdiction to tax income from the provision of ADS paid to a non-resident entity. The tax would be levied by the source jurisdiction on the gross revenue at a rate which would need to be established during bilateral treaty negotiations between the source and residence jurisdictions. The Commentary to the draft Article 12B envisages that the tax would apply by way of a gross WHT. Payments would be sourced to the payer's jurisdiction of residence, or to the jurisdiction of any PE where that PE bears the payment. However, Article 12B also permits the service supplier to elect to be taxed on the net instead of gross basis where the qualified profit is 30% of the net profits. The provision is disapplied if the taxpayer has a PE in the source jurisdiction to which the income belongs, or if the income falls within Article 12A of the UN Model Tax Convention, because it is a payment made in respect of technical services fees.[221]

Article 12B, if approved by the UN Tax Committee, would be a provision in the UN Model Tax Convention. Accordingly, developing and emerging economies such as Nigeria, who may wish to adopt the provision in their bilateral tax treaties, would require bilateral negotiations with their relevant treaty partners to add the provision to the existing treaty or to any new treaties. ATAF has advised African countries that a treaty cannot create a taxing right for a jurisdiction. That taxing right must be created through enactment of domestic legislation in the country. ATAF further advised that if a developing African country wishes to create such a taxing right for itself, it will need to determine if it would be more beneficial to the country to introduce a unilateral digital tax measure such as a DST – in which case they may wish to use the ATAF suggested approach (explained further below) as a tool to assisting the country in drafting such legislation.[222] It is

[221] ATAF, *supra* note 126.
[222] Ibid.

however noteworthy that if the OECD Inclusive Framework on BEPS does reach a global consensus-based solution, OECD Inclusive Framework members may be required to cease applying unilateral digital tax measures such as DSTs or the likes to multinationals that are subject to the Amount A rules in the OECD Pillar 1 BEPS proposal.[223] I show further below why unilateral digital tax measures are ill-advised in a globalized economy – especially for developing and emerging economies such as Nigeria.

2.3 South Centre and ATAF Offer Alternatives to the OECD and UN Proposals

In a policy brief prepared for the South Center, the authors argued that the world should move beyond the two-pillar solution advocated by the OECD.[224] The authors identified the pragmatic flaws of OECD's two-pillar proposal (which were mostly political), summarized their findings, and proposed an alternative digital tax model thus[225]:

> This paper puts forward an alternative to the proposed multilateral convention under Pillar One of the BEPS project, by building on and going beyond the progress made so far. A new direction was signaled in 2019 by the G-24 paper proposing a taxable nexus based on significant economic presence, combined with fractional apportionment. The resulting measures agreed under the two pillars entail acceptance in principle of this approach, and also provide detailed technical standards for its implementation. These include: **(i)** a taxable nexus based on a quantitative threshold of sales revenues; **(ii)** a methodology for defining the global consolidated profits of

[223] ATAF, *supra* note 126.
[224] Sol Picciotto et al, *supra* note 129. See also Reuven Avi-Yonah, *supra* note 145.
[225] Ibid.

> [Multinational Enterprises ("**MNEs**")] for tax purposes; and **(iii)** detailed technical standards for defining and quantifying the factors that reflect the real activities of MNEs in a jurisdiction (sales, assets, and employees).
>
> The time is now right to take up the roadmap outlined by the G-24. The work done shows that technical obstacles can be overcome, the challenge is essentially political. This paper aims to provide a blueprint for immediate measures that States can take, while engaging in deliberation at national, regional, and international levels for a global drive towards practical and equitable reforms. Unitary taxation with formulary apportionment is the only fair and effective way to ensure taxation of MNEs where economic activities occur, as mandated by the G20. It can ensure that MNE profits are taxed once and only once, provide stability and certainty for business, and establish a basis for international tax rules fit for the 21st century.

Agreeing with this view, Reuven Avi-Yonah (Professor of International Taxation at the University of Michigan in the US) observed that the immense amount of technical work put into Pillar 1 is wasted upon its current iteration, because of political limitations. These include the limitation to multinationals with over 20 billion Euros in revenue (that is, fewer than 100 multinationals), allocating only 25% of net profit above 10 billion Euros to the market jurisdiction, and retaining the obsolete Arm's Length Principle ("**ALP**") and PE for the remaining 75% of net profit. As a result of these limitations, only 15 billion Euros get reallocated, and much of it goes to developed countries. This is a small fraction of the annual net profits of a single multinational entity like Apple or Google. In addition, and as earlier noted, the MLC to implement Pillar 1 requires ratification by the US before the moratorium on DSTs expires at the end of 2024, and that cannot happen because of unified Republican opposition (it requires 67 votes in the US Senate and the

Democrats only have a bare majority of 61 through 2024). Therefore, the DSTs will go into effect and the MLC will not – thereby making irrelevant all the work done in Pillar 1.[226]

The South Centre policy brief proposed a unitary solution to the tax challenges presented by globalization and digitalization of the economy. It argued that such unitary approach should start from the consolidated global profits of multinationals, and apportion them for tax purposes among all the countries where they do business, based on factors that reflect their real activities in each country. This is the only way to ensure that their profits are taxed at least once and only once. Rules based on this economic reality would be much simpler to administer, and would provide predictability and certainty, for both businesses and tax administrations. This would also help to ensure a level playing field on tax between MNEs and purely national enterprises. It would greatly reduce the costs of compliance with international tax rules, which have continued to become increasingly complex, unfair, subjective, hard to enforce, and ineffective.[227]

The South Centre policy brief further argued that such unitary approach could be adopted in a coordinated way, that would restore national tax sovereignty, which has been undermined by the power of MNEs and economic globalization. Coordination would be provided by the adoption of agreed standards to define each MNE's global consolidated profits for tax purposes, as well as for the factors for apportionment and their weighing. Such standards have already been formulated in the detailed technical work done for the two pillars in the BEPS project. Each country would remain free to decide its own rate of tax on corporate profits, to be applied to its share of each MNE's profits based on that firm's activities in the country. The pressures of competition to offer lower rates on excess profits would be restricted by concerted measures to ensure a global

[226] Reuven Avi-Yonah, *supra* note 145.
[227] Sol Picciotto et al, *supra* note 129.

minimum effective tax rate, which are already being implemented under the Pillar 2 GloBE Rules.[228]

The South Centre proceeded to propose physical assets, employees, and sales as acceptable factors to be adopted for apportionment of profits for the MNEs in relevant source countries. It was argued that these factors reflect the elements of both supply and demand that are essential in producing profits. They are also physical factors that can be relatively easily measured and geographically located. It was suggested in the South Centre policy brief that rules based on these principles would be relatively easy to administer, and hard to avoid. MNEs could of course respond by moving production to lower-tax jurisdictions, but this would be deterred by the inclusion of sales in the formula. Such strategies would also depend greatly on the suitability of a country for the location of such real investments: availability of a workforce with relevant skills, adequate infrastructure, etc. Under unitary taxation, countries would no longer be able to compete by offering tax breaks to attract paper profits, but would also need to offer an attractive location for real activities. It was hinted that this type of competition between states could be beneficial. The authors expressed the view that this approach would finally achieve the objective set for the BEPS project of aligning rights to tax MNE profits with their substantive presence in each country.[229]

I agree that the world (especially developing and emerging economies such as Nigeria) should look beyond the two-pillar proposals put forward by the OECD. However, I disagree with the unitary solution proposed by the authors of the South Centre policy brief. I rather align myself with Reuven Avi-Yonah's points of difference with the proposed South Centre unitary solution.[230]

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[228] Sol Picciotto et al, *supra* note 129.
[229] Ibid.
[230] Reuven Avi-Yonah, *supra* note 145.

First, it requires coordination between countries, but there is no realistic possibility that countries whose MNEs benefit from the current international tax system and who reluctantly agreed in principle to the minimal reforms of Pillar 1, like the US, would go along. Nor would many developing countries that would derive more revenues from a DST.[231] This is why the UN tax resolution of November 22, 2023, received such massive support from mostly developing countries in the first place. Second, the inclusion of assets and employees in the unitary formula would encourage MNEs to move production to low tax jurisdictions (subject to the constraints under Pillar 2). However, the minimum tax rate of 15% under Pillar 2 is low and there is a substance-based exclusion as well as an allowance for refundable and transferable credits, so that the actual effective tax rate is much lower. By this I mean that the effective tax rate of Pillar 2 could be as low as 7% following the application of the exceptions relating to substance-based exclusion as well as allowance for refundable and transferable credits. The technicalities relating to the computation of the effective tax rate of Pillar 2 are beyond the scope of this thesis. Third, the inclusion of production factors in the formula will continue to encourage tax competition among countries, which is not beneficial when it is driven by the need to match the tax rates of another country. This will result in windfalls for MNEs who will be able to continue to pit one developing country against another for investments they will make even with no tax subsidy.[232]

I partially align myself with the approach proposed by Reuven Avi-Yonah, which is based entirely on sales because the approach addresses the three problems of the unitary solution above.[233] First, it does not require coordination or global consensus since countries can adopt it unilaterally by taking the global net profit on the MNE as revealed in its financial statements and applying the

[231] Reuven Avi-Yonah, *supra* note 145.
[232] Ibid.
[233] Ibid.

sales factor to it. Indeed, that is what most US states are currently doing. The move among the US states toward single factor sales-based apportionment (as well as the universal adoption of destination basis for value added tax) shows that this result can be achieved without coordination or global consensus. The model would be the Indian fractional apportionment proposal, enhanced by the technical rules to locate sales adopted in the MLC. Second, since assets and employees are not included in the formula, this formula will not encourage MNEs to shift production based on tax rates. Third, since the consumer and user base are immobile, this formula will not encourage tax competition among countries, and will not confer windfalls upon MNEs.[234]

My key point of difference with Reuven Avi-Yonah's proposal is the encouragement of unilateral implementation. While I argue that global consensus is impracticable and therefore unreasonable, I maintain that unilateralism is likewise impracticable and therefore unreasonable. A balanced or middle point approach should be the regional approach advanced in ODTMDE (detailed in Chapter 5 of this thesis).

In addition to my key point of difference above, and as rightly noted by Reuven Avi-Yonah, the sales only approach has its limitations in that the sales only formula can be avoided by using thin margin distributors while the MNE only sells into a low tax jurisdiction where the unrelated distributor is located. However, the MLC addresses this problem by tracing the ultimate destination of sales. In any case, it is doubtful that MNEs will abandon control over sales to unrelated distributors. The second limitation of the sales only formula is that it benefits large market economies. That is true, but most countries (even the least developed ones) have a market, and a formula based on assets and employees will result in tax competition so that production locations

[234] Reuven Avi-Yonah, *supra* note 145.

are unlikely to derive revenue from these factors. Finally, sales only formula may violate WTO rules against export subsidies, but the theoretical basis of these rules is dubious since economists argue that excluding exports and taxing imports does not actually increase exports because of exchange rate adjustments, and in any case, the WTO cannot enforce its rules since the Appellate Body is suspended as a result of the US' deliberate actions. Even a blatant export subsidy like the US Foreign Derived Intangible Income regime has not drawn a WTO challenge[235] given the comatose state of the WTO Appellate Body and other countries' indifference to what the US is doing in this regard. This is perhaps evidence that the sales only approach's violation of WTO's rules against export subsidies may not be fatal to the proposal.

On its part, ATAF suggested an improvement of the provisions of the draft Article 12B of the UN Model Tax Convention which sources the income to the location of the payer.[236] The reason is that Article 12B does not seem to address the key concern of economic digitalization. One of the main tax-related concerns of economic digitalization is to develop new profit allocation rules that would allocate taxing rights where value is created in the digital era. User participation and the network effects created by users are important value streams which need to be remunerated. Article 12B does not seem to capture this value stream.

ATAF suggests the adoption of coordinated DST measures that will provide a very broad definition of the term "user" to ensure that the DST is encompassing in scope.[237] It is believed that this is necessary to ensure that businesses that generate revenue from the provision of digital services that are provided on a standardized basis to a large population of customers or users across

[235] Reuven Avi-Yonah, *supra* note 145.
[236] ATAF, *supra* note 126.
[237] Ibid.

multiple jurisdictions, typically using little or no local infrastructure, are in-scope of the DST.[238] ATAF argues that this approach will enable a country to tax both the income of a non-resident derived directly or indirectly for digital services where the payer of that income is resident in the country and also revenue which may be attributed to a country as a result of user participation (such as viewing of online adverts). ATAF further argues that the digital services revenue is not only revenue received or arising directly or indirectly from that country but also other revenue that may be received or arose in another jurisdiction.[239]

Curiously, in a policy brief published in January 2024, the ATAF expanded its options for taxing digital firms in Africa to include: **(i)** Option 1 – wait for the MLC to come into force; **(ii)** Option 2 – enact DST legislation that is not an income tax based on the ATAF suggested approach to drafting DST legislation, highlighted above; **(iii)** Option 3 – enact DST legislation that is an income tax; **(iv)** Option 4 – unilateral adoption of alternative nexus rules such as significant economic presence provision and Zimbabwe's taxation of e-commerce provisions; and **(v)** Option 5 – implementation of Article 12B of the UN Model Tax Convention.[240] All of these approaches have one key limitation: they lean towards the *Digital Tax Extremes* of global consensus or unilateralism without considering any balanced middle point that will avoid these extremes.

I disagree with ATAF's suggested approach above to addressing the tax challenges of globalization and digitalization of the economy in African developing countries. DSTs have been criticized (and rightly so) as not the best approach to resolving the tax challenges of the digital economy. There is a risk of double taxation since some digital transactions and revenues are already taxed, the

[238] ATAF, *supra* note 126.
[239] Ibid.
[240] Ibid.

confusion and complexity around what counts as a taxable service, ad finally, the potential damage to the country's reputation for cooperation in the international community. The sales only approach proposed by Reuven Avi-Yonah above is relatively better (save for the unilateral implementation concern highlighted above) because while it focuses only on sales, it does so with an eye to determining an acceptable and workable basis for taxation of MNEs in a globalized and digitalized economy. The key problem of the sales only approach is that it is open for unilateral adoption which could still result in international trade difficulties and consequently prove impracticable for developing countries that choose to adopt it.

Alternatively, Nigeria could lead the charge (as it had done in the UN tax resolution of November 22, 2023) for the UN framework tax convention that will be developed following the UN tax resolution, to present a new approach that builds upon the theoretical and practical achievements of the OECD's two-pillar approach without the accompanying limitations identified above.[241]

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[241] Reuven Avi-Yonah, *supra* note 145.

CHAPTER 3

DIGITAL TAX EXTREMES – UNILATERALISM

3.1 Overview

This chapter completes the framing of my "*Digital Tax Extremes*" concept, by providing a detailed doctrinal overview of Nigeria's unilateral digital tax regime vis-à-vis Canada's unilateral Digital Services Tax ("**DST**") measure, which took effect on June 28, 2024. It further provides a short overview of approaches adopted by other developed countries such as France and the United States of America ("**US**"). The aim is to provide a doctrinal analysis of how developing and developed countries have addressed (or proposed to address) digital tax challenges at national levels. Chapter 3 also bridges a number of areas of scholarly and policy concerns by drawing connections between the unilateral digital tax measures and tax competition, international trade relations, tax justice, constitutional issues, and treaty commitment concerns raised by the *Digital Tax Extremes* concept in developing and emerging economies.

This chapter shows that while global consensus is not feasible, unilateralism is not a pragmatic approach to addressing the tax challenges arising from globalization and digitalization of the economy. The chapter is divided into five parts. Following this introduction, part 3.2 provides an overview of relevant unilateral digital tax measures. Specifically, the unilateral digital tax measures adopted by Nigeria, Canada, and France, plus the US' foreign policy approach to unilateral digital tax measures that affect the business operations of US big data companies. Part 3.3 addresses emerging trade concerns arising from unilateral digital tax measures in developing and emerging economies. I underscore the tax competition and international trade relations

concerns raised by unilateral digital tax measures. Part 3.4 raises the tax justice and human rights compliance concerns raised by unilateral digital tax measures in developing and emerging economies within the framework of international tax law and policy.

Finally, Part 3.5 contends that unilateral digital tax measures constitute unacceptable unilateral tax treaty overrides that violate the Permanent Establishment ("**PE**") provisions of applicable bilateral tax treaties, specifically the Double Tax Avoidance Treaty between Nigeria and Canada (the "**Treaty**"). Unilateral digital tax measures have the potential of defeating the double-tax avoidance objectives of the Treaty. I argue that states can only lawfully exercise tax jurisdiction over any subject matter in international tax law and policy if a nexus warranting the tax exists. The absence of a tax nexus invalidates the exercise of tax jurisdiction by a state. In addition, states are bound by their treaty commitments and cannot validly rely on their domestic law to circumvent treaty obligations. I contend that the reciprocal wrongful conduct of the parties to a treaty does not automatically terminate or warrant the termination of the treaty. It also does not excuse or validate the reciprocal wrongful conduct of the parties in breach of the treaty. Only bilateral and multilateral tax arrangements that recognize digital presence as part of a PE will allow source countries to tax non-resident digital companies without unilaterally overriding or breaching treaty provisions.

3.2 Overview of Relevant Unilateral Digital Tax Measures

3.2.1 *Nigeria's Unilateral Digital Tax Measure*

- *General rules*

To address the tax challenges of globalization and digitalization of the economy in Nigeria, the

Finance Act 2019 was enacted to establish a taxable digital presence for Non-Resident Companies ("**NRCs**") doing business in Nigeria's digital economy. Notably, the provisions of the Finance Act 2019 regarding taxation of Nigeria's digital economy were greatly influenced by the work of the Organization for Economic Cooperation and Development ("**OECD**")'s Inclusive Framework on Base Erosion and Profit Shifting ("**BEPS**") and its proposals for addressing the tax challenges associated with the digitalization of the global economy. The Act achieved its objective by amending the provisions of Section 13(2) of the Companies Income Tax Act[242] (as amended) ("**CITA**"), to subject to tax, the incomes of NRCs generated from businesses involving: **(a)** operations in Nigeria's digital economy; or **(b)** provision of technical, management, consultancy, or professional services in Nigeria, provided such NRCs have a significant economic presence in Nigeria.[243] This provision was renewed and restated in the Finance Act 2021.[244]

The CITA does not define what constitutes "significant economic presence in Nigeria" for tax purposes. Instead, it vests the power to do so upon the Minister of Finance.[245] The Minister of Finance has exercised that power by issuing the Company Income Tax (Significant Economic Presence) Order 2020 (the "**Order**"). The Order, which has a commencement date of February 3, 2020, drew extensively from OECD's work on the concept of "significant economic presence" in digital taxation. It heralds a paradigm shift in the basis for taxation of NRCs in Nigeria's corporate income tax regime.[246]

The Order appears to have been influenced by the guidelines published by the OECD in its BEPS

[242] Cap. C21 Laws of the Federation of Nigeria 2004.
[243] See Finance Act 2019, S. 4.
[244] Jude Odinkonigbo & Emmanuel Onyeabor, "Nigeria's Finance Act 2019 and the Significant Economic Presence concept: Prospects and Challenges" (2020/2021) 20:1 Uniben Law Journal 1.
[245] See CITA, S. 13(4).
[246] Ibid.

Action Point 1. OECD's conception of the "significant economic presence" principle allocates taxing rights based on evidence of a combination of factors that create purposeful and sustained interaction with the economic life of a jurisdiction through digital means. The factors considered include revenue generated on a sustained basis, the existence of a user base, maintenance of the website in a local language, volume of digital content generated from the relevant tax jurisdiction, and other relevant factors.[247]

Under the Order, NRCs doing business in Nigeria's digital economy are deemed to have a significant economic presence in the country, in a relevant accounting year, if they[248] –

(a) derive gross turnover or income of more than ₦25,000,000 (Twenty-Five Million Naira)[249] or its foreign currency equivalent in an accounting period from their digital activities in Nigeria[250];

(b) use Nigerian domain names (.ng) or register a website address in Nigeria; or

(c) have purposeful and sustained interactions with persons in Nigeria by customizing their digital pages or platforms to target persons in Nigeria, including reflecting the prices of their products or services in Nigerian currency or providing options for billing or payment in Nigerian currency.

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[247] See OECD, "Addressing the Tax Challenges of the Digital Economy, Action 1 2015 Final Report" (2015), online (blog): OECD's Online Library <https://www.oecd-ilibrary.org/docserver/9789264241046-en.pdf?expires=1598712249&id=id&accname=guest&checksum=7784A29D19636AB459B93377E84A5C8A> (accessed 17 December 2023).

[248] See para 1(1)(a)-(c) of the Order.

[249] Roughly about US$16,677 (Sixteen Thousand, Six Hundred and Seventy-Seven United States Dollars) or $23,277 CAD (Twenty-Three Thousand, Two Hundred and Seventy-Seven Canadian Dollars at the parallel market exchange rate of about ₦1,499 to US$1 and ₦1,074 to $1 CAD respectively, as of June 9, 2024.

[250] The taxable digital activities that could give rise to this include one or more of the following: **(i)** streaming or downloading services of digital contents, including but not limited to movies, videos, music, applications, games, and e-books to any person in Nigeria; **(ii)** transmission of data collected about Nigerian users which has been generated from such users' activities on a digital interface, including website or mobile applications; **(iii)** direct or indirect provision of goods or services through a digital platform to Nigeria; and **(iv)** provision of intermediation services through a digital platform, website or other online applications that link suppliers and customers in Nigeria.

However, the tax treatment of digital incomes generated by NRCs covered by multilateral or bilateral treaties relating to digital taxation between Nigeria and any other country shall be exclusively governed by the relevant multilateral or bilateral treaty. The multilateral or bilateral treaty could be invoked to override the domestic legislation from the date it becomes effective.[251]

To determine whether the ₦25,000,000 (Twenty-Five Million Naira) gross turnover or income threshold specified in the Order has been met, activities carried out by connected persons in that accounting year shall be aggregated. Connected persons include: **(a)** persons that are "associates" as applicable under Nigerian law; or **(b)** persons that are business associates in any form. Persons are considered to be business associates, where: **(i)** one person participates directly or indirectly in the management, control, or in the capital of the other; or **(ii)** the person or persons participate directly or indirectly in the management, control, or in the capital of both enterprises.[252]

For NRCs providing technical, management, consultancy, or professional services in Nigeria, they will be deemed to have a significant economic presence if they earn any income or receive any payment from a person in Nigeria or from a fixed base or agent of an NRC in Nigeria.[253] Technical service means any service of a specialized nature (including advertising, training, or personnel service) that is not professional, management, or consultancy service.[254]

NRCs will not be deemed to have a significant economic presence in Nigeria, if: **(i)** payments are made to an employee of the person making the payment under a contract of employment; **(ii)** the

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[251] See para 1(3) & (4) of the Order. Currently, there is no multilateral, bilateral or consensus arrangement reached between Nigeria and any country to govern taxation of the digital economy. However, the Treaty between Nigeria and Canada specifically covers income taxes and provides the PE rules for taxation of non-resident entities by a contracting source country.
[252] See para 1(5) & (6) of the Order.
[253]See para 2(1) of the Order.
[254] See para 2(2) of the Order.

payments are for teaching in an educational institution or for teaching by an educational institution; or **(iii)** payments are made by a foreign fixed base of a Nigerian company.

- *Application of turnover tax on incomes of non-resident digital companies in Nigeria*

The Finance Act 2021, which came into force on December 31, 2021, introduced the application of turnover tax on the incomes of non-resident digital companies. A non-resident digital company with significant economic presence in Nigeria will be subject to turnover tax on the incomes attributable to its operations in the country's digital economy if such company produces no assessable profits in a relevant accounting year. Turnover tax will also apply if the company produces assessable profits which in the opinion of the Federal Inland Revenue Service ("**FIRS**") are less than might be expected to arise from the operations of the company, or where the FIRS is unable to determine the assessable profits of the company in the relevant accounting year.[255]

Prior to the enactment of the Finance Act 2021, Section 30 of the CITA only allowed the FIRS to charge turnover tax on the incomes of NRCs attributable to Nigeria – with no extension to non-resident digital companies. Turnover assessment is applied where the FIRS is unable to determine the assessable profits of an NRC or where the NRC produces no assessable profits. It is also applied where the assessable profits are, in the opinion of the FIRS, less than might be expected to arise from the company's operations in Nigeria within the relevant accounting year. This method of assessment is known as the Best of Judgment ("**BOJ**") assessment – that is, presumptive

[255] See section 30 of the CITA as amended by the Finance Act 2021. See also Jude Odinkonigbo & Chibuike Ikefuna, "Appointment of Non-Resident Persons as Tax Agents and the Application of Turnover Tax on Incomes of Non-Resident Digital Companies in Nigeria" (2021) online (blog): Templars <https://www.templars-law.com/app/uploads/2022/01/Clean-Non-resident-digital-companies-as-Tax-Agents-simplified-2.pdf> (accessed on 23 April 2024).

assessment. However, the imposition of the tax is required to be on a fair and reasonable percentage of the NRC's turnover for the relevant assessment period.[256]

In practice, the FIRS adopts 20% as the fair and reasonable percentage of an NRC's turnover as the profits of the company. It then subjects the 20% to income tax at the rate of 20% or 30% depending on the company's total turnover in the relevant accounting year.[257] This results in an effective tax rate of 6%.[258] The Finance Act 2021 extends this turnover tax to the incomes of non-resident digital companies attributable to their activities in Nigeria. This is especially so where the FIRS is unable to determine the assessable profits of a non-resident digital company, or the company produces no assessable profits. It is also the case where the company's assessable profits are in the opinion of the FIRS less than might be expected to arise from the company's operations in Nigeria's digital economy within the relevant period.[259]

It is noteworthy that the Finance Act 2021 does not introduce a new head of tax to the existing taxes payable by companies. It rather extends the reach of an already existing turnover tax to the incomes of non-resident digital companies operating in Nigeria's digital economy. In this regard, a BOJ assessment is usually applied where an NRC fails to file its income tax returns for a relevant

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[256] Jude Odinkonigbo & Chibuike Ikefuna, *supra* note 255.

[257] Companies are liable to Companies Income Tax ("**CIT**") in Nigeria on their taxable profits in each accounting year, at the rates of 20% or 30% of taxable profits made in a relevant accounting year, or total exemption from CIT in the relevant accounting year, depending on the amount of the companies' total gross turnover of income in a relevant accounting year. For ease of reference, CIT in Nigeria is subject to the following thresholds: **(i)** for "small" companies, exemption from CIT for a relevant assessment period, where the gross turnover of income earned by the company is ₦25,000,000 or less (it is however noteworthy that notwithstanding this exemption, penalties and interests will apply where there is failure to comply with any statutory tax registration or reporting obligations specified under Nigerian law); **(ii)** for "medium-sized" companies, CIT at the rate of 20% of taxable profits earned by the company as income in the relevant assessment period, where the gross turnover of income is greater than ₦25,000,000 but less than ₦100,000,000 during the relevant assessment period; and **(iii)** for "large" companies, CIT at the rate of 30% of taxable profits earned by the company as income in the relevant assessment period, where the gross turnover of income is ₦100,000,000 or above during the relevant assessment period. See sections 40 and 105 of the CITA.

[258] Jude Odinkonigbo & Emmanuel Onyeabor, *supra* note 244.

[259] Jude Odinkonigbo & Chibuike Ikefuna, *ibid* note 255.

year; and the FIRS is unable to determine the company's assessable profits in the relevant period. To avoid a BOJ assessment, NRCs are expected to file their income tax returns with audited financial statements of their Nigerian operations, the portion of profit derived from Nigeria, and the relevant tax computation schedules. This enables the FIRS to determine the NRCs' assessable profits for the relevant accounting period.[260]

There are enforcement challenges and retaliatory measures that may arise from international politics – especially from the US, in response to Nigeria's unilateral digital tax regime. Two relevant questions are: **(a)** how will the FIRS track the incomes of non-resident digital companies that are attributable to Nigeria for the purpose of levying digital and turnover tax; and **(b)** how prepared is Nigeria to engage the US in retaliatory socio-politico-economic sanctions and other punitive measures for daring to tax US big data companies? It is difficult to see how the FIRS will determine the incomes of non-resident digital companies that are attributable to Nigeria for the purpose of digital and turnover tax assessment.[261] It may be possible to trace financial flows if all payments made by Nigerian recipients of goods and services supplied by non-resident digital companies are made through approved banking channels. For instance, electronic payments made through authorized payment channels may be tracked and accounted for. This is not the case where Nigerian residents with foreign-issued credit or debit cards pay for goods and services delivered in Nigeria. In addition, payments made through other channels that are not controlled by Nigerian authorities may be difficult to monitor or account for if an NRC is uncooperative or recalcitrant.[262]

The OECD's efforts on exchange of information (both automatic and on request) suggests that

[260] Jude Odinkonigbo & Chibuike Ikefuna, *supra* note 255.
[261] Jude Odinkonigbo & Emmanuel Onyeabor, *supra* note 244.
[262] Ibid.

countries can easily share information to expose cross-border businesses that are involved in tax evasion and abusive tax avoidance. This is only possible where there is international tax cooperation. Unilateralism clearly does not encourage such cooperation. Considering that digital earnings have upset the international tax rules and there is no global consensus on how to go about taxing digital companies, especially in the face of US' opposition and threat to retaliate against any country that taxes its digital companies, it is difficult to see how Nigeria will effectively tax US big data companies. These companies are bolstered by the US' policy of retaliation against countries that choose to implement unilateral digital tax measures. It is expected that US digital companies may choose to oppose Nigeria's unilateral digital tax regime. I expect that trade sanctions are the major retaliatory measures that may be employed by the US in response to unilateral digital tax measures. Since the US is a major trading partner of Nigeria, such retaliatory measure may adversely impact the country's economy. It is also not clear how Nigeria intends to respond to likely US retaliatory measures. These are legitimate concerns that should agitate the minds of the FIRS and the Nigerian government. A pragmatic approach to digital taxation in bilateral or multilateral arrangements and cooperation between or amongst global trade partners. This is a path Nigeria must pursue for seamless enforcement of its digital tax regime. While global consensus is not feasible, adopting a unilateral approach is also not a pragmatic option.[263]

3.2.2 *Canada's Unilateral Digital Services Tax Measure*

Canada has implemented a unilateral DST measure with effect from June 28, 2024.[264] This

[263] Jude Odinkonigbo & Emmanuel Onyeabor, *supra* note 244. See also Jude Odinkonigbo & Chibuike Ikefuna, *supra* note 255.

[264] BDO Canada, "Canada's Digital Services Tax – Are your digital services caught in the net?" (19 October 2023) online (blog): BDO <https://www.bdo.ca/insights/canadas-digital-services-tax-are-your-digital-services-caught-in-the-net#:~:text=Beginning%20January%201%2C%202024%2C%20with,from%20customers%20located%20in%20Canada> (accessed 13 February 2024).

unilateral DST measure essentially means that beginning June 28, 2024, certain large businesses will be subjected to a 3% DST on their "in-scope" digital services revenues earned from customers located in Canada.[265] Prior to the Order-in-Council of June 28, 2024, the Canadian Government had announced on August 4, 2023, that it intended to proceed with the DST even though the other members of the OECD/G20 Inclusive Framework on BEPS had agreed to a further one year delay in the implementation of new domestic DSTs.[266] This move ignited political and international trade tensions between Canada and several OECD countries – especially the US. There is also the larger concern that such unilateral digital tax measure may unilaterally override and violate the PE rules established in the existing bilateral tax treaties between Canada and various countries, including Treaty between Canada and Nigeria.

The Canadian Department of Finance ("**Canada Finance**") reportedly released an amended version of the Digital Services Tax Act ("**DSTA**") concurrent with the August 4, 2023, announcement referenced above.[267] (The DSTA is the legislative instrument by which Canada aims to implement its unilateral DST measure.) Subsequently, on November 23, 2023, as part of the Notice of Ways and Means Motion to introduce a bill entitled "*An Act to implement certain provisions of the fall economic statement tabled in Parliament on November 21, 2023, and certain provisions of the budget tabled in Parliament on March 28, 2023*," Canada Finance reportedly released a new version of the DSTA with additional amendments along with a Digital Services Tax Regulations ("**DSTR**").[268] Canada has also issued an Order-in-Council dated June 28, 2024, authorizing the implementation of its DST measure with effect from June 28, 2024.

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[265] BDO Canada, *supra* note 264.
[266] Randy Schwartz et al, "Canadian Digital Services Taxes – Part II: Updated Draft Legislation Released", (November 30, 2023), online (blog): McCarthy Tetrault Tax Perspectives <https://www.mccarthy.ca/en/insights/blogs/mccarthy-tetrault-tax-perspectives/canadian-digital-services-tax-part-ii-updated-draft-legislation-released-what-you-need-know> (accessed 14 February 2024).
[267] Ibid.
[268] Ibid.

The DSTA and the DSTR both set out a broad framework of the proposed unilateral DST measure and how it will work when and if implemented. Generally, both Canadian and non-Canadian taxpayers will be subject to DST in Canada under the DSTA if they meet two conditions: **(i)** the taxpayer, or a consolidated group of which the taxpayer is a member, earned at least €750,000,000 in total global revenue in the prior calendar year; and **(ii)** the taxpayer or the consolidated group earned at least $20,000,000 CAD in "digital services revenue" in the prior calendar year. Where these conditions are satisfied, the DST will apply at a rate of 3% on the taxpayer's taxable Canadian digital services revenue earned in the relevant calendar year beginning January 1, 2022. However, DST only applies to the taxpayer's Canadian digital services revenue above $20,000,000 CAD in the relevant calendar year.[269] The DST liability is not expected to be creditable against Canadian income tax payable. However, a deduction of the DST liability may be available in calculating taxable income for Canadian income tax purposes under general principles.[270]

The DST applies to taxable Canadian digital services revenue, which is derived from four different revenue streams that are sourced to online users in Canada: **(i)** online marketplace services revenue; **(ii)** online advertising services revenue; **(iii)** social media services revenue; and **(iv)** user data revenue. The question of whether revenue is sourced to users in Canada is generally based on the revenue's association with Canadian users (data available to the taxpayer in the normal course of its business, including any address on file for the use or IP address data). The DSTA contains detailed definitions and exclusions for each revenue stream along with complex application rules to determine the revenues derived from Canadian users. The revenue streams are hierarchical and are set out in order such that if, for example, a particular revenue is online marketplace services

[269] Randy Schwartz et al, *supra* note 266.
[270] Ibid.

revenue, it cannot fall within one of the other revenue streams.[271] Compliance obligations include registration and filing/payment requirements. Taxpayers may have a registration and filing requirement even if they have no obligation to pay DST. Taxpayers who fail to register are subject to a penalty of $20,000 CAD per year beginning in the calendar year the taxpayer was required to register and ending in the year it registers. Taxpayers can deregister from the DSTA if they would not have satisfied the three thresholds in the prior three years.[272]

Taxpayers must file DST returns and make payments for the relevant year by June 30 of the following year. Members of a consolidated group can jointly elect to designate one member to pay all DST due for payment by the consolidated group on the group's behalf. Taxpayers who fail to file and pay DST in a timely manner are subject to interest and penalties. If a taxpayer is a member of a consolidated group, each member of the taxpayer's consolidated group is jointly and severally liable for the unpaid DST that has become due and payable.[273] Certain key amendments were introduced in the August and November 2023 versions of the DSTA[274] which are not relevant to this thesis.

3.2.3 *Approaches adopted by the US and France*

France enacted its unilateral DST legislation in July 2019. The law imposes DST at the rate of 3% on gross turnover derived from certain digital services for which the French Government deems user participation essential in creating value. These taxable services include targeted online advertising (such as the sale of user data) and online digital intermediation services (that is,

[271] Randy Schwartz et al, *supra* note 266.
[272] Ibid.
[273] Ibid.
[274] Ibid.

platforms and marketplaces). The tax is limited to companies with: **(i)** worldwide revenue from taxable services of at least €750,000,000 annually; and **(ii)** total taxable revenue from taxable services obtained in France exceeding €25,000,000 annually, based on an apportionment of French deemed services to be computed for each category of taxable services.[275]

The revenue attributable to France is the proportion of the worldwide revenue from the company's taxable services that are derived from French users, determined by a percentage that is based on the location of users in France and number of accounts opened in France. The French DST is designed as a temporary measure pending a global or regional consensus on digital trade taxation. It is expected that France will suspend its unilateral DST measure in favour of the OECD's Pillar 2 approach once it takes effect.[276]

In the meantime, unilateral digital tax measures continue to be met with stiff opposition from the US. The US argues that it should be the only country taxing US companies involved in digital trade,[277] and that unilateral digital tax measures discriminatorily target its companies.[278] Consequently, the US has repeatedly threatened to retaliate against any country that tries to implement such measures.[279] As recently as October 10, 2023, the US threatened to sever trade

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[275] EY, "France issues comprehensive draft guidance on digital services tax" (2020), online (blog): EY <https://www.ey.com/en_gl/tax-alerts/france-issues-comprehensive-draft-guidance-on-digital-services-tax#:~:text=France%20enacted%20its%20DST%20in%20July%202019.&text=The%20DST%20is%20imposed%20at,participation%20essential%20in%20creating%20value> (accessed 30 April 2024).

[276] Okanga Ogbu Okanga, "Testing for Consistency: Certain Digital Tax Measures and WTO Non-Discrimination" (2021) online (blog): 2 Schulich Law Scholars (Schulich School of Law at Dalhousie University) <https://digitalcommons.schulichlaw.dal.ca/scholarly_works/628/> (accessed 3 May 2024).

[277] Colin Wilhelm, "U.S. Retaliation Still Looms in French Digital Tax Talks (1)" (2019), online (blog): Bloomberg Tax <https://news.bloombergtax.com/daily-tax-report/u-s-retaliation-still-looms-in-french-digital-tax-talks> (accessed 4 May 2024).

[278] US entities like Google, Amazon, Facebook, and Apple are reputed to be the biggest players in the global digital economy. See Naomi Jagoda & Emily Birnbaum, "Trump Escalates Fight over Tax on Tech Giants" (2019), online (blog): The Hill <https://thehill.com/policy/technology/472915-trump-escalates-fight-over-tax-on-tech-giants> (accessed 4 May 2024).

[279] Pierre Briançon, "Why the UK and France play against type in digital tax row with the US" (2020), online (blog): Market Watch <https://www.marketwatch.com/story/why-the-uk-and-france-play-against-type-in-digital-tax-row-with-the-us-2020-01-23> (accessed 4 May 2024).

ties with Canada should the latter implement its unilateral DST measure in 2024, on the basis that such measure would be discriminatory against US tech companies. While this threat appears excessive, the US Senate Committee on Finance had specifically advised the US Trade Representative that the US "*will immediately respond using available trade tools upon Canada's enactment of any DST*".[280] It further threatened that "*the strong economic relationship between the US and Canada… will become immensely challenging… if Canada subjects innovative American companies to arbitrary discrimination without facing any consequences*".[281]

3.2.4 *Analysis of the approaches adopted by Nigeria, Canada, the US and France*

Nigeria's digital tax regime, and those of Canada/France, have one thing in common: they are all unilateral digital tax measures. They were not the products of negotiation and left no room for political compromise. The result is an avoidable international trade dispute between all three countries and their key cross-border trade partner – the US. The US issued specific threats to both Canada and France, warning that it would sever its trade ties with both countries and possibly impose trade sanctions on them if they proceed with the implementation of their DSTs. The US argued that both countries' DSTs were 'discriminatory' against American tech companies. France ignored these threats and proceeded with the implementation of its DST measure. Canada has also issued an Order-in-Council dated June 28, 2024, authorizing the implementation of its DST measure with effect from June 28, 2024. I am not aware if the US has or will make good on its threats to sever trade ties with Canada following the implementation of Canada's unilateral DST measure.

[280] US Senate Committee on Finance, Trade Advisory to Ambassador Katherine Tai – US Trade Representative (October 10, 2023).
[281] Ibid.

The key difference between Nigeria's approach and those of Canada/France is that while the former is income tax on the digital activities of non-resident companies in Nigeria, the latter are DSTs on the digital sales of both local and non-resident companies in Canada/France – provided they meet the other "in-scope" requirements already highlighted above. While the technical difference between digital income taxes and DSTs is mostly theoretical, it is noteworthy. It has been argued that DSTs are distinct from income taxes, online sales taxes, and value added taxes.[282] DSTs are gross revenue taxes with a tax base that includes revenues derived from a specific set of digital goods or services or based on the number of digital users within a country – that is, a user-based tax.[283] It is arguable that a non-resident company does not need to have a PE in the source country for DSTs to properly apply. Digital income taxes, on the other hand, seek to redefine what constitutes PE to include digital companies that have no physical presence within a jurisdiction. These virtual or digital PEs are usually defined using specific criteria including engagement with the local market.[284] The problem with unilateral digital taxes is that they effectively perform this PE redefinition function at the national level – whereas PE is an international tax concept.

I contend that the distinction between digital income taxes and DSTs is merely semantic. They are both *in fact* income taxes. As a rational pragmatist, I assess the true nature of a digital tax measure by its *actual* or *practical* effect. To the extent that both DSTs and digital income taxes are taxes on the revenue – and therefore the active business income of non-resident digital companies, both taxes are digital income taxes regardless of the appellation. A wolf is a wolf notwithstanding that it is garbed in sheep's clothing. Being *effectively* taxes on active business income, DSTs and digital

[282] Bloomberg, "The OECD and Digital Services Taxes" (14 May 2024), online (blog): Bloomberg Tax <https://pro.bloombergtax.com/brief/understanding-digital-services-taxes-the-oecd/> (accessed 3 June 2024).
[283] Daniel Bunn et al, "Digital Taxation Around the World" (28 May 2020) online (blog): Tax Foundation <https://taxfoundation.org/research/all/global/digital-tax/> (accessed 3 June 2024).
[284] Ibid.

income taxes both breach the PE provisions of applicable bilateral and multilateral tax treaties which do not yet recognize ‘digital presence’ as a component of PE.

I note the alternative argument that a unilateral digital tax measure (such as Canada’s DST) may not be a violation of double tax treaty provisions any more than say, Canada’s taxation of capital gains on the sale of immovable property in foreign jurisdictions would be a violation of the treaty. It is arguable that the treaty does not need to contemplate all of the terms and concepts used in the domestic taxing statute – if the tax is a tax on business profits, then the treaty arguably covers it.[285] Proponents of this argument agree that it would be a violation of a double tax treaty if the domestic revenue authorities refused to honour the terms of the treaty, and one might be convinced that there is a violation of the spirit of the treaty if the source country successfully avoided the application of the treaty in a situation where it should apply. But one might never assume that a country like say Nigeria or Canada should change its domestic tax laws (or avoid enacting new tax laws) of general application because it has agreed not to tax the business profits of the residents of a number of other countries unless they have a PE in Nigeria or Canada.[286] Also, it is arguable that since the US is the major trade partner that developing countries like Nigeria need to care about in the formulation of their digital tax measures, and there isn’t any double tax treaty between Nigeria and the US, then Nigeria is entirely entitled to tax the income of US residents generated in Nigeria.

While I fully appreciate the compelling nature and thematic strengths of this argument, my key argument in this thesis is that unilateral digital tax measures by source countries are impracticable and therefore unreasonable because they do not serve any functional utility to the implementing

[285] Wei Cui, “The Canadian Digital Services Tax” (2023) in C. Elliffe, ed, International Tax at the Crossroads (forthcoming), online (blog): Allard Research Commons <The Canadian Digital Services Tax (ubc.ca)> (accessed 5 August 2024).
[286] Ibid.

countries. This is especially so for developing and emerging economies like Nigeria. The key reason for this being that they separately lack the socio-politico-economic capacity to enforce such unilateral digital tax measures without the international tax cooperation of their developed host country trading partners. That international tax cooperation will clearly not be available if there was no room for negotiations with host countries – as is the case with unilateral digital tax measures. This argument applies to all host countries, including countries like the US which do not have a tax treaty with developing and emerging economies like Nigeria.

I however make the collateral argument that unilateral digital tax measures are not (in my view) tenable within the framework of international tax law and policy – at least until reviewed and updated to align with the contemporary realities of the globalized and digitalized economy. My understanding of the international tax regime (as represented in most bilateral and model tax treaties) is that the relatively unlimited jurisdiction to tax incomes is only recognized in favour of host countries – with defined limitations where the restricted income taxing rights of source countries are recognized. That restricted income taxing rights of source countries in international tax law and policy is largely hinged on physical presence – except in certain defined cases. This is especially so regarding active business income. The international tax regime (perhaps because it is essentially a product of the 1920s with very few revisions till date) does not recognize 'digital presence' as an acceptable income tax nexus for source countries. This to my mind means that the imposition of unilateral digital tax measures by source countries (without negotiations that result in the appropriate alteration of existing bilateral and multilateral tax treaties) would necessarily breach or at the very least unacceptably override such tax treaties – at least from the perspective of host countries that have tax treaties with the relevant source countries.

Moving on from this, another difference to note between the unilateral digital tax measures of

Nigeria, Canada, and France is that they all vary significantly in the minimum threshold for tax liability. Canada's DST threshold is $20,000,000 CAD while Nigeria's digital tax threshold is roughly $23,277 CAD based on the parallel market exchange rate of about ₦1,074 to $1 CAD as of June 9, 2024. The French DST, on the other hand, has a dual threshold of €750,000,000 (worldwide revenue) and €25,000,000 (taxable revenue in France). This means that while the scope of Nigeria's digital tax regime is almost limitless – as almost every non-resident company will meet the threshold; that of France is limited, as fewer companies will meet the dual threshold. Canada's DST is somewhere in the middle; the threshold seems low enough for most non-resident companies to meet but it is not as low as that of Nigeria's digital tax regime – which I reasonably believe would be unacceptable to most developed host countries.

The US approach is mostly political and combative in scope. This is not surprising because most of the global tech giants that would be affected by digital tax measures in Nigeria, Canada, and France are US companies. Hence the US argument that Canada/France DST measures are discriminatory against US companies. This argument is of course political and lacks factual basis. This is not to say that the US is the only developed host country in the world that would be opposed to unilateral digital tax measures for similar or other reasons. I have only used the US as a case study in this thesis due to its strategic trade relevance to developing countries like Nigeria.

3.3 Emerging Trade Concerns Arising from Unilateral Digital Tax Measures in Developing and Emerging Economies

3.3.1 *The World Trade Organization (WTO) Non-Discrimination Principle*

In this section of the thesis, I analyze emerging trade concerns arising from unilateral digital tax

measures in low-income jurisdictions and show that unilateral digital tax measures are impracticable for developing and emerging economies because they run the risk of breaching certain established international trade rules.

International trade can make a significant contribution to economic development and prosperity in developed as well as in developing and emerging economies. However, for this potential to be realized, there must be good governance at the national level, increased reduction of cross-border trade barriers, heightened development aid for low-income countries, and better international tax cooperation and global governance of economic globalization and international trade. The requirement of global governance of international trade led to the formation of the World Trade Organization ("**WTO**").[287]

The WTO is a multilateral trade body established pursuant to the Marrakesh Agreement of 1994 (the "**Marrakesh Agreement**").[288] The WTO is the only global international organization dealing with the rules of trade between nations. At its heart are the WTO agreements, negotiated and signed by the bulk of the world's trading nations and ratified in their parliaments. The WTO's primary objective is to ensure that global trade flows as smoothly, predictably, and freely as possible amongst its member countries. The WTO has many roles. It operates a global system of trade rules. It acts as a forum for negotiating trade agreements. It settles trade disputes between its members, and further supports the needs of developing nations. The WTO asserts that its primary purpose is to open up trade for the benefit of all.[289] The truth of this assertion is, however, arguably open to question.

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[287] Peter Van den Bossche & Werner Zdouc, *The Law, and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge, UK: Cambridge University Press, 2013) Third Edition, p. 30.

[288] Okanga Ogbu Okanga, *supra* note 276.

[289] World Trade Organization, "About WTO – The WTO", online (blog): WTO <https://www.wto.org/english/thewto_e/thewto_e.htm> (accessed 16 December 2023).

The Marrakesh Agreement – which established the WTO – is an umbrella treaty setting out a series of agreements. Amongst these are the General Agreement on Tariffs and Trade ("**GATT**"), the General Agreement on Trade in Services ("**GATS**"), and the Agreement on Trade-related aspects of Intellectual Property Rights ("**TRIPs**").[290] Five key rules of the WTO principles of international trade governance are: **(i)** market access rules; **(ii)** non-discrimination rules; **(iii)** unfair trade rules; **(iv)** rules regarding the conflict between trade liberalization and other societal values; and **(v)** institutional and procedural rules, including those relating to WTO decision-making, trade policy review, and dispute settlement. These pillars serve as major drivers of trade liberalization[291] in the globalized and digitalized economy.

In this thesis I focus on the WTO principle of non-discrimination and its international trade implications for unilateral digital tax measures in developing and emerging economies such as Nigeria. The WTO principle of non-discrimination consists of two basic rules: **(a)** the Most-Favoured Nation ("**MFN**") treatment obligation; and **(b)** the national treatment obligation.[292] The non-discrimination principle prohibits contracting parties to an international economic treaty from treating domestic market actors more favourably than foreign market actors. This is known as the national treatment principle. It further prohibits contracting parties to an international economic treaty from treating some foreign actors more favourably than other foreign actors. This is known as the MFN principle. The WTO non-discrimination principles essentially require equal treatment of members that are similarly situated based on their prevailing conditions.[293]

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[290] Jinyan Li, "Relationship Between International Trade Law and National Tax Policy: Case Study of China" (2005) 59:2 Bulletin for International Taxation 77.

[291] Marta Carmo, "International Trade Law, Double Taxation Agreements and the Principle of Non-Discrimination" (2017) 3(3) RJLB 928-929.

[292] Peter Van den Bossche & Werner Zdouc, *supra* note 286, p. 36.

[293] Okanga Ogbu Okanga, *supra* note 276.

A domestic tax or regulatory measure may be discriminatory in one of two ways: **(i)** where there is an intent to discriminate (that is, the purpose, motive, or aim of the measure is to discriminate between relevant market actors); or **(b)** where the effect of the measure is discriminatory (that is, the disparate impact of the measure is discriminatory to relevant market actors).[294] Intent to discriminate may be found in the views of the legislators or regulators as expressed in the instrument establishing the measure, or in the overall motive of the government for introducing the measure, as gleaned from the text of the relevant measure.[295] The effect theory looks at whether the measure has a discriminatory effect or impact against imports.[296] It is also well established that non-discrimination obligations not only apply to measures that differentiate directly (*de jure* discriminatory measures) on the basis of origin, but also to indirect (*de facto* discriminatory measures).[297] De jure discrimination is apparent on the face of the measure. De facto discrimination does not explicitly differentiate between imported and domestic goods or services but distinguishes between them based on their characteristics.

The non-discrimination principles of MFN and national treatment obligations are enshrined in Articles I and III of GATT and Articles II and XVII:1 of GATS.[298] Some of the arguments against unilateral digital tax measures are hinged on the WTO principle of non-discrimination. For instance, the US has consistently argued that proposed unilateral digital tax measures like those of

[294] Simon Lester et al, *World Trade Law: Text, Materials and Commentary* (Great Bookham Surrey, United Kingdom: Hart Publishing, 2018) Third Edition, 259–260.
[295] Ibid.
[296] Ibid.
[297] Ibid.
[298] Okanga Ogbu Okanga, *supra* note 276.

France[299] and Canada[300] are discriminatory against American companies.[301] This sentiment was expressed by the US as recently as October 10, 2023, in respect of Canada's unilateral DST measure that took effect on June 28, 2024.[302] I am not aware of any type of dispute resolution proceedings that has been initiated by the US against either Canada or France in respect of their unilateral digital tax measures either at the WTO or elsewhere.

3.3.2 *The Most-Favoured Nation (MFN) Principle*

The MFN treatment obligation requires a WTO member that grants certain favourable treatment to any given country to grant that same favourable treatment to all other WTO members. A WTO member is not allowed to discriminate between its trading partners by, for instance, giving the products imported from some countries more favourable treatment with respect to market access than the treatment accorded to 'like' products of other members. Despite many exceptions and deviations from this obligation, the MFN treatment obligation is arguably the single most important rule in WTO law. It is believed that without this rule, the multilateral trading system could and would not exist.[303]

The MFN provision sets out a three-tier test of consistency: whether **(a)** the measure at issue is a measure covered by GATS; **(b)** the services or service suppliers concerned are alike; and **(c)** the

[299] Okanga Ogbu Okanga, *supra* note 276.
[300] Paul Vieira, "U.S. Warns of Trade Fight Over Canada's Digital Tax Plan" (2023), online (blog): The Wall Street Journal <https://www.wsj.com/articles/u-s-warns-of-trade-fight-over-canadas-digital-tax-plan-751ffa30> (accessed 5 May 2024).
[301] Emmanuel Onyeabor, "Towards a United Nations Tax Convention: Prospects and Challenges for Developing Economies" (12 December 2023), online (blog): Afronomicslaw <Towards a United Nations Tax Convention: Prospects and Challenges for Developing Economies | Afronomicslaw> (accessed 3 June 2024).
[302] United States Senate Committee on Finance letter dated October 10, 2023, to Ambassador Katherine Tai, United States Trade Representative, online: <https://www.finance.senate.gov/imo/media/doc/20231010wydencrapolettertoustroncanadadst.pdf> (accessed 5 May 2024).
[303] Peter Van den Bossche & Werner Zdouc, *supra* note 287.

member accords less favourable treatment to the goods or services of another member. In *EC-Banana III*,[304] the WTO Appellate Body opined that the phrase "no less favourable treatment" should be taken to include both de jure and de facto discrimination.[305] As such, a measure affords less favourable treatment if it adversely modifies the conditions of competition between imports from different states. To establish whether the '*no less favourable"* standard has been met, there is need to determine whether the relevant measure has the *potential* to cause less favourable treatment to a relevant imported product, and not whether it *did* so.[306]

It may be difficult to find Nigeria's unilateral digital tax measure under Section 13(2)(c) of the CITA, in breach of the WTO MFN non-discrimination obligation. It appears that there is no apparent or underlying intention to accord favourable treatment to big data or digital economy players from any country or group of countries over and above that accorded to any other country or group of countries. To be sure, Section 13(2)(c) of the CITA provides as follows:

> The profits of a company other than a Nigerian company from any trade or business shall be deemed to be derived from or taxable in Nigeria where it transmits, emits, or receives signals, sounds, messages, images or data of any kind by cable, radio, electromagnetic systems or any other electronic or wireless apparatus to Nigeria in respect of any activity, including electronic commerce, application store, high frequency trading, electronic data storage, online adverts, participative network platform, online payments and so on, *to the extent that the company has significant economic presence in Nigeria and profit can be attributable to such activity*.

[304] ABR, *EC – Bananas* WT/DS27/AB/R, paras 231–234.
[305] Okanga Ogbu Okanga, *supra* note 276.
[306] Federico Ortino, "The Principle of Non-discrimination and Its Exceptions in GATS: Selected Legal Issues" (2006), online (blog) SSRN <http://ssrn.com/abstract=979481> (accessed 16 December 2023).

(Emphasis supplied.)

As noted earlier above, the NRCs carrying on business in Nigeria's digital economy are deemed to have a significant economic presence in any accounting year in Nigeria if they[307]: **(a)** derive gross turnover or income of more than ₦25,000,000 or its foreign currency equivalent in an accounting period from their digital activities in Nigeria[308]; **(b)** use Nigerian domain names (.ng) or register a website address in Nigeria; or **(c)** have purposeful and sustained interactions with persons in Nigeria by customizing their digital pages or platforms to target persons in Nigeria, including reflecting the prices of their products or services in Nigerian currency or providing options for billing or payment in Nigerian currency.[309]

These provisions are general and seek to capture all NRCs that operate in Nigeria's digital economy with a significant economic presence in the country, with very little exception. Under the Order, the tax treatment of digital incomes generated by NRCs that are covered by multilateral or bilateral agreements dealing with digital taxation between Nigeria and any other countries shall be exclusively governed by the relevant multilateral or bilateral agreement. The multilateral or bilateral agreement could be invoked to override the domestic tax legislation from the date it becomes effective.[310] It is arguable that the application of such multilateral or bilateral agreements may not breach the MFN obligation if they relate to the avoidance of double taxation. There is an

[307] See again, para 1(1)(a)-(c) of the Order.
[308] Again, the taxable digital activities that could give rise to this include one or more of the following: **(i)** streaming or downloading services of digital contents, including but not limited to movies, videos, music, applications, games, and e-books to any person in Nigeria; **(ii)** transmission of data collected about Nigerian users which has been generated from such users' activities on a digital interface, including website or mobile applications; **(iii)** direct or indirect provision of goods or services through a digital platform to Nigeria; and **(iv)** provision of intermediation services through a digital platform, website or other online applications that link suppliers and customers in Nigeria.
[309] Jude Odinkonigbo & Emmanuel Onyeabor, *supra* note 244.
[310] See para 1(3) & (4) of the Order. Currently, there is no multilateral, bilateral or consensus arrangement reached between Nigeria and any country to govern the taxation of digital economy.

exception to the application of MFN as regards to obligations arising under double tax agreements. Thus, a differential treatment may not be deemed a violation of the MFN rule if it is the result of a binding double tax agreement.[311]

It appears that the exception applies only where the relevant measure is meant to avoid double taxation.[312] It follows that where a state receives less favourable digital tax treatment in Nigeria, it could attempt to enforce the MFN rule by contending that it would be unreasonable to expect the Article XIV(e) exceptions to extend to tax treaty measures that are not geared towards avoiding double taxation.[313] In this regard, it is arguable (though not convincing in my opinion) that by using income thresholds to distinguish between like digital services providers operating in Nigeria's digital economy from different WTO members, Nigeria's unilateral digital tax regime under Section 13(2)(c) of the CITA and the Order may be properly said to violate the MFN principle, unless the difference is based on a relevant double tax agreement or Nigeria is able to show that the relevant digital services are not alike.[314]

The key defect of this argument is that the income threshold in Nigeria's unilateral digital tax regime is so negligible that practically every viable company will fall within the threshold. The threshold is annual gross turnover or income of more than ₦25,000,000 – which is a little less than US$17,500 based on the exchange rate as of May 6, 2024. While this may mean that Nigeria is

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[311] Okanga Ogbu Okanga, *supra* note 276. See also GATS, Art. XIV(e). This flows from Paragraph 2 of Art. II which allows a member to maintain a measure inconsistent with paragraph 1 (of Article II) provided that such measure is listed in, and meets the conditions of, the Annex on Article II Exemptions. See Catherine A. Brown, "Non-discrimination and Trade in Services: The Role of Tax Treaties" (2017) 20 Springer, (asserting that "while the GATS provides general non-discrimination obligations, Member States may not challenge an alleged violation in respect of "matters that are the result of, or fall within, the scope of an agreement on the avoidance of double taxation ('tax treaty')").
[312] Okanga Ogbu Okanga, *supra* note 276. See also Jennifer E. Farrell, "The Interface of International Trade Law and Taxation" (2011) IBFD 186.
[313] Jennifer E. Farrell, *ibid*, citing tax sparring as a common example of Double Tax Convention provisions with a different objective than the avoidance of double taxation).
[314] Okanga Ogbu Okanga, *ibid* note 276. See also Jennifer E. Farrell, *ibid* note 313.

arguably meeting its WTO non-discrimination obligation, the threshold is a problem in itself because it means that non-resident digital companies are taxed on the same threshold as local companies. (Companies with annual gross turnover of ₦25,000,000 or less in a relevant accounting year are treated as “small companies” exempt from tax in the relevant year under the combined provisions of Sections 23(1)(n), 40, and 105 of the CITA.)

It is further arguable that the provisions of Section 13(2)(c) and the Order may become discriminatory in breach of the WTO MFN obligation if Nigeria enters a multilateral or bilateral agreement on digital taxation with any WTO member(s) and thereby grants non-double taxation avoidance related digital tax benefits to its treaty partners that are not available to other WTO members under Nigerian digital tax law. The extent to which this argument is likely to succeed is left open to question. However, the risk persists.

3.3.3 *The National Treatment Principle*

The national treatment obligation requires a WTO member to treat foreign products, services, and service suppliers no less favourably than it treats ‘like’ domestic products, services, and service suppliers. Where the national treatment obligation applies, foreign products, for example, should, once they have crossed the border and entered the domestic market, not be subject to less favourable taxation or regulation than ‘like’ domestic products. Pursuant to the national treatment obligation, a WTO member is not allowed to discriminate against foreign products, services, and service suppliers.[315]

[315] Peter Van den Bossche & Werner Zdouc, *supra* note 287.

The national treatment obligation is an important principle in WTO law which has given rise to many trade disputes. For trade in goods, the national treatment obligation has general application to all measures affecting trade in goods. By contrast, for trade in services, the national treatment obligation does not have such general application. It applies only to the extent that a WTO member has explicitly committed itself to grant 'national treatment' in respect of specific services sectors. Such commitments to give 'national treatment' are made in a Member's Schedule of Specific Commitments on Services.[316]

When establishing whether a discriminatory tax measure falls under the national treatment obligation, one must determine the following: **(i)** if the service sector or subsectors are subject to national treatment; **(ii)** that the mode of supply of the service in question is subject to market access and national treatment commitments; and **(iii)** that there are no specific or horizontal limitations excluding tax treatment. It seems apparent that there is no pathway to reaching a conclusion that Nigeria's unilateral digital tax regime under Section 13(2)(c) of the CITA and the Order is in breach of the WTO national treatment obligation. The ₦25,000,000 threshold specified in the Order regarding NRCs operating in Nigeria's digital economy, is the same amount of threshold set for both local and foreign companies under Sections 23(1)(n), 40, and 105 of the CITA. These sections provide income tax exemption for a relevant assessment period, where the gross turnover of income earned by a company in a relevant accounting year is ₦25,000,000 or less.

The above notwithstanding, it is clear that developed countries like the US will nonetheless argue that Nigeria's unilateral digital tax regime is discriminatory against US big data companies. This could put Nigeria in a trade difficulty with the US – which may not be economically beneficial to

[316] Peter Van den Bossche & Werner Zdouc, *supra* note 287. See also GATS, Art. XVI.

the former.

3.3.4 *Tax Competition and International Trade Relations Concerns*

Tax competition is not a well-defined concept. However, the basic idea involves states competing with other states to devise tax systems that attract and retain mobile businesses, investments, or even just paper profits.[317] Tax competition is a euphemistic term for cutting corporate tax rates and deregulating to attract foreign investment based on the misconception that countries can compete like companies in a market.[318] However, competition between companies in a market bears no resemblance to the functioning and interdependencies of local and global economies, nor the funding or operating of states.[319] Tax competition has been widely debunked as a false economy that results in a 'global race to the bottom' where countries spiral down to low corporate tax rates in a bid to outdo each other while failing to produce economic growth. Surveys show that tax rates are low on the list of factors that companies consider when choosing where to set up business and operate.[320] Factors that rank as more important to companies are infrastructure, rule of law, healthy and educated workforces, and other public goods – all of which require tax.[321]

As noted in chapter 2 above, the global minimum tax rules in the GloBE Rules of Pillar 2 were developed by the OECD Inclusive Framework on BEPS to ensure that large multinationals pay a minimum rate of tax on their income in each jurisdiction where they operate. This reduces the

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[317] Ruth Mason, "Tax Competition and State Aid" (6 June 2022), online (blog): SSRN<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4125304> (accessed 16 December 2023). See also, Tsilly Dagan, *International Tax Policy: Between Competition and Cooperation* (Cambridge, United Kingdom: Cambridge University Press, 2018).
[318] Tax Justice Network, "What is tax competition?", online (blog): Tax Justice Network <https://taxjustice.net/faq/what-is-tax-competition/> (accessed 16 December 2023).
[319] Ibid.
[320] Ibid.
[321] Ibid.

incentive for profit shifting and places a floor under tax competition, bringing an end to the race to the bottom on corporate tax rates.[322] OECD Inclusive Framework members sought to achieve this outcome through agreement on a coordinated set of rules that impose a minimum rate of income tax on multinationals without giving rise to double taxation.[323] As noted in chapter 2, the extent to which Pillar 2 achieved this objective is debatable.

The above notwithstanding, it has been observed that Pillar 2 could have the effect of limiting profit shifting out of the US while preserving the competitiveness of US multinationals. It also preserves the ability of the US to reduce the corporate tax by various credits aimed at bolstering domestic manufacturing and combating climate change, as well as the proposed expensing of research and development if the US Congress makes it refundable over four years (or creditable against payroll tax liabilities).[324] In this regard, Pillar 2 benefits the US if the rest of the world adopts it even if the US itself never adopts it. Reducing profit shifting out of the US has been a bipartisan goal in the US since 1962, and Pillar 2 brings it closer to reality than ever before.[325] For this reason, the US has been very combative towards countries that seek to implement unilateral digital tax measures. Its argument, as I have shown earlier, has been that such unilateral digital tax measures are *discriminatory* towards US technology and big data companies.

Nigeria's unilateral digital tax regime clearly does not raise any real tax competition concern – at least not in favour of the country. If it does raise any tax competition concern, it does so in the negative – in that it makes Nigeria *less tax competitive* in the international trade market. While

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322 OECD, "Minimum Tax Implementation Handbook (Pillar Two)" (2023), online (blog): OECD/G20 Base Erosion and Profit Shifting Project, OECD, Paris <https://www.oecd.org/tax/beps/minimum-tax-implementation-handbook-pillar-two.pdf> (accessed 16 December 2023).
323 Ibid.
324 Reuven Avi-Yonah, "The case for coordinated corporate tax rates" (18 July 2023) unpublished commentary published on the author's LinkedIn page on July 18, 2023.
325 Ibid.

Nigeria's unilateral digital tax regime may not necessarily raise tax competition concerns, it is obvious that the regime raises serious international trade relations concerns – especially with the US. The US is a key trade partner of Nigeria. Most US big data and technology giants (like Facebook, Google, Amazon, etc.) have very large customer base in Nigeria.[326] The revenue generated annually by these entities from Nigeria would surely exceed the threshold for taxable significant economic presence in the country's digital economy under the Order – by miles. This means that if the US keeps its word to implement trade retaliatory measures against countries that enact 'discriminatory' digital tax measures against US companies, Nigeria's enforcement of its unilateral digital tax measure could be visited with trade retaliatory measures from the US. Indeed, the US has threatened even developed countries and regional groups like Canada, France, and the EU,[327] with trade retaliatory measures against unilateral or regional digital tax measures.[328] Possible retaliatory measures that the US may resort to include trade sanctions, increased taxes targeted at Nigerian entities doing business in the US, and denial of humanitarian aids (where applicable and necessary).[329] The impact that these trade/tax measures would have is unclear. It is also arguable that such trade/tax measures may be in breach of the WTO non-discrimination rules. It is also clear how much humanitarian aid (if any) that Nigeria is getting from the US at this time and whether that would be significant enough to dissuade the country from pursuing its unilateral digital tax measures.

Unfortunately, Nigeria cannot afford to exempt NRCs resident in the US from the operation of its unilateral digital tax regime. Such exemption would breach the country's MFN obligations under the GATS and other bilateral and multilateral agreements to which Nigeria is a party.[330] Nigeria's

[326] Jude Odinkonigbo & Emmanuel Onyeabor, *supra* note 244.
[327] Ibid.
[328] Emmanuel Onyeabor, *supra* note 301.
[329] Jude Odinkonigbo & Emmanuel Onyeabor, *ibid* note 244.
[330] Ibid.

economic situation over the last decade has been abysmal. The country's tax-to-GDP ratio has been ridiculously low while its inflation rate has been at an all-time high. With the worsening economic situation in the country, a trade war with the US may not be ideal for Nigeria or indeed any developing economy at this time. In any event, Nigeria may not have the political and economic resources required to sustain such avoidable trade war with the US.[331] This makes it both impracticable and unreasonable for Nigeria to implement unilateral digital tax measures.

There are consequently political and international trade concerns that may impede the successful implementation of Nigeria's unilateral digital tax regime.[332] The country has been unable to collect any dime in digital taxes from any NRC with significant economic presence in Nigeria since the enactment of the Finance Act 2019 and the Order in 2020. This is testament to the political and international trade impediment to the enforcement of Nigeria's unilateral digital tax measure. It should therefore be taken very seriously by all relevant stakeholders in the country – as well as in other developing economies.

This lends credence to the argument that in practice, several political and international trade concerns may impede a country's ability to adopt and implement fully a viable digital tax policy within its jurisdiction.[333] A clear example is the US response to the proposed and enacted unilateral digital tax measures of its trade partners like Canada and France. The US, which represents several of the NRCs currently doing business in Nigeria's digital economy, has expressed dissatisfaction towards other countries' unilateral move to tax the digital activities of US tech giants. This stance of the US may encourage US entities' defiance and lack of cooperation with foreign tax authorities

[331] Jude Odinkonigbo & Emmanuel Onyeabor, *supra* note 244.
[332] Ibid.
[333] Ibid.

seeking to tax their digital income sourced from such countries.[334]

3.4 Tax Justice and Constitutional Issues Raised by Unilateral Digital Tax Measures

- *Tax justice concerns and unilateral digital tax measures*

Tax justice refers to ideas, policies and advocacy that seek to achieve equality and social justice through fair taxes on wealthy members of society and multinational corporations. To this end, tax justice often focuses on tackling tax havens and curtailing corruption and tax abuse by multinational corporations and the super-rich.[335] The rules for allocation of cross-border taxing rights in international tax law and policy have inevitably occasioned tax injustice. Wealthy multinationals are enabled by technology to digitally do business and earn millions/ billions of dollars in income from developing and emerging economies without having any form of physical presence in such jurisdictions. They consequently pay no taxes in these source developing countries due to the absence of any taxable physical presence. Yet the income sourced from these developing countries with higher tax rates is shifted (tax-free) to so-called tax havens with lower or zero tax rates where no economic activity exists. In other cases, these multinationals participate in the digital economy of developing countries without paying any taxes to such countries, while repatriating their profits and paying taxes to their host developed countries.

Accordingly, notwithstanding the possibility of trade war described above, several countries that have proposed or adopted unilateral digital tax measures to harness the revenue potential of their digital economies, seek a larger allocation of taxing rights to source states where consumers are

[334] Jude Odinkonigbo & Emmanuel Onyeabor, *supra* note 244.
[335] Tax Justice Network, *supra* note 318.

located.[336] They argue that the allocation of taxing rights should reflect the present stage of economic development, in which multinational entities develop their businesses without physical presence.[337] It is further argued that adopting measures to tax the digital economy would reduce the competitive advantages of companies operating in the digital economy. The rationale for this argument is that large technology companies allegedly face a lower tax burden than their competitors in the traditional economy, which has led to a scenario that distorts competition and increases the economic power of digital giants. The taxation of the digital economy would also prevent an increase in the tax burden levied on less volatile elements, such as labour income. To address these challenges, some tax policy analysts conclude that the exponential increase of the digital economy and the digitalization of the traditional economy require the adoption of new tax rules, given the growing gap between the economic reality and tax systems.[338]

- *Constitutional issues raised by unilateral digital tax measures*

I noted earlier that Nigeria may have difficulty implementing its unilateral digital tax measure without the cooperation of the relevant NRCs' host countries. The lack of physical presence within the country may make it problematic for Nigeria to apply any effective enforcement measure against such companies. A possible solution is for developing and emerging economies that have implemented unilateral digital tax measures to adopt rules that allow blocking access to digital services upon default of an NRC to pay accrued digital taxes. This was the approach adopted by Turkey in its DST Law No. 7194 of December 7, 2019, which introduced DST in Turkey effective

[336] Jude Odinkonigbo & Emmanuel Onyeabor, *supra* note 244.
[337] Bruno Fajersztajn & Ramon Tomazela Santos, "The Challenges of Taxing the Digital Economy" (30 March 2020), online (blog): ITR - International Tax Review <https://www.internationaltaxreview.com/article/b1ky5z950v9tl6/the-challenges-of-taxing-the-digital-economy> (accessed 16 December 2023).
[338] Ibid.

March 1, 2020.[339] It is, however, arguable that the implementation of unilateral digital tax measures which result in the restriction of access to the digital services of defaulting non-resident digital companies may constitute a breach of constitutional rights.

Article 7 of the Turkish DST Law introduced measures to secure the tax. It provides that digital service providers or their representatives in Turkey who have not submitted DST returns or made DST payments on time may be served a notice urging them to fulfill their DST filing and payment obligations. The tax office will then issue this notice based on information obtained from digital services providers' websites, domain names, IP addresses, and information obtained from similar sources, and utilize the notification methods listed under applicable law, electronic mail, or any other communication methods. The notice will also be announced on the Turkish Revenue Administration's website. Where the taxpayer fails to fulfill its tax filing and/or payment obligations within thirty (30) days following the notice, the Turkish Ministry of Treasury and Finance may issue a decision to block access to the taxpayer's digital services until the tax obligations are satisfied. The Ministry's decision is then sent to the Turkish Information and Communication Technologies Authority to notify the relevant internet service providers, who must execute the decision to block access within twenty-four (24) hours after the notification is served. A Turkish Constitutional Court decision published in the Official Gazette on September 12, 2023, annulled this provision of Article 7 of the Turkish DST Law on the grounds that the rule is in breach of the Turkish Constitution.[340]

In its decision, the Turkish Constitutional Court stated that the rule that permits blocking access to

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[339] EY, "Turkiye's Constitutional Court annuls rule that allows blocking access to digital services upon default on Digital Services Tax liability" (15 September 2023), online (blog): Tax News Update – Global Edition <https://globaltaxnews.ey.com/news/2023-1536-turkiyes-constitutional-court-annuls-rule-that-allows-blocking-access-to-digital-services-upon-default-on-digital-services-tax-liability> (accessed 6 May 2024).
[340] Ibid.

digital services limits the freedom of enterprise of digital services providers. The Constitutional Court further stated that blocking access to the services offered by digital service providers that do not fulfill their tax-related obligations is a severe sanction. The court reasoned that, less stringent restrictions, such as an "advertising ban", "prohibition of contract conclusion", or a "gradual narrowing of internet traffic bandwidth" for the website where service providers carry out all their activities, may be considered first. The court further reasoned that while it is possible to implement a gradual tax security measure, the reasonable balance between freedom of enterprise and public interest is disrupted by placing excessive burdens on service providers by deciding to block direct access to their services upon default of their DST obligations. The court concluded that the limitation the rule imposed on the freedom of enterprise was disproportionate, violating the principle of proportionality.[341]

The annulment decision will enter into force nine (9) months after September 12, 2023 – its publication date in the Official Gazette (that is, June 12, 2024). During this period, it is expected that the necessary legal changes will be made, and new rules will be introduced. If no rules are introduced, administrative actions regarding blocking access to the services offered by digital service providers upon default of their DST obligations, despite the warning given to them, will be unconstitutional.[342]

While the Nigerian Constitution does not expressly provide for the right to freedom of enterprise, the closest that is provided is the "takings clause" which prohibits the government from compulsorily acquiring private property without the payment of compensation.[343] Derogation is

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[341] EY, *supra* note 339.
[342] Ibid.
[343] See Section 44(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) (the "**Nigerian Constitution**").

allowed in favour of "any general law for the imposition or enforcement of any tax, rate, or duty".[344] This notwithstanding, it is possible (albeit remote) that a Nigerian court may be persuaded to follow the Turkish decision which annulled the rule that permits blocking access to digital services for default of DST obligations, on the basis that it limits the freedom of enterprise of digital services providers.[345] If this is the case, then it is impracticable and therefore unreasonable to implement unilateral digital tax measures. Drastic measures such as the blocking of access to digital services for default of digital tax obligations will only be necessary where the digital tax is unilateral. Digital tax measures that are the product of international tax cooperation at bilateral and multilateral levels will generally not require such drastic enforcement measures. The host countries of the relevant digital companies will be obliged under the relevant bilateral or multilateral digital tax instrument to aid the source country in the enforcement of its digital tax measures.

3.5 Treaty Commitment Concerns Arising from Unilateral Digital Tax Measures

I contend in this section of the thesis that unilateral digital tax measures constitute unacceptable unilateral tax treaty overrides that violate the PE provisions of applicable bilateral tax treaties, specifically the Treaty between Nigeria and Canada. This is more so because such measures have the potential of defeating the double-tax avoidance objectives of the Treaty. I argue that states can only lawfully exercise tax jurisdiction over any subject matter in international tax law and policy if a nexus warranting the tax exists. The absence of a tax nexus invalidates the exercise of tax

[344] See Section 44(2)(a) of the Nigerian Constitution.

[345] The general rule is that when there is no known Nigerian decision on a principle of law, the Nigerian courts should be persuaded to follow decisions of foreign courts, particularly foreign courts that apply the common law. Thus, English case law have strong persuasive effect on Nigerian courts where the law and facts decided are similar, and there is no known Nigerian decision on the same set of facts and principles of law: *Omega Bank Plc v Government of Ekiti State* (2007) 16 NWLR (Pt. 1061) 445. Turkey is a civil law country. This, however, does not mean that a Nigerian court may not be persuaded to follow the decision of a Turkish court where the law and facts decided are similar, and there is no known Nigerian decision on the same set of facts and principles of law.

jurisdiction by a state. In addition, states are bound by their treaty commitments and cannot validly rely on their domestic law to circumvent treaty obligations. I contend that the reciprocal wrongful conduct of the parties to a treaty does not automatically terminate or warrant the termination of the treaty. It also does not excuse or validate the reciprocal wrongful conduct of the parties in breach of the treaty. Only bilateral and multilateral tax arrangements that recognize digital presence as part of PE will allow source countries to tax non-resident digital companies without unilaterally overriding or breaching treaty provisions.

This is without prejudice to the alternative argument that the position above could be conflating a legal issue with a normative issue, that is, Nigeria *shouldn't* tax the relevant income because there is no nexus between Nigeria and the income vis-à-vis Nigeria *can't* tax the relevant income because there is a double tax treaty in place that will relieve the double-taxation in favour of the residence state. As noted earlier above, it is arguably not a "violation" of the treaty where a source country's law purports to tax income in situations where a treaty will later relieve. It may be more properly thought of as a situation that the treaty will handle.[346] I, however, disagree with this position on the basis that the double tax treaties in international tax law and policy do not seem to have contemplated the tax treatment of incomes derived by source countries from the digital activities of non-resident entities operating in their digital economy. As such, it is difficult to see how these treaties would successfully relieve double tax losses suffered on incomes that it did not contemplate.

[346] Wei Cui, *supra* note 285.

3.5.1 *Permanent Establishment Rules under Article 5 of the Treaty*

The Treaty applies to persons who are residents of one or more of the contracting states, that is, Nigeria and Canada.[347] This is true of most bilateral tax treaties to which Nigeria and Canada are parties. The taxes covered by the Treaty include all categories of income taxes (in both Nigeria and Canada) and capital gains tax (in Nigeria only), including all such identical or substantially similar taxes that are imposed by the contracting states after the execution date of the Treaty (August 4, 1992) in addition to, or in place of, the existing taxes highlighted above.[348] Contracting states are also specifically required to notify each other of any substantial changes that have been made in their respective taxation laws.[349] Non-resident entities are taxable in a contracting source country only to the extent that they have a degree of taxable physical presence in the contracting source country. The tests for determining the existence of a taxable physical presence for non-resident persons in a contracting source country are contained in the Treaty's PE rules.[350]

Article 5(1) of the Treaty defines PE to mean a fixed place of business through which the business of an enterprise is wholly or partly carried on. Essentially, PE constitutes the activities that trigger the taxing right of a contracting source country over a non-resident person under the Treaty. PE includes: **(i)** place of management; **(ii)** a branch; **(iii)** an office; **(iv)** a factory; **(v)** a workshop; **(vi)** a mine, an oil or gas well, a quarry or any other place of extraction of natural resources; **(vii)** a building site or construction or assembly project or supervisory activities in connection therewith, where such site, project or supervisory activities continue for a period of more than three (3) months; and **(viii)** an installation, or the provision of supervisory activities in connection with an

[347] See Article 1 of the Treaty.
[348] See Article 2 of the Treaty.
[349] See Article 2(2) of the Treaty.
[350] See Article 5 of the Treaty.

installation, incidental to the sale of machinery or equipment where the charge payable for such installation or activities exceeds ten percent (10%) of the sale price of the machinery or equipment free-on-board.[351] PE includes dependent agents and a fixed base of business used as a sales outlet.[352]

Control is not a measure of PE.[353] As such, while a subsidiary may constitute a PE where it acts as a dependent agent,[354] a subsidiary does not automatically constitute a PE without more where it acts in the ordinary course of its business.[355] The following are also excluded from the Treaty's definition of PE:

(a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or for collecting information, for the enterprise; and

(e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character.[356]

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[351] See Article 5(2) of the Treaty.
[352] See Article 5(4) and (6) of the Treaty.
[353] See Article 5(7) of the Treaty.
[354] See Article 5(6) of the Treaty.
[355] See Article 5(5) of the Treaty.
[356] See Article 5(3) of the Treaty.

3.5.2 *Unacceptable Tax Treaty Override and Violation of Article 5 of the Treaty*

A careful review of the PE provisions of Article 5 of the Treaty clearly shows that a degree of physical presence is required for the active business income of a non-resident person to be taxable within a contracting source country. In other words, a degree of taxable physical presence is required to establish PE for a non-resident person within a contracting source country. If this PE is not established, then the active business income of a non-resident person is not taxable within a contracting source country. This is the only logical interpretation of Article 5 of the Treaty.

The PE rules established in the Treaty are outdated because they clearly did not contemplate the rise of digital businesses or the possibility of actively doing business and earning income in a contracting source country without having any form of physical presence within the country.[357] This explains why devising appropriate rules for the taxation of the digital economy has been one of the most awkward challenges governments have set for themselves in the OECD/G20 Inclusive Framework on BEPS project. This is especially so because determining the scope of the digital economy is also an issue in itself.[358]

The above notwithstanding, unacceptable unilateral tax treaty overrides, or clear violations of existing and binding tax treaties, are not allowed in international tax law and policy. Accordingly, to the extent that Nigeria's unilateral digital tax measure and Canada's unilateral DST measure

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[357] David R. Tillinghast, "The Impact of the Internet on the Taxation of international Transactions" (1996) 50:11/12 Bull Intl. Fiscal Doc 524. Here, the author noted that the existing body of international tax rules, as reflected both in national law and in treaties, is based in large part on the supposition that international trade consists of the physical shipment of tangible goods or the physical movement of persons to perform services at different locations. The author further noted that the challenge posed by the development of the internet and related means of communication is that in many cases this is simply no longer true.

[358] Aaran Fronda, "BEPS and the Digital Economy: Why Is It so Taxing to Tax" (2014) 25:6 Intl. Tax Rev 13 <https://perma.cc/67ML-UHV8> (accessed 12 March 2024).

seek to tax the active business incomes of non-resident persons in contracting source countries where they do not have any degree of taxable physical presence within the meaning of the PE rules established in the Treaty, I contend that these unilateral digital tax measures constitute unacceptable unilateral tax treaty overrides that clearly violate the PE provisions of Article 5 of the Treaty. An alternative argument would be that unilateral digital tax measures are not effective against or do not apply to residents of the host country because the double tax treaty in place will apply to relieve any double taxation suffered on such digitally sourced business income. I, however, disagree with this alternative conclusion for the reasons set out above and below.

Treaties, including tax treaties, are negotiated agreements concluded between states that are binding in international law.[359] They vary in form, substance, and complexity, and govern a wide variety of politically and economically significant matters, such as territorial boundaries, trade, commerce, fiscal regulation, taxation, and mutual defence.[360] These treaties are binding on the signatory countries. Validly executed treaties are governed by international law and, in that sense, there is no fundamental legal difference between tax treaties and treaties that deal with other matters.[361] The Vienna Convention on the Law of Treaties ("**Vienna Convention**") contains the rules applicable to treaties concluded after it came into force (27 January 1980)[362] between states that are parties to the Vienna Convention.[363] Most of the principles established in the Vienna

[359] Craig Elliffe, "Preventing Unacceptable Tax Treaty Overrides" (2022) 1 BTR 38 (Sweet & Maxwell: Thomson Reuters and Contributors) <https://ssrn.com/abstract=4125713> (accessed 4 March 2024).
[360] Ibid.
[361] Ibid.
[362] The Treaty between Nigeria and Canada was concluded on August 4, 1992. The provisions of the Vienna Convention are therefore applicable to the Treaty.
[363] Vienna Convention on the Law of Treaties. Concluded at Vienna on May 23, 1969, 1155 U.N.T.S. 331 (Vienna Convention) <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>. Nigeria and Canada are both parties to the Vienna Convention. For the list of countries that have signed the Vienna Convention and their ratification status, see the United Nations Treaty Collection at https://treaties.un.org/pages/ParticipationStatus.aspx?clang=_en. It is noteworthy that even in countries that have not yet ratified the Vienna Convention, such as the USA, it is generally acknowledged that the Vienna Convention represents customary international law and so would be recognised by those countries. See Reuven Avi-Yonah, "Tax

Convention have been derived from customary international law. Relevant to my arguments and conclusions in this thesis is the codification of both the *pacta sunt servanda* and the "good faith" principles of customary international law in the Vienna Convention.[364]

In this regard, Article 26 of the Vienna Convention provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith. The first obligatory element of the *pacta sunt servanda* principle in Article 26 of the Vienna Convention is that "agreements must be kept". This means that the contracting state parties to a treaty are recognized in international law to have entered into a mutual obligation to respect and apply the treaty provisions.[365] It is noteworthy that the reciprocal wrongful conduct of the parties to a treaty does not automatically terminate or warrant the termination of the treaty. It also does not excuse or validate the reciprocal wrongful conduct of the parties in breach of the treaty.[366] Accordingly, Nigeria and Canada's reciprocal wrongful conduct in respectively implementing the former's unilateral digital tax measure under the CITA and proposing to implement the latter's unilateral DST measure under the DSTA, in breach of the Treaty's PE rules, does not automatically terminate, or warrant the termination of the Treaty between both countries.

The "good faith" element of Article 26 of the Vienna Convention suggests that the state parties to

Treaty Overrides: A Qualified Defence of U.S. Practice" in Guglielmo Maisto (ed.), Tax Treaties and Domestic Law (Amsterdam: IBFD, 2006), p. 65, as cited in Craig Elliffe, *ibid*.

[364] Both the preamble to, and Article 26 of the Vienna Convention, validate these propositions.

[365] In the International Court of Justice ("**ICJ**") decision in 1997 concerning the *Gabčíkovo-Nagymaros Project, Hungary v Slovakia*, the ICJ required "that the parties find a solution within the co-operative context of the Treaty". See *Gabčíkovo-Nagymaros Project, Hungary v Slovakia*, Judgment, Merits, ICJ GL No.92, [1997] I.C.J. Rep. 7; [1997] I.C.J. Rep. 88, 114 (Sept. 25).

[366] The *Gabčíkovo-Nagymaros Project, Hungary v Slovakia* case involved the implementation of a treaty providing for the construction of a hydroelectric scheme between Hungary and Slovakia. The ICJ held that the reciprocal wrongful conduct of both parties necessarily meant neither the termination of the applicable treaty, nor the need to justify its termination. Despite both contracting states breaching their treaty obligations in that case, they were forced by the ICJ to "take all necessary measures to ensure the achievement of the objectives of the said treaty". See "Gabčíkovo-Nagymaros Project (Hungary/Slovakia): Overview of the case", online:<https://www.icj-cij.org/en/case/92> (accessed on February 16, 2024). See Craig Elliffe, *supra* note 359.

a treaty are required to take the necessary steps to comply with the object and purpose of the treaty. This was stressed in the 1974 ICJ case involving Nuclear Tests.[367] The ICJ considered that the statements made by the French Government concerning the discontinuation of nuclear testing in the South Pacific had met the object of the Australian and New Zealand applications for cessation of French nuclear testing in the case. In assessing the French President's public statements, the ICJ in the New Zealand case discussed the "good faith" principle of customary international law, as follows:

> One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential.[368]

The ICJ consequently held in parallel judgments that both New Zealand and Australia could rely in good faith on the statements made by the French President to cease nuclear tests. Given this surety, there was no need for the court to formally decide on the applications to cease the nuclear tests.[369]

Applying this principle to my arguments in this part of the thesis, I contend that both Canada and

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[367] In this case, both Australia and New Zealand instituted proceedings against France, alleging that France should discontinue nuclear testing because of the risk of nuclear fallout on Australian and New Zealand territory. France refused to recognise the jurisdiction of the ICJ, did not appear at the public hearings, and did not file any pleadings. The decisions, in separate judgments for the two countries, considered that the court no longer had to decide on the basis that France had, in various public statements, announced its intention to discontinue nuclear testing in the South Pacific. See *Nuclear Tests* (*New Zealand v France*), Judgment, 1974 I.C.J. 457 at [49]. See also Craig Elliffe, *supra* note 359.

[368] See *Nuclear Tests* (*New Zealand v France*), Judgment, 1974 I.C.J. 457 at [49]. See also Craig Elliffe, *ibid* note 359.

[369] Ibid.

Nigeria have good faith obligations under Article 26 of the Vienna Convention and in customary international law to take the necessary steps to comply with the object and purpose of the PE provisions of the Treaty. This necessarily entails reversing or holding off on implementing their unilateral digital tax measures, respectively, until the PE provisions of the Treaty are mutually updated to recognize "significant economic presence" as a test for determining the taxable presence of non-resident persons in a contracting source country. Failure to take this measure amounts to unilateral and unacceptable tax treaty overrides by both countries which violate the PE provisions of the Treaty.

Unilateral tax treaty overrides are unacceptable and amount to a breach of treaty obligations because the contracting state parties to a treaty are not allowed in international law to rely on their domestic law to circumvent treaty obligations. In this regard, Article 27 of the Vienna Convention provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty obligation.[370] As such, neither Nigeria nor Canada can rely on their domestic laws to justify unilateral overrides of the Treaty by implementing unilateral digital tax measures that violate the Treaty's PE provisions. It is immaterial that both countries are dualist states where treaty provisions are constitutionally required to be domesticated by local law before they can have the force of law within the countries' national borders.[371] I am not saying that Nigeria and Canada need to amend their domestic income tax laws to correspond to all the existing double tax treaties to which they are parties. I am saying that both countries need to reevaluate their unilateral digital tax measures because they present practical enforcement difficulties and also because they raise treaty commitment concerns – at least from the perspective of the host countries. These concerns

[370] Reuven S. Avi-Yonah, "The Dubious Constitutional Origins of Treaty Overrides" (20 May 2022), online (blog): SSRN <https://ssrn.com/abstract=4099091> (accessed 18 February 2024).

[371] See section 12(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) (the "**Constitution**").

are eliminated once the digital tax measure is bilateral or multilateral in that it is a negotiated digital tax measure between the source and host countries concerned.

Bruno Fajersztajn and Ramon Tomazela Santos (CEO and Partner, respectively, at Mariz de Oliveira e Siqueira Campos Advogados) have argued that from a legal standpoint, the only actual constraint to the introduction of unilateral digital tax measures by any country lies in the obligation to comply with international commitments, such as tax treaties and trade agreements.[372] With specific reference to Nigeria, there is legitimate concern that the country's unilateral digital tax regime introduced in the CITA may adversely impact its commitment to treaty obligations. Nigeria is yet to enter a bilateral or multilateral tax treaty that addresses digital taxation. This arguably suggests that no NRC operating in Nigeria's digital economy may make a case to be taxed outside the provisions of the CITA. Accordingly, it may be argued that it is only when a tax treaty that specifically addresses digital taxation is ratified and domesticated[373] in Nigeria that NRCs operating in the country's digital economy may successfully invoke the said treaty provisions for determination of their tax liabilities in Nigeria. It may also be argued that since existing tax treaties entered into by Nigeria with other countries (such as the Treaty between Nigeria and Canada) do not specifically address digital taxation, the provisions of Section 13(2)(c) of the CITA and the Order relating to treaty preference in the country's unilateral digital tax regime cannot apply.[374]

I however favour the alternative argument that Nigeria's unilateral digital tax regime cannot apply to entities that are resident in any of the countries with which Nigeria has a treaty regarding the taxation of NRCs in place, such as Canada. The reason is that none of such treaties (including the

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[372] Bruno Fajersztajn & Ramon Tomazela Santos, *supra* note 337.
[373] See Section 12 of the Constitution of the Federal Republic of Nigeria 1999 (as amended), for the requirement of domestication as a condition precedent for the enforcement of international treaties in Nigeria.
[374] Jude Odinkonigbo & Emmanuel Onyeabor, *supra* note 244.

Treaty between Nigeria and Canada) recognize "significant economic presence" as a test for determining NRCs' PE in the country.[375] Nigerian law acknowledges that disputes between local statutes (other than the Nigerian Constitution) and treaties must be resolved in favour of the treaty. This rule applies only to the extent that the said treaty has been domesticated in Nigeria by an Act of the National Assembly as required in Section 12(1) of the Nigerian Constitution. The rule is hinged on the presumption that the legislature does not intend to breach a treaty obligation.[376] Unfortunately, however, most (if not all) of Nigeria's existing bilateral tax treaties with various countries (including the Treaty between Nigeria and Canada) have not yet been domesticated in the country by the National Assembly as constitutionally required. This means that while the relevant bilateral tax treaties remain enforceable against Nigeria at the international level, affected NRCs will be unable to rely on them in a Nigerian court to challenge their liability to unilateral digital tax in the country. This could lead to international trade disputes between Nigeria and the relevant NRCs' host countries who have existing bilateral tax treaties with Nigeria.[377] In addition, such outcome violates the rule in Article 27 of the Vienna Convention that contracting state parties to a treaty should not rely on domestic law to circumvent treaty obligations.

I note the possible argument that Nigeria's unilateral digital tax regime under Section 13(2)(c) of the CITA and the Order is fully applicable to companies that are resident in any of the countries with which Nigeria has bilateral tax treaties regarding taxation of NRCs in place.[378] The reason is that Nigeria operates the dualist system of international law, which holds that the difference between domestic and international laws, requires the translation of the latter into the former. In other words, international law must be transformed to domestic law, or it is no law at all and cannot

[375] Chimezirim Echendu, "Nigeria's Significant Economic Presence Income Tax on Digital Economic Activities: Challenges and Opportunities" (2020) 74(9) Bulletin for International Taxation.
[376] See *General Sani Abacha & ors. v Chief Gani Fawehinmi* (2000) 6 NWLR (Pt. 660) 228.
[377] Jude Odinkonigbo & Emmanuel Onyeabor, *supra* note 244.
[378] Ibid.

be enforced within the country's national borders. This position is codified in Section 12(1) of the Nigerian Constitution, which provides that no treaty between the Federation and another country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly. In *Abacha v Fawehinmi*,[379] the Supreme Court of Nigeria ("**SCN**") held that a treaty does not have the force of law in Nigeria unless and to the extent it is domesticated through an Act of the National Assembly. The SCN has also held that the provisions of Section 12(1) of the Nigerian Constitution extend to every treaty entered into by Nigeria, such that no treaty can have the force of law in the country unless it is domesticated by an Act of the National Assembly.[380]

Following the position of the SCN in *Abacha v Fawehinmi*,[381] it is arguable that it is only when the provisions of Section 12(1) of the Constitution are complied with, that a domesticated treaty can rank higher in status than a local legislation enacted by the National Assembly.[382] However, the same National Assembly has the constitutional authority to repeal or amend a domesticated treaty. An amendment could be expressed or implied. When a new legislation cannot be reconciled with an existing one, the latter statute could be said to have impliedly amended the earlier one. Thus, it is arguable that Section 4 of the Finance Act 2019 (which amended section 13(2) of the CITA to introduce a unilateral digital tax regime in the country) has impliedly amended or overruled the provisions of all tax treaties involving Nigeria, which do not recognize digital taxation. For instance, the Treaty between Nigeria and Canada allows the taxation of active business income only in the contracting country of residence. However, the active business income of a non-resident person can be validly taxed in the contracting source country only where the non-

[379] (2000) 6 NWLR (Pt. 660) 228.
[380] See *The Registered Trustees of National Association of Community Health Practitioners of Nigeria & ors. v Medical & Health Workers Union of Nigeria & ors.* (2008) LPELR-3196(SC).
[381] (2000) 6 NWLR (Pt. 660) 228.
[382] See *Abacha v Fawehinmi* (2000) 6 NWLR (Pt. 660) 228.

resident person has a PE in that country.[383] Non-resident digital businesses fall outside the scope of the PE rules established in Article 5 of the Treaty. This suggests that the Finance Act 2019 is an unacceptable unilateral tax treaty override which violates the PE provisions of Article 5 of the Treaty.[384]

This argument is strengthened by the fact that the Finance Act 2019 failed to define what constitutes "significant economic presence" for NRCs in Nigeria. Instead, the definition was provided by the Order – a subsidiary legislation. Paragraph 1(3) of the Order only exempts digital taxpayers who are corporate residents of Nigeria's treaty partners in treaties or arrangements covering online or digital taxation. The implication is that any treaty or arrangement that does not cover digital taxation (such as the Treaty between Nigeria and Canada) cannot be relied upon by any non-resident entity that is based in a treaty partner country to avoid Nigeria's unilateral digital tax regime under the CITA. I hold that this position may be challenged on the basis that a subsidiary legislation cannot validly overrule or impliedly alter the provisions of a treaty – whether that treaty has been domesticated or not.

3.6 Looking Forward

As hinted earlier on in Chapter 1, John A. Swain (Professor Emeritus of Taxation at the James E. Rogers College of Law at the University of Arizona) rightly observed that one of the most contentious issues in state taxation is the reach of the state's jurisdiction to tax net income.[385] The failure to resolve this issue is a leading cause of the recent dramatic decline in state corporate

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[383] See Articles 1 to 5 of the Treaty.
[384] Jude Odinkonigbo & Emmanuel Onyeabor, *supra* note 244.
[385] John A. Swain, "State Income Tax Jurisdiction: A Jurisprudential and Policy Perspective" (2003) 45 Wm. & Mary L. Rev. 319, online: <https://scholarship.law.wm.edu/wmlr/vol45/iss1/5> (accessed 13 February 2024).

income tax revenues[386] in this globalized and digitalized economy – especially for source countries. Key reasons include the shift from mercantile to a largely digital service economy, increased capital mobility, electronic commerce, the proliferation of digital business models, and the mainstreaming of aggressive tax planning techniques promoted by tax consultants. These forces allow multinationals to actively do business and earn millions of dollars in revenue from countries in which they have little or no form of taxable physical presence.[387] Thus the traditional markers of nexus to tax in the international tax regime – such as physical presence in the PE rules of most tax treaties – are absent.[388] The international tax regime does support the notion that the mere economic presence of a non-resident entity is sufficient ground for a state to assert its income tax jurisdiction.[389]

Tax jurisdiction as a concept is nebulous and does not lend itself to any generally accepted definition or description. However, it seems tenable that the jurisdiction to tax as a concept, necessarily contemplates three broad categories: enforcement jurisdiction, adjudicative jurisdiction, and prescriptive/legislative jurisdiction – that is, the power of any state to enact valid legislation imposing taxes[390] within its territory. My argument in this thesis focuses on prescriptive/legislative jurisdiction and enforcement jurisdiction. Both have been intimately linked in the past because of the "revenue rule" under which, traditionally, one state would not assist in the collection of taxes due to another state.[391] Enforcement jurisdiction was consequently limited to the territory of the state imposing the tax.[392] This meant that taxes could only be collected if the

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[386] John A. Swain, *supra* note 385.
[387] Ibid.
[388] Ibid.
[389] Ibid.
[390] Philip Baker, "Some Thoughts on Jurisdiction and Nexus", online (blog): Field Tax <https://www.fieldtax.com/wp-content/uploads/2020/04/Philip-Baker-Some-Thoughts-on-Jurisdiction-and-Nexus.pdf> (accessed 13 February 2024).
[391] Ibid.
[392] Ibid.

taxpayer was physically present in the jurisdiction, or the taxpayer owned property located in the relevant territory or derived income sourced from the territory of the collecting country.[393] Thus, prescriptive/legislative jurisdiction was limited by the territorial scope of enforcement jurisdiction in international tax law and policy.[394]

However, the "revenue rule" is now subject to widespread exceptions, with the result that a state may now enlist the assistance of other states to collect taxes owed to it by a person resident outside its physical borders.[395] Hence prescriptive/legislative jurisdiction is now very distinct from enforcement jurisdiction. The scope of and conditions for both categories of tax jurisdiction are not necessarily the same. Enforcement jurisdiction may in the future remain largely territorial, but with a growing (yet ancillary) extra-territorial element through arrangements involving international assistance in the collection of taxes. On the other hand, prescriptive/legislative jurisdiction is no longer limited by the consequences of the revenue rule.[396] It now extends way beyond that.

I contend that a nexus with a state (duly recognized in international tax law and policy) is required for the legitimate exercise of prescriptive/legislative jurisdiction. Some tax scholars have expressed the view that there are no limitations on the tax jurisdiction of a state (though some of those tax scholars do accept that the practicalities of enforcement often require a nexus).[397] Others contend that tax treaties (bilateral, multilateral, or plurilateral) are not necessary for the exercise of tax jurisdiction by a state – not even for the purpose of avoidance of double taxation on cross-border trade. They argue that states may unilaterally employ tools such as tax credits and

[393] Philip Baker, *supra* note 390.
[394] Ibid.
[395] Ibid.
[396] Ibid.
[397] Ibid.

deductions to address double taxation concerns on cross-border trade within their borders. I disagree. I adopt the view aptly expressed by Stjepan Gadžo, an Assistant Professor of International Taxation and Public Finance Law at the Faculty of Law of the University of Rijeka, and captured by Philip Baker, KC (Visiting Professor of International Tax Law at the Faculty of Law of the University of Oxford). Their view effectively holds that the exercise of taxing powers by a state is only lawful from an international tax perspective where there is a "tax nexus" or a qualifying connection between the taxing state and a particular set of facts relevant for taxation.[398]

Respectfully drawing from Philip Baker's work on tax jurisdiction, I reasonably believe that one of the current issues which raise, or may raise, questions of the exercise of prescriptive/legislative jurisdiction by a state in tax matters, and therefore give rise to conversations on the requirement for tax nexus in international tax law and policy,[399] is globalization and digitalization of the economy. The net result of globalization and digitalization of the economy is that several (source) countries are now making new claims to tax jurisdiction, which were not made previously, and which test the limits of prescriptive/legislative jurisdiction.[400] A good example of this development is the recent clamour of source countries to tax the economic activities of digital businesses operating within their digital economy.

While I recognize the equitable right of source countries to tax digital businesses, I contend that the international tax regime does not admit the exercise of prescriptive/legislative jurisdiction on digital tax matters by source countries because "significant economic presence" and other iterations of digital presence are not recognized tax nexus factors in international tax law and

[398] Philip Baker, *supra* note 390.
[399] Ibid.
[400] Ibid.

policy. As such, the exercise of enforcement jurisdiction by source countries in respect of unilateral digital tax measures would not only be impracticable but also illegitimate within the framework of international tax law and policy. Allocation of taxing rights in the international tax regime would have to be altered to recognize significant economic presence as a basis or nexus for the legitimate exercise of tax jurisdiction by a source country over non-resident digital businesses operating within its economy.

I reasonably believe that both Nigeria's unilateral digital tax regime and Canada's unilateral DST measure violate the PE provisions of Article 5 of the Treaty.[401] This is more so because they both have the potential of defeating the double-tax avoidance objectives of the Treaty.[402] The income taxing rights of a contracting source country over non-resident entities under the Treaty are hinged on the taxable physical presence of a non-resident entity within the contracting source country. The tests for determining the taxable physical presence of a non-resident entity within a contracting source country are contained in the PE rules established in Article 5 of the Treaty. As such, any unilateral digital tax measure that seeks to circumvent the PE rules established in Article 5 of the Treaty is an unacceptable unilateral tax treaty override that violates Article 5 of the Treaty.

To address the issues referenced above, a redrafting of the Treaty is required to recognize the "significant economic presence" concept as one of the tests for determining the taxable presence of a non-resident entity within a contracting source country under the PE rules specified in Article 5 of the Treaty. In redrafting Article 5 of the Treaty for this purpose, OECD's robust definition of what constitutes "significant economic presence" for digital tax purposes should serve as a guide

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[401] Katherine E. Karnosh, "The Application of International Tax Treaties to Digital Services Taxes" (2021) 21:2 Chicago Journal of International Law 8 513-547, online: <https://chicagounbound.uchicago.edu/cjil/vol21/iss2/8> (accessed 3 June 2024).
[402] Ibid.

– with relevant improvements to suit the peculiarities of both Nigeria and Canada where necessary.

The "significant economic presence" concept was proposed and explained by the OECD/G20 Inclusive Framework on BEPS in Chapter 7.6 of its Action 1 Report on "*Developing options to address the broader tax challenges of the digital economy*".[403] The concept jettisons the reliance on taxable physical presence for the taxation of non-resident entities in source countries and rather embraces the notion of "significant economic presence". Here, a taxable presence will arise for non-resident entities in a source country based on factors that evidence a purposeful and sustained interaction with a tax jurisdiction via digital technology and other automated means.[404] Revenue generated on a sustained basis appears to be the primary factor. Still, without more, such income is not sufficient to establish nexus – save when combined with other factors that would potentially be used to establish nexus in the form of a significant economic presence in the source country concerned.[405] In this context, one or more of the following factors may be considered relevant for constituting the kind of purposeful and sustained interaction with a jurisdiction via digital technology and other automated means that would be sufficient to create a significant economic presence[406]:

(a) The existence of a user base and the associated data input;

(b) The volume of digital content derived from the jurisdiction;

(c) Billing and collection in local currency or with a local form of payment;

(d) The maintenance of a website in a local language;

(e) Responsibility for the final delivery of goods to customers or the provision by the NRC of other support services such as aftersales service or repairs and maintenance; or

[403] OECD, *supra* note 247.
[404] Jude Odinkonigbo & Emmanuel Onyeabor, *supra* note 244.
[405] Ibid.
[406] Ibid.

(f) Sustained marketing and sales promotion activities, either online or otherwise, to attract customers.

OECD's Action 1 Report clearly notes that a link would have to be established between the revenue-generating activity of an NRC and its significant economic presence in the market jurisdiction.[407] I believe that updating the PE rules established in the Treaty to include the "significant economic presence" criterion is one of the feasible approaches to addressing the tax challenges of the digital economy faced by contracting source countries, without necessarily breaching Treaty obligations. To make sufficient room for DSTs, elements of OECD's proposed "user participation"[408] concept may be incorporated into the proposed "significant economic presence" aspect of the PE rules in the Treaty. I will discuss this in Chapter 5.

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[407] Jude Odinkonigbo & Emmanuel Onyeabor, *supra* note 244.

[408] This concept allocates taxing rights by focusing on user base for digital services, data, and content generation in a highly digitized business.

CHAPTER 4

STRATEGIC REASONABLE POLITICAL COMPROMISE

4.1 Overview

This chapter frames my concept of *Strategic Reasonable Political Compromise* ("**SRPC**"). SRPC forms the basis of my proposal of the *Onyeabor's Digital Tax Model for Developing and Emerging Economies* ("**ODTMDEE**") in Chapter 5. ODTMDEE is my proposition for effectively achieving the digital tax objectives of developing and emerging economies such as Nigeria. The preceding chapters of this thesis have laid the foundation for SRPC in their framing of the *Digital Tax Extremes* concept. In this chapter I rely largely on the theories of neorealism in international relations and rational pragmatism and draw richly on concepts drawn from tax policy evaluation, reasonableness, and tax jurisdiction to contend that African developing and emerging economies need to look beyond the *Digital Tax Extremes* if they wish to succeed in their digital tax revenue goals.

The SRPC concept discussed in this chapter is focused on a set of defined practical steps for achieving recognition of 'digital presence' as a key component of Permanent Establishment ("**PE**") for harmonized digital taxation purposes in international tax law and policy. It suggests a pathway for achieving this objective without: **(a)** jeopardizing the international relations of African developing and emerging (source) economies with their developed (host) country trade partners; or **(b)** compromising Africa's socio-politico-economic autonomy in the negotiation process.

SRPC is hinged on rational pragmatism rather than equity. It is focused on the tax policy evaluative

criteria of administrability and efficiency. Finally, the SRPC concept draws largely on the theories of rational pragmatism and neorealism in international relations to contend that Africa's digital tax strategy must deliberately shift away from unilateralism toward multilateralism, bilateralism, or a plurilateral approach at the very least. In doing this, African developing and emerging economies must learn to appeal to the self-interest (mutual benefit approach) as opposed to the mercy (victim mentality or tax aid-sourcing approach) of developed economies, in their digital tax negotiations. This seems like a reasonable pathway to achieving digital tax efficiency for developing and emerging economies in international tax law and policy.

This chapter is divided into five parts. Following this overview of the chapter in part 4.1, part 4.2 highlights my understanding of *strategy* as used in my formulation of the SRPC concept. Part 4.3 addresses the concept of *reasonableness* as an evaluative criterion of SRPC. It highlights how and why 'reasonability' must necessarily be tied to rational pragmatism for effective digital tax actualization in international tax law and policy. Part 4.4 focuses on the third leg of the SRPC concept – *political compromise* – and what it means for achieving digital tax efficiency in developing and emerging economies such as Nigeria. Finally, part 4.5 summarizes the SRPC concept and lays the framework for my ODTMDEE proposal in Chapter 5.

4.2 Strategy

I contend in this part of Chapter 4 that to devise an effective strategy for actualizing their digital tax objectives, developing and emerging economies must pay close attention to the socio-politico-economic realities that have impacted and shaped international relations, international politics, and international tax law and policy. In this regard, they have to be pragmatic and adopt a practical approach that is guaranteed to produce favourable results in the comity of nations. Digital tax

measures that do not take account of this crucial fact may result in failure.

I begin my analysis by noting that we have arguably reached a significant point in the evolution of human civilization. Now more than ever, adopting a combative approach to resolving conflicts is seriously discouraged and gravely frowned upon. All areas of social life require the ability to persuade people in ways that do not offend or impose. If we are to change people's opinions and persuade them to accept our point of view, we must act in diplomatic ways.[409] This rationale forms an essential aspect of modern politics and international relations.[410]

We now live in a culture that promotes democratic values of being fair to one and all, the importance of fitting into a group, and knowing how to cooperate with other people. We are taught early on in life that those who are outwardly combative and aggressive pay a social price: unpopularity and isolation which deprives them of valuable information and resources.[411] While being beneficial to human interaction in several respects, this evolution in human civilization creates the illusion that the classical human reality of constant battles for supremacy amongst various groups with varying interests has ceased. This is, however, not the case.[412] The international conflicts of today are resolved at the negotiation tables of international behemoths like the United Nations and the Organization for Economic Cooperation and Development ("**OECD**"). These conflicts are resolved with diplomacy, veiled threats, economic/trade sanctions, and the calculated withholding of aid to low-income countries with the aim of imposing ideological dominance over them to shape their national policies. Essentially, developed economies use their socio-politico-economic might to assert dominance and advance their own national interests in

[409] Robert Greene & Joost Elffers, *The Art of Seduction* (New York, USA: Viking Penguin Books, 2001) ix – xx.
[410] Ibid.
[411] Robert Greene & Joost Elffers, *The 33 Strategies of War* (New York, USA: Viking Penguin Books, 2007) xv.
[412] Ibid.

their negotiation of taxing rights allocation with developing and emerging economies. I contend that negotiations amongst nations and states are generally driven by two factors: the power balance between, and the varying interests of, the negotiating parties. Leverage levels the playing field where the power balance between the negotiating parties is unequal – which is largely the case in most negotiations.

This unsavoury dynamic affects how the allocation of taxing rights is negotiated and decided at international levels. It is consequently no surprise that the so-called 'Inclusive Framework' of the OECD is in fact *not* inclusive. Its proposals (such as the two-pillar approach to resolving the tax challenges of the globalized and digitalized economy) appear to mean different things to different tax jurisdictions based on their various socio-politico-economic realities.

Developing and emerging economies must be rational and strategic in their resolution of international tax conflicts, especially with developed economies.

I contend that the use of unilateral measures by source countries to assert their digital tax jurisdiction is not an ideal way of resolving the tax challenges presented by the globalized and digitalized economy. It is inefficient in that it is avoidably combative and therefore inevitably attracts the ire of host countries who consequently withhold their cooperation in the enforcement of such unilateral digital tax measures. This is also true for attempts to use global consensus to resolve the tax challenges presented by the globalized and digitalized economy. The unilateralist and global consensus pathways to resolving digital tax challenges have two fatal flaws in common. They both depict a poor understanding of how socio-politico-economic realities impact and shape international politics, international relations, and international tax law and policy.

The two key digital tax strategies employed by developing and emerging economies appear to be unilateralism and activism. In other words, misplaced aggression, and appeal to pity. Both strategies are ineffective for two key reasons. Firstly, society today generally frowns at unnecessarily combative approaches to resolving conflicts. If one is perceived as unnecessarily combative, the merit of their cause may in most cases no longer matter. The focus of attention will be on the unacceptable combative approach deployed by them to resolving the conflict. This has the practical effect of alienating them and therefore denying them the valuable information, resources, and assistance required to further their cause.

Secondly, appeal to pity is ineffective because it puts one at the mercy of one's competitor. The result is that one is either ignored by one's competitors or forced to negotiate at a disadvantage. Classical writers have argued that in negotiating terms, it is much more effective in practical terms to appeal to the self-interest of one's competitor rather than to their mercy or gratitude.[413] If one can show their competitor how their cause will benefit the competitor, their chance of securing the competitor's cooperation is that much more likely in practical terms. It also helps if one can find a way to level the playing field or equal the power balance as much as possible so that one is not negotiating from a place of weakness. Negotiating from a place of weakness generally puts one at a great disadvantage. This is true for negotiations between state parties in international tax law and policy. I contend that activism (without more) for equity in the allocation of digital taxing rights in international tax law and policy will not help African developing and emerging economies, if they do not strategically unite to amass the socio-politico-economic clout that will make their competitors take them seriously. They must also be realistic in the negotiation process by meeting their competitors half-way, rather than simply appealing to their competitors' pity by holding out

[413] Robert Greene & Joost Elffers, *The 48 Laws of Power* (New York, USA: Viking Penguin Books) 95.

themselves as helpless victims of the international tax system. I reasonably believe that this strategy is a pragmatic approach that will guarantee realistic and long-lasting results.

The foreign policies of nations are designed to protect and advance national interests – regardless of the front put up by nations to mask the true intent of those foreign policies. These national interests are subtly (and in some cases not-so-subtly) advanced by nations using their socio-politico-economic might. As such, if one's proposed foreign policy does not present any tangible benefit to their international trade partners, or the latter's socio-politico-economic might is insignificant compared to that of the former, one may most likely be ignored. This is a key logic of the neorealist theory of international relations.[414] As hinted earlier on in Chapter 1, my conception of international relations for the purposes of this thesis is that interactions amongst sovereign states, and the state of the international legal regime which regulates inter-state relationship, is determined by political and economic power dynamics. In this regard, I mirror the view that an indisputable reality of international relations is that states are not and have never been equal. The international tax regime was birthed – and is maintained – in that state of structural inequality.[415]

Diane Ring, Professor of International Taxation at the Boston College Law School, identifies four evaluative perspectives or theories of international relations analysis: neorealism, neoliberalism,[416]

[414] Diane Ring, "International Tax Relations: Theory and Implications" (2007) 60:2 Tax L Rev 83.
[415] Okanga Ogbu Okanga, "Disabusing the Tax Aid Narrative: What Inter-national Tax Equity Really Means for "Poor" Countries and How to (Re)Frame It" (2022) *Schulich Law Scholars* (Schulich School of Law, Dalhousie University: PhD Dissertations – Theses and Dissertations), online: "Disabusing the Tax Aid Narrative: What International Tax Equity Reall" by Okanga Ogbu Okanga (dal.ca) (accessed on May 24, 2024). See also Diane Ring, *ibid*.
[416] According to Ring, neoliberalists regard states' self-interest, more than their power and craving for relative gain, as the primary driver of states' engagement on the international stage. They view a state's pursuit of national self-interest within a market-oriented ecosystem as a dominant factor in shaping international relations and in determining how successful international institutions can be in directing and modifying international behaviours. Here, the pursuit of absolute gains (that is, both states are better off) is more important than the pursuit of relative gains (measured in comparison to other states' success).

pluralism,[417] and cognitivism.[418] Professor Ring notes that these perspectives or theories of international relations form part of the background for the formation of international regimes.[419] It is further inferred that each of these major threads or theories of international relations relies on a primary explanatory variable for behaviour and outcomes in the international context.[420] I focus on the neorealist theory of international relations. Neorealists view power as the driving force behind states' decisions, behaviour, and interactions on the world stage.[421] Central to a state's engagement on the world stage is its desire to achieve relative gains over other states; and the state, being a rational actor, will exert its (socio-politico-economic) power to achieve preferred ends, regardless of the distributional consequences for other states.[422]

Bearing this in mind, developing and emerging economies in Africa must deliberately shift their digital tax strategies away from unilateralism to multilateralism, bilateralism, or a plurilateral approach at the very least. In doing this, African developing and emerging economies must learn to appeal to the self-interest (mutual benefit approach) as opposed to the mercy (victim mentality or tax aid-sourcing approach) of developed economies, in their digital tax negotiations. Unilateral digital tax measures are ineffective because they are combative in nature. They isolate developing and emerging (source) economies from their developed (host) country trade partners. This deprives them of the international tax cooperation necessary to effectively enforce their digital tax laws.

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[417] Ring also highlights the emergence of "pluralism", a gap-filler framework which illuminates and analyses the role of non-state actors such as individuals, bureaucracies, and non-governmental organizations in global decision-makings.
[418] Ring notes that the cognitivists – critics of neorealism and neoliberalism – treat knowledge and information as critical to the shaping of international regimes. Those with information, knowledge, and ideas, and who determine what we value and think, practically determine much of the outcome. This is because states create their identities and determine their interests based on the predominant beliefs held by state actors. Therefore, changes in knowledge and belief systems can trigger changes in policy. Attention should thus be focused on how knowledge is distributed and how it shapes the views of decision-makers.
[419] Diane Ring, *supra* note 414.
[420] Ibid.
[421] Okanga Ogbu Okanga, *supra* note 415.
[422] Ibid.

Granted, the power imbalance between developed economies on the one hand, and developing and emerging economies on the other hand, is massive. A negotiation for equitable allocation of digital taxing rights amongst these categories of economies without reasonably closing that massive power imbalance may be unproductive for developing and emerging economies. I however reasonably believe that the said power imbalance can be sufficiently closed with a concerted regional multilateral approach to the negotiation process. This belief is one of the key bases for my formulation and recommendation of the ODTMDEE proposal in Chapter 5.

Certainly, a group of developing and emerging economies will have more power than one. However, one might ask if a group of developing countries could muster enough power to provide some significant balance or leverage in a negotiation with powerful developed economies like the US. I reasonably believe that this is possible if all the African countries can act as a single block through the African Union ("**AU**"). The power balance might not be equal, but it will be enough to make the relevant developed host economy (such as the US) to seriously consider the concerns of the African developing and emerging source economies. One might also ask what meeting each other half-way in the negotiations would look like. My thinking is that this would entail both parties giving up a part of their digital taxing rights to secure the cooperation of the other party. African developing and emerging economies (such as Nigeria) have a very large market which the big tech companies of most developed host countries (including the US) want a share of. Access to that market can be blocked as a negotiation tactic if the relevant developed host country refuses to negotiate reasonable terms. Continued access to that market and giving up a part of their absolute digital tax jurisdiction in respect of income derived by non-resident entities from activities conducted within their digital economy, would be the developing source countries' efforts at meeting the developed host countries halfway in the negotiations. Recognizing (to a reasonable

degree) the developing source countries digital taxing rights in respect of income derived from their digital economy and providing the international tax cooperation necessary to enforce those digital taxing rights, would be the developed host countries' efforts at meeting the developing source economies halfway in the negotiations.

4.3 Reasonableness

I contend in this part of Chapter 4 that a digital tax measure is only reasonable if it is *practicable* in this globalized and digitalized economy. This means that it must be both administrable by the implementing state and 'fair' or acceptable to both the source and host countries. If it is not *practicable*, then it is unreasonable and should be abandoned. In testing the reasonability of a digital tax measure, equity is relevant but should not be the guiding principle. An equitable digital tax measure that is not practicable is unreasonable as it has no functional utility to the implementing state. A digital tax measure has functional utility if it can be successfully enforced by the implementing state without jeopardizing the state's international relations with its key cross-border trade partners and the benefits of its implementation markedly outweigh the cost. Anything less is unrealistic and therefore unreasonable. As such, the SRPC test for the reasonability of a digital tax measure is rational pragmatism.

One might ask what would change the US' default opposition towards all forms of digital tax measures by source countries, since the neorealist theory of international relations suggests that developed host economies like the US would seek to achieve relative gains over developing source countries in the digital tax negotiations. My thinking is that if access to Africa's large (and rather essential market) is blocked against non-resident big tech companies, this could encourage developed host countries like the US to seriously consider negotiating acceptable terms with

Africa's developing source economies – if only to secure continued access to that market for their big tech companies. I recognize that it is possible that the US would choose to forfeit Africa's market rather than negotiate digital taxing rights with developing and emerging source economies. However, this outcome seems remote as the US big tech companies affected by the blockage of access to Africa's large market may lobby or pressurize the US to negotiate acceptable terms with Africa's developing and emerging source economies.

I start here by noting that the international tax regime is designed to limit the exercise of sovereign tax jurisdiction. It does so by extracting the surrender of taxing rights aimed at constraining the burdens of international double taxation.[423] The international tax system is not flawless, but its merits still outweigh its demerits. A revert to the absolute national tax system would result in economic chaos in this globalized and digitalized economy. The national governments of source countries *cannot feasibly* act unilaterally in digital taxation matters. The practical reason for this limitation on exercise of sovereign tax jurisdiction (asides treaty restrictions) is that digital taxes on active business income cannot be successfully enforced without the tax cooperation of the host countries' national governments. This calls to question the reasonability of unilateral digital tax measures in international tax law and policy. But to make this determination, I first determine what *reasonability* entails. I then fit this narrative into the framework of international tax law and policy.

As noted earlier on in Chapter 1, *reasonableness* is a nebulous concept in law. It is not susceptible to any generally acceptable definition. However, reasonableness is generally conceived as a technical and functional concept in law.[424] Consequently, a digital tax measure is only reasonable

[423] Okanga Ogbu Okanga, *supra* note 415.
[424] Ibid.

if it is functional to the state implementing the digital tax measure.[425] It is functional if it is acceptable to both the source and host countries involved, which would make it enforceable by the implementing state party. If it is not functional to the state implementing the digital tax measure, then it is unreasonable.[426] The functionality of a digital tax measure must be assessed not only by its results at the national level. It must be equally assessed by the international consequences that arise from its implementation. Both results must be functional. If either one of the results is not functional to the state implementing the digital tax measure, then such measure must be adjudged unreasonable and consequently abandoned.

I use "reasonableness" here in a technical sense. My contention is that from a rational pragmatic perspective, impracticable measures are not reasonable because they are not workable within the environment they operate. A measure would only be reasonable from a pragmatic point of view if it is practicable within the environment it operates. My thinking is that 'reasonableness' is a relative concept, and it could mean so many things to different people. To a rational pragmatist, 'reasonableness' is akin to being 'realistic'. An unrealistic approach to resolving an issue is 'unreasonable' because it is unworkable and therefore bound to fail whereas a realistic approach is 'reasonable' because it is workable and therefore likely to succeed. A digital tax measure is not workable if it cannot be enforced. It is not possible to enforce a digital tax measure if it does not enjoy the international tax cooperation of the implementing source country's international trade partners, that is, the host countries. A digital tax measure is also unworkable if it is manifestly unfair in its allocation of digital taxing powers between source and host countries and therefore unacceptable to either one or both parties.

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[425] Okanga Ogbu Okanga, *supra* note 415.
[426] Ibid.

To be clear, 'reasonableness' as used in my SRPC concept means that a digital tax measure must be: **(a)** administrable or enforceable by the implementing source country; and **(b)** allow the source country a fair share of the tax revenue generated from the digital activity conducted within its digital economy – relative to the degree of economic activity conducted within the source country in generating the revenue, while taking into account the host country's interests. In other words, the allocation of digital taxing rights must be acceptable to both the source and host countries involved. I do not attempt in this thesis to define what a *fair* allocation of digital taxing rights entails. I rather contend that the state and host countries should be free to determine what is *fair* to them in the allocation of digital taxing rights between them. Hence the need for negotiation. If the allocation of digital taxing rights is acceptable to both parties, then it is fair. If it is not, then it is unfair to the dissatisfied parties and should be reevaluated until consensus is achieved. In this regard, the negotiation prowess of the state parties involved is key.

One might wonder if my reliance on the theories of rational pragmatism and neorealism in international relations would not have the effect of diminishing equity or fairness in the allocation of digital taxing rights between source and host countries in international tax law and policy. As noted earlier on in Chapter 1, my argument for rational pragmatism in the development of digital tax measures does not seek to diminish the importance of equity or fairness in the allocation of digital taxing rights between source and host countries in international tax law and policy. I reckon that there is already so much literature focusing on equitable or fair allocation of digital taxing rights, with very little if any literature that is focused on removing the practical impediments to the implementation of such equitable and fair allocation of digital taxing rights. My contribution to literature in this thesis is that rational pragmatism is as important as equity or fairness in setting and attaining the digital taxation goals of source countries – especially for developing and emerging economies like Nigeria. To my mind, it makes no practical sense to expend time and

resources in developing unilateral digital tax measures that are unenforceable by the implementing country because they do not have the support of the host countries involved.

As a technical functional concept, reasonableness embodies attributes of relativity, adaptability, rationality, flexibility, and pragmatism.[427] It displaces resort to the rigidity of legal texts and the illogic of sentiments.[428] For instance, what constituted a reasonable threshold for PE in the past – a compromise threshold that source countries were willing to accept – may not meet such standards today considering the digital transformation of economic activities.[429] Reasonableness is adaptable to such changes.[430] As such, the PE rules of the international tax regime are unreasonable. The reason being that they are still reliant on physical presence for allocation of taxing rights, which is no longer practicable today. (The globalized and digitalized economy has enabled non-resident entities to do business in countries where they do not have any form of physical presence.)

The above notwithstanding, the *Digital Tax Extremes* are unreasonable and should be rejected by developing and emerging economies for two key reasons. Firstly, they promote global consensus, which is impracticable and favours wealthy host countries to the detriment of low-income source countries like Nigeria in terms of both *process* and *substance*. Secondly, they promote unilateralism, which is neither administrable nor efficient, thereby socio-politico-economically hurting developing countries much more than it helps them. These issues have been addressed in Chapters 2 and 3 of my thesis. Hence my contention that African developing (source) economies can only achieve their digital tax objectives through "*strategic reasonable political compromise*"

[427] Okanga Ogbu Okanga, *supra* note 415.
[428] Ibid.
[429] Ibid.
[430] Ibid.

with developed (host) economies as contemplated in my ODTMDEE solution to the digital tax challenges they face.

My conception of reasonableness for the purposes of this thesis is based on rational pragmatism. By this I mean that in testing the reasonability of a digital tax measure, I am guided more by rational practical considerations rather than by utopian ideals. I reasonably believe that developing countries, in their pursuit of equitable digital taxing rights in the international tax system, must adopt an approach that evaluates tax theories and the measures they propose in terms of the probable success of their practical application. The problem of social inequality in the allocation of taxing rights between developed host countries and developing source countries in the international tax system, must be dealt with in a sensible manner that suits the socio-politico-economic realities of African developing countries within the framework of international tax law and policy. Following the bandwagon-effect-fixed theories, ideas, or rules represented by the *Digital Tax Extremes* is impracticable and therefore unreasonable. My ODTMDEE solution in Chapter 5 to developing countries' digital tax challenges is based on rational practical solutions rather than on idealistic and unrealistic theories that only serve the purpose of straining international relations between African developing countries and their developed trade partners.

My proposition is that for a digital tax measure to be practicable, it must be both enforceable by the source country and 'fair' or acceptable to both the host and source countries. I however do not attempt to define what would be a 'fair' allocation of digital taxing rights amongst source and host countries in this thesis. I leave that to the outcome of negotiations between the parties.

As a rational pragmatist, the underlying bases for my conception of reasonableness are logic, balance, and rationality. The key element of my conception of reasonableness is *rationality*. The

concept of *rationality* is nebulous. However, my conception of '*rationality*' for the purposes of this research thesis is that a decision or measure is rational if it is logical within the context of applicable contemporary realities. Hence a decision or measure is irrational if it defies logic. This begs the question *why* the decision or measure defied logic in the first place. To answer this question, I draw on Denis Galligan's conception of '*rationality*',[431] which holds that rationality is relative and "requires that decisions be made *for reasons which are rational in terms of our understanding of the world*".[432] (Denis Galligan is a Professor of Socio-Legal Studies at the University of Oxford.) In this regard, a decision or measure is unreasonable if it is irrational. A decision or measure is irrational if it is illogical in the sense that it fails to take account of practical realities in the world in which it is to be applied. In other words, if – on the evaluation of the merits, the decision or measure is impracticable, then it is unreasonable. Here, I draw inspiration from a Canadian judicial statement of reasonableness, which holds that a statement regarding the reasonability or otherwise of a decision is "*a statement about the logical relationship between the grounds of the decision and premises thought by the court to be true*".[433]

This simply means that if a decision or measure is impracticable within the context of the contemporary realities in which it operates, then it is unrealistic and therefore unreasonable. It simply does not make practical sense, from a point of administrative efficiency, to expend state resources enacting measures that cannot be enforced within the context of contemporary realities.

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[431] Paul Daly, "The Analytical Structure of Reasonableness Review" (2012) *A Theory of Deference in Administrative Law: Basis, Application, and Scope* (Cambridge University Press), online: https://www.canlii.org/en/commentary/doc/2016CanLIIDocs273 (accessed on February 14, 2024).

[432] Denis Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon, 1986), p. 5. The same point applies to the sliding scale developed by the English courts in respect of judicial review for alleged breaches of legitimate expectations. See *e.g. R (Begbie) v Department of Education and Employment* [1999] EWCA Civ 2100; [2000] 1 WLR 1115, 1129-1131, *per* Laws LJ. Guidance in determining what constitutes *Wednesbury* unreasonableness, remains necessary.

[433] *Canadian Association of Industrial, Mechanical and Allied Workers, Local 14 v Paccar of Canada* [1989] 2 SCR 983 at 1018, per Sopinka J.

This is why the principle of administrability in international tax law and policy requires states to only enact tax measures which they have the capacity to enforce. The point here is that practicability will always be a realistic test to determine the reasonability of a tax measure. Indeed, one of the strongest arguments against the global minimum tax proposed by OECD in its two-pillar solution to the tax challenges of the globalized and digitalized economy, is its impracticability. Highlighting this defect of the OECD global minimum tax proposal in his insightful piece,[434] Dr. Leopoldo Parada (an Associate Professor of Tax Law and the Director of the Centre for Business Law and Practice at the University of Leeds School of Law in the United Kingdom) observed in his abstract as follows:

> The world has seemingly embraced the altruistic idea of ensuring a minimum level of corporate income taxation worldwide, consolidating a "benefits for all" narrative by which both developed and developing countries apparently gain. However, this altruistic narrative proves to be quite unrealistic for many developing countries. As argued in this article, the perceived benefits of a global minimum corporate income tax in developing countries rest exclusively upon three unconvincing premises. These include the assumption that all corporate income tax incentives provided by developing countries are equally inefficient, the idea that all developing countries can seamlessly transition from corporate income tax competition to alternative forms of tax and non-tax competition, and most notably, the notion that supporting or opposing a global minimum corporate income tax could either boost or diminish tax revenue for developing countries.[435]

[434] Leopoldo Parada, "Global Minimum Taxation: A Strategic Approach for Developing Countries" (2024) 15:2 Columbia Journal of Tax Law 187 - 211.
[435] Ibid.

This quote suggests that practicability is a legitimate basis for testing the reasonability of a tax measure. Consequently, I apply these concepts to my research to determine the reasonability of a digital tax measure by considering its rational practical effect(s) on the socio-politico-economic standing of developing countries within the framework of international tax law and policy. Does the measure allow African developing (source) countries to achieve their digital tax objectives without: **(a)** jeopardizing international relations with their developed (host) country trade partners; or **(b)** compromising their socio-politico-economic autonomy in the negotiation process? Do they have the capacity to enforce such digital tax measures? These are the key elements of my 'reasonableness' test as used in the formulation of my SRPC concept. All these questions will be answered in the affirmative if the relevant digital tax measure is acceptable to both the source and host countries. It will only be acceptable to both countries if it is considered 'fair' by both countries. And it will only be considered 'fair' by both countries if it is the outcome of negotiations between both countries, where both countries negotiated from a place of strength. The outcome of such negotiations will clearly be enforceable by the implementing state because it will enjoy the international tax cooperation of the corresponding state.

The test applied is whether, on an objective analysis, the relevant digital tax measure is both logical and rationally practicable within the framework of international tax law and policy. If it is not practicable, then it is unreasonable and should be abandoned. It is a pragmatic test which determines the functionality of a digital tax measure based on its practical results within the socio-politico-economic realities of the implementing state. Nigeria's unilateral digital tax measure enacted in the Finance Act 2019 is not practicable because it does not have the support of any of the country's major trading partners such as the United States of America. It therefore cannot be enforced. Digital tax measures cannot be effectively enforced against non-resident entities who

have no form of physical presence within the enforcing state if the taxpayers' host country is uncooperative. I am not aware that the Federal Inland Revenue Service has been able to generate any dime in digital taxes since the enactment of Nigeria's unilateral digital tax measure in January 2020. This underscores the point of my contention.

As a rational pragmatist, I recognize the equitable right of developing (source) countries to exercise tax jurisdiction over economic activities conducted by digital businesses within their digital economy. I however perceive as unreasonable any digital tax measure enacted without reference to applicable international tax law and policy concerns. The reason being that such measures are not socio-politico-economically functional to the implementing country – especially for developing countries. Logic necessarily dictates that national governments cannot act unilaterally on crucial global matters like digital taxation without risking the adverse reaction of other countries – some of which may be their key trade partners. The test should always be that of objectivity, balance, logic, and rationality. On a cost-benefit analysis, does the revenue that may be derived from a relevant digital tax measure exceed the socio-politico-economic cost of its implementation? If the objective answer to this question is affirmative, then the measure is reasonable. However, if the objective answer to the question is negative, then the measure is unreasonable.

Of relevance here is Dr. Okanga Ogbu Okanga's concept of Reasonable Impairment Compromise ("**RIC**"). (Okanga is a Tax Associate at Osler, Hoskin & Harcourt LLP in Toronto, and an LLM/PhD alumnus of the Schulich School of Law at Dalhousie University.) Okanga's RIC concept requires a trifactor analysis of any international tax compromise that apportions taxing rights between states.[436] Okanga opines that through such analysis we can ascertain whether a

[436] Okanga Ogbu Okanga, *supra* note 415.

compromise can be deemed reasonable – and therefore equitable – to the states involved.[437] The three questions constituting the RIC test proposed by Okanga are: **(i)** is there a normative basis for a state to tax; **(ii)** does a relevant compromise impair tax jurisdiction; and **(iii)** is the relevant impairment reasonable in the circumstances?[438] Okanga opines that the test is progressive, which means that we move from stage to stage and should stop at any stage of the analysis if the outcome turns negative.[439] Thus, if it is found that there is no basis to tax, the analysis ends there. If we find that the state has a basis to tax, we can proceed to the next step, and so on.[440]

While I agree with the logical flow of the questions constituting the RIC test propounded by Okanga, I disagree with the outcome. Unlike the RIC test, I do not (in this thesis) equate reasonability with equity. I contend that a tax measure may be *unreasonable* notwithstanding that it is *equitable*. The mere fact that a state has the normative basis to impose a tax does not mean that it *should* (or that it *can*) in fact impose that tax in practical terms. Put differently, the normative basis to tax is relevant to a determination of whether the exercise of a taxing power is legitimate – and thus reasonable. However, of much more relevance to this determination is the practicability of the exercise of that taxing power. The mere fact that a right exists does not guarantee its successful exercise if the practical impediments to the exercise of that right are not removed. As such, unlike Okanga's RIC test, my SRPC test is this simple: Is the relevant digital tax measure practicable in the circumstances? If yes, then the digital tax measure is reasonable. If not, then the measure is unreasonable and should be jettisoned by the implementing state.

[437] Okanga Ogbu Okanga, *supra* note 415.
[438] Ibid.
[439] Ibid.
[440] Ibid.

4.4 Political Compromise

I contend in this part of Chapter 4 that political compromise is central to the negotiation of any pragmatic digital tax measure. The give-and-take nature of negotiations necessitates compromise. That compromise is determined by political considerations in negotiations between sovereign states. Unilateral digital tax measures are impracticable for the simple reason that they are not the results of negotiations between source and host countries. They consequently leave no room for the political compromise that will guarantee their successful implementation because they will most likely be unacceptable to the host country.

I begin by noting that compromise is at the heart of every meaningful negotiation process. Indeed, there is no negotiation without compromise. It is essential for achieving the ideal outcome of any healthy negotiation process: a win-win arrangement between the negotiating parties. In negotiations between state parties, political considerations are at the center of these compromise arrangements. The extent of the compromise made by each state party is determined by the strength of its socio-politico-economic might. The state party with less socio-politico-economic might may in most cases get the short end of the stick in the outcome of the negotiation process.

Negotiation is critical to the formulation and implementation of any pragmatic digital tax measure because national borders have become blurred by the globalized and digitalized economy.[441] Sovereign states simply cannot afford to exercise their tax jurisdiction powers – however legitimate – without seriously considering how such exercise of power may impact their international relations with other countries – especially their key cross-border trade partners. This

[441] "*This is the new world. There are no more countries. That's old think (sic). They're just economic realities. Profit and loss. Efficiency and waste. Think global not local.*" – Robert Knepper (as *Jonas Johnson*) in *Transporter 3*.

is the cold reality of how the world works. Indeed, the international tax system was devised for the primary purpose of facilitating cross-border trade between nations by mitigating double taxation.

The classical and contemporary masters of persuasion teach us one thing: the best form of persuasion is the win-win philosophy of persuasion.[442] To achieve a win-win result in our bid to convince others to our way of thinking, we have to compromise by meeting them half-way – otherwise there is no deal. This is why a key law of persuasion is the law of reciprocity: When someone gives us something of perceived value, we immediately respond with the desire to give something of value back to them.[443] Dale Carnegie, an American writer and lecturer who wrote the best-seller - *How to Win Friends and Influence People*, notes that "*the only way on earth to influence the other fellow is to talk about what he wants and show him how to get it*".[444]

As such, the easiest way for a source country to persuade a host country to support its digital tax measure is to show how that measure will benefit the host country. This sounds oddly simplistic on paper, but the reality is much more complex than that. However, the mechanics of the negotiation process that may result in a win-win digital tax arrangement is not the focus of this part of Chapter 4. The focus here is to clarify that there *must* be negotiation – preferably a negotiation that results in a win-win digital tax arrangement with the host country – for a source country to achieve a practicable digital tax measure. For this to happen, the source country must be willing to compromise its digital tax jurisdiction with the host country. The extent to which it will have to compromise its digital tax jurisdiction is determined by politics.

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[442] Kevin Hogan, *The Psychology of Persuasion: How to Persuade Others to Your Way of Thinking* (USA: Pelican Publishing Company, 1996) 19.
[443] Ibid.
[444] Ibid.

Political compromise is therefore critical for developing and emerging economies who may separately lack the socio-politico-economic might to enforce unilateral digital tax measures. Such measures are consequently unpragmatic because they eliminate negotiation and thus deprive the source countries of the international tax cooperation necessary for the effective implementation of their digital tax laws. Adopting a concerted regional multilateral approach to the negotiation process may help developing and emerging economies to sufficiently close the massive power gap between themselves and their developed cross-border trade partners. This should allow them to achieve the most profitable outcome from the negotiation process.

Recall that in Chapter 1 of this thesis, I had noted that *negotiated expansion* is one of the three broad goals of taxation in tax policy as a distinct area of study and practice.[445] In brief, the idea is that in an international society of states in which lawmaking is state-based (controlled by national governments) but economic activity is globalized, each state's tax regime choices necessarily stand in relation to those of others. Consequently, national governments use taxation strategically to achieve goals that only materialize as a result of economic interdependence among states.[446] Accordingly, national governments negotiate how their own tax system interacts with that of other jurisdictions with an express aim: to create socio-politico-economic advantages and disadvantages within (or from) the international society of states.[447] A failure to engage in this negotiation process would mean the practical failure of a domestic tax measure that has international implications. This is the inevitable fate of unilateral digital measures in this globalized and digitalized economy.

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[445] Allison Christians, "Introduction to Tax Policy Theory" (2018) SSRN, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3186791 (accessed on May 26, 2024).
[446] Ibid.
[447] Ibid.

4.5 Strategic Reasonable Political Compromise

Having examined the critical components of my SRPC concept in the preceding parts of this chapter, I now summarize the SRPC concept in this part of Chapter 4. This lays the framework for my ODTMDEE proposal in Chapter 5. Flowing from my analysis of the SRPC concept's key elements above, I conceive SRPC as a framework by which developing and emerging economies may effectively achieve their digital tax objectives in a globalized and digitalized economy. This framework operates on three key elements: strategy, reasonableness, and political compromise.

Firstly, strategy requires that developing and emerging economies must jettison the combative approach of unilateralism that is sure to incur the ire of their key cross-border trade partners. Drawing largely on the theories of rational pragmatism and neorealism in international relations, I contend that Africa's digital tax strategy must deliberately shift away from unilateralism to multilateralism, bilateralism, or a plurilateral approach at the very least. In doing this, African developing and emerging economies must learn to appeal to the self-interest (mutual benefit approach) as opposed to the mercy (victim mentality or tax aid-sourcing approach) of developed economies, in their digital tax negotiations. Prior to commencing the digital tax negotiations, developing, and emerging economies can explore the option of closing the obvious power imbalance between themselves and their developed trade country partners with concerted regional multilateral approaches to the negotiation process. It is neither realistic nor an effective strategy for developing countries to rely on the perceived benevolence, altruism, or equitable tax disposition of developed countries in the pursuit of their digital tax objectives.

Secondly, the reasonableness element of the SRPC concept contends that a digital tax measure is only reasonable if it is practicable by the implementing state in this globalized and digitalized

economy. This means that it must be both administrable by the implementing state and 'fair' or acceptable to both the source and host countries. If it is not practicable, then it is unreasonable and should be abandoned. In testing the reasonability of a digital tax measure, equity is relevant but should not be the guiding principle. An equitable digital tax measure that is not practicable is unreasonable as it has no functional utility to the implementing state. A digital tax measure has functional utility if it can be successfully enforced by the implementing state without jeopardizing the state's international relations with its key cross-border trade partners and the benefits of its implementation markedly outweigh the cost. Anything less is unrealistic and therefore unreasonable. In this regard, the SRPC test for reasonability is rational pragmatism.

Lastly, the political compromise element of the SRPC concept contends that there *must* be negotiation – preferably a negotiation that results in a win-win digital tax arrangement with the host country – for a source country to achieve a practicable digital tax measure. For this to happen, the source country must be willing to compromise its digital tax jurisdiction with the host country. The extent of this compromise is determined by political considerations. Adopting concerted regional multilateral approaches to the negotiation process may help developing economies to sufficiently close the obvious power gap between themselves and their developed trade partners. This should allow them to achieve the most profitable outcome from the negotiation process.

Drawing from the broad tax policy goal of *state-building*,[448] I recognize that the technological realities of the globalized and digitalized economy suggest that societies must now use taxation to establish control not only over their physical territories and their people, but also over their *digital territories*. The design of their tax policy must be such that the inherent rights of the sovereign

[448] Societies use taxation to establish control over a physical territory and a people, and to pay for the cost of governance, amongst other things. See generally Allison Christians, *supra* note 445.

state to exercise tax control over its physical territory extends necessarily to its *digital territory*. However, tax policy as a distinct area of study and practice recognizes that tax jurisdiction is constrained by the administrative or practical limits of state capability to enforce taxation.[449] A state's competence to tax is an amalgam of economic, political, and administrative realities.[450] Hence, in theory, a state is expected to only impose taxes that it is economically, politically, and administratively capable of enforcing. This is the bedrock of administrability as an evaluative criterion of international tax. I consequently draw on the insights of tax policy analysis to contend that it is counterproductive for developing countries such as Nigeria to enact unilateral digital tax measures if they lack the socio-politico-economic capacity to implement such measures.

It has been opined, and I agree, that coordination among nations on their national tax systems could eliminate the complexities that ultimately arise from taxpayers' ability to arbitrage the differences in national tax systems.[451] This coordination will necessarily result from productive negotiations. Unilateral digital tax measures are ill-advised because they leave no room for such negotiations.

As hinted earlier on in Chapter 1, I assume for the purposes of this research that a nexus with a state (duly recognized in international tax law and policy) is required for the exercise of prescriptive/legislative jurisdiction. I adopt the view aptly expressed by Stjepan Gadžo, an Assistant Professor of International Tax and Public Finance Law at the Faculty of Law of the University of Rijeka, that the exercise of taxing powers by a state is only lawful in international tax law and policy where there is a "tax nexus" or a qualifying connection between the taxing state

[449] Okanga Ogbu Okanga, *supra* note 415.
[450] Ibid.
[451] Rebecca M. Kysar, "The Global Tax Deal and the New International Economic Governance" (2024) 74 Tax L. Rev., online (blog): SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4831166> (accessed on May 30, 2024).

and a particular set of facts relevant for taxation.[452] That tax nexus does not yet exist – at least as far as international tax law and policy is concerned. Stakeholders are still in the process of finalizing negotiations on how that tax nexus will be determined and allocated in the international tax system. That is the whole essence of the two-pillar solution proposed by the OECD.

While I recognize the *equitable* right of source countries to tax digital businesses, I argue that the international tax regime does not admit the exercise of prescriptive/legislative jurisdiction on digital tax matters by source countries. This is because "significant economic presence" and other iterations of digital presence are not recognized tax nexus factors in international tax law and policy. As such, the exercise of enforcement jurisdiction by source states in respect of unilateral digital tax measures would not only be impracticable but also illegitimate within the framework of international tax law and policy. Allocation of taxing rights in the international tax regime would have to be altered to recognize economic nexus as a basis for the legitimate exercise of tax jurisdiction by a source country over non-resident digital businesses operating within its economy.

This is why I argued in Chapter 3 that both Nigeria's unilateral digital tax regime and Canada's unilateral digital services tax measure violate the PE provisions of the Nigeria-Canada Double Tax Avoidance Treaty (the "**Treaty**"). The reason being that the PE provisions of the Treaty do not contemplate "significant economic presence" or any other iteration of digital presence in the allocation of taxing rights to contracting state parties over the active business income of non-resident entities. Hence my ODTMDEE solution in Chapter 5.

[452] Rebecca M. Kysar, *supra* note 451.

The essence of the SRPC concept is to provide a pathway to devising a digital tax solution that is (a) strategic (that is, "recognizing the power dynamics at play in international politics and putting practical measures in place to counteract them"), (b) reasonable (that is, securing the international tax cooperation of host countries to ensure its "enforceability"), and (c) a political compromise (that is, "negotiated on a multilateral, plurilateral, or bilateral (but certainly not global) basis").

One might ask: Is it the case that Nigeria's unilateral digital tax measure is unreasonable as applied to say, US-resident corporations (because it risks a trade war with an important trading partner), but might be reasonable as applied to corporations that are resident in some other state which is less important to Nigeria's economic interests? One might also ask what it is that developing countries are going to give host countries (such as the US) in return for some cooperation in taxing the digital activities of the host countries' tech entities within the source countries' digital economy? The answers to these questions are in Chapter 5 of this thesis.

I, however, note here that while I use the US as a case study due to its strategic trade relevance to Nigeria and its consistent adverse reaction to the unilateral digital tax measures of source countries like Canada and France, my thesis does not focus on the US alone. It focuses on the application of rational pragmatism in the negotiation of practical digital tax measures between developing source countries and developed host countries, generally. As already hinted above, the benefit offered by African developing and emerging economies to the developed host countries they will be trading with is their large markets which the big tech companies of most developed host countries (including the US) want a share of. Access to that market can be blocked as a negotiation tactic if the developed host country refuses to negotiate reasonable terms.

CHAPTER 5

CONCLUSION

5.1 Overview

This chapter summarizes the discussion and frames my proposal for the Onyeabor's Digital Tax Model for Developing and Emerging Economies ("**ODTMDEE**"). It suggests a workable pathway towards achieving ODTMDEE. It also considers the likely impact of international tax policymaking at the United Nations ("**UN**") following the UN tax resolution of November 22, 2023 (the "**UN Tax Resolution**"). ODTMDEE is my proposition for effectively and pragmatically achieving the digital tax objectives of developing and emerging economies such as Nigeria.

ODTMDEE is a three-phased digital tax model based on four key rationales. First, African developing and emerging economies, as the underdogs of the international tax regime, cannot reasonably expect developed economies – who largely benefit from the status quo at Africa's expense – to midwife any meaningful global digital tax consensus that will work in Africa's favour. This rules out the '*global consensus*' approach to resolving digital tax challenges, represented in OECD's two-pillar solution. Second, the cold reality that African developing and emerging economies are separately incapable (socio-politico-economically) to drive and successfully implement unilateral digital tax measures. This rules out the '*unilateralist*' approach to resolving digital tax challenges, represented in Nigeria's unilateral digital measure. Third, international tax law and policy cannot be successfully divorced from international politics. I have provided context to these conclusions in my framing and analysis of the '*Digital Tax Extremes*' concept in Chapters 2 and 3 of this thesis. And fourth, African developing and emerging (source) economies can best

achieve their digital tax objectives through "*strategic reasonable political compromise*" with developed (host) economies. I have provided context to this proposition in my framing and analysis of the Strategic Reasonable Political Compromise ("**SRPC**") concept in Chapter 4 of this thesis. To this end, ODTMDEE represents a "*strategic reasonable political compromise*" or block regional approach that seeks to effectively and pragmatically achieve Africa's digital tax objectives in terms of both *process* and *substance*.

ODTMDEE starts its phase 1 with Nigeria - as the "Giant of Africa", expands to the Economic Community of West African States ("**ECOWAS**"), moves up to the African Union ("**AU**"), and ends at the steps of the UN, with the aim of bringing developed (host) economies (represented by the Organisation for Economic Cooperation and Development ("**OECD**")) to the negotiating table. Phase 2 of ODTMDEE proposes a redrafting of existing OECD and UN Model Tax Treaties to recognize a special definition of "*significant economic presence*" for digital tax purposes as one of the tests for determining the taxable presence of a non-resident entity within a contracting state under the Permanent Establishment ("**PE**") rules specified in the treaties. Phase 3 of ODTMDEE proposes a reflection of the updated PE rules in relevant bilateral tax treaties with other countries such as Canada. I then show how the UN Tax Resolution has paved a pathway to achieving phase 1 of ODTMDEE. I further show why the UN Tax Resolution may not achieve Africa's bid for active inclusion in global tax policymaking – at least with respect to digital taxation concerns – if ODTMDEE is not implemented.

This chapter is divided into four parts. Following this overview of the chapter, part II provides a detailed framework of the ODTMDEE proposal and makes suggestions regarding a workable pathway towards achieving ODTMDEE. Part III addresses the likely impact of international tax policymaking at the UN following the UN Tax Resolution. It shows how the UN Tax Resolution

has paved a pathway to achieving phase 1 of ODTMDEE. It further shows why the UN Tax Resolution may not achieve Africa's bid for increased participation in global tax policy formulation – at least in respect of digital taxation concerns – if ODTMDEE is not implemented. Finally, part IV summarizes the discussion.

5.2 Onyeabor's Digital Tax Model for Developing and Emerging Economies

In this part of Chapter 5, I elaborate on the three phases of ODTMDEE and how each can be effectively achieved. Phase 1 of ODTMDEE is a process-based approach that starts with Nigeria - as the "Giant of Africa", expands to the ECOWAS, moves up to the AU, and ends at the steps of the UN, with the aim of bringing the developed (host) economies (represented by the OECD) to the negotiating table with developing and emerging economies. Phase 1 of ODTMDEE is based on the belief that regional digital tax efforts serve a dual purpose. First, they provide the socio-politico-economic clout necessary to shield developing source countries from exploitation in the negotiation of digital tax initiatives with developed host countries. They provide an opportunity for developing and emerging economies to negotiate with developed countries from a position of strength. This protects developing and emerging economies from jeopardizing their autonomy in the negotiation process. Second, regional digital tax efforts are collaborative and provide an opportunity for negotiated outcomes that take account of developed countries' concerns. As earlier noted in Chapter 4, while I mention the US due to its strategic trade relevance to Nigeria and its consistent adverse reaction to the unilateral digital tax measures of source countries like Canada and France, my thesis does not focus on the US alone. It focuses on the application of rational pragmatism in the negotiation of practical digital tax measures between developing source countries and developed host countries, generally. The benefit offered by African developing and emerging economies to the developed host countries they will be trading with is their large markets

which the big tech companies of most developed host countries (including the US) want a share of. Access to that market can be blocked as a negotiation tactic if the developed host country refuses to negotiate reasonable terms. Additionally, the developing and emerging economies should be willing to meet the developed host countries halfway by giving up a reasonable part of their sovereign digital tax rights by agreeing to an acceptable digital tax threshold. This, in practical terms, ensures the buy-in of developed host countries and provides developing and emerging economies the international tax cooperation necessary for the effective implementation of their digital tax laws. As noted by Irma Mosquera Valderrama (Professor of Tax Governance and International Taxation at the Leiden Law School of Leiden University in The Netherlands), regional tax cooperation initiatives can help to enhance regional economic development and to strengthen the voices of developing countries in international tax negotiations.[453]

Nigeria is often referred to as the "Giant of Africa" owing to its large population and economy, and the size of its military, relative to that of other African countries. It is also considered to be an emerging market by the World Bank. The President of Nigeria, Bola Ahmed Tinubu, is the Chairman of the ECOWAS Authority of Heads of State and Government as of July 21, 2024. He was first elected to office for a one-year term at the 63rd ordinary session of the Authority held on July 9, 2023, in Bissau, Guinea-Bissau.[454] He was then re-elected to office for another one-year term at the 65th ordinary session of the Authority held on July 7, 2024, in Abuja, Nigeria.[455]

[453] Irma Mosquera Valderrama, "How Can Regional Cooperation Help the Enhancement of Regional Economic Development and Strengthen the Voices of Developing Countries in Global Tax Negotiations?" (2024) 25 Journal of World Investment & Trade 201-236.

[454] Folahanmi Aina, "Bola Tinubu is the new chair of ECOWAS – the burning issues that face the Nigerian president" (19 July 2023), online (blog): The Conversation <https://theconversation.com/bola-tinubu-is-the-new-chair-of-ecowas-the-burning-issues-that-face-the-nigerian-president-209655> (accessed 27 June 2024).

[455] Lanre Lasisi & Emmanuel Egobiambu, "UPDATED : Tinubu Re-Elected as ECOWAS Chairman" (updated 7 July 2024), online (blog): Channels TV <https://www.channelstv.com/2024/07/07/just-in-tinubu-re-elected-as-ecowas-chairman/#:~:text=President%20Bola%20Tinubu%20has%20been,Bissau%20on%20July%209%2C%202023> (accessed 21 July 2024).

ECOWAS was established on May 28, 1975, under the Treaty of Lagos. It is a 12-member (formerly 15-member)[456] regional group with a mandate of promoting economic integration in all fields of activity of the constituting countries. ECOWAS is one of the pillars of the African economic community and was set up to foster the ideal of collective self-sufficiency for its member states. As a trading union, it is also meant to create a single, large trading bloc through economic cooperation. The vision of ECOWAS is the creation of a borderless region where the population has access to its abundant resources and can exploit same through the creation of opportunities under a sustainable environment.[457] The Nigerian President's position as the ECOWAS Chair is a welcome development. It is believed that Nigeria's experience is needed to reposition the regional body. This belief is based on the sentiment that Nigeria's leadership status in West Africa will be useful, considering the challenges confronting the sub-region. While the ECOWAS Chair does not have any executive powers, he is in a strategic position to liaise more closely with the ECOWAS President - who wields the power to implement ECOWAS decisions and policies.[458]

I believe that Nigeria can play a critical role in the pragmatic actualization of Africa's digital tax objectives. Its socio-politico-economic status in Africa places it in a strategic position to start meaningful conversations on practical steps towards effectively achieving the digital tax objectives of developing and emerging economies in the continent. This is important because, as I have shown in the preceding chapters of this thesis, a unilateral approach to digital taxation is ill-advised in today's socio-politico-economic climate. This is especially so for developing and emerging economies. Unilateral digital tax measures are also unsupported within the framework of international tax law and policy. Global consensus is likewise impracticable within the socio-

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[456] On January 27, 2024, Mali, Niger, and Burkina-Faso announced their immediate withdrawal from the ECOWAS due to political differences with the ECOWAS leadership and the other ECOWAS member states.

[457] ECOWAS "Basic Information" (2024), online (blog): ECOWAS CEDEAO <https://www.ecowas.int/basic-information/> (accessed 27 June 2024).

[458] Folahanmi Aina, *supra* note 454.

politico-economic reality of today. As such, a regional collectivist approach is better. That regional collectivist approach can be kick-started by Nigeria. The ECOWAS is a perfect platform to kick-start that conversation.

In driving these conversations, Nigeria should encourage African developing and emerging economies to deliberately shift their digital tax strategies away from unilateralism to multilateralism, bilateralism, or a plurilateral approach at the very least. These conversations should be focused on driving reform of the PE provisions of bilateral and multilateral tax treaties involving African countries to recognize 'digital presence' as a measure for determining the taxing rights of source countries over the active business income of non-resident entities operating within their digital economy. Promoting the recognition of the concept of 'significant economic presence' as a test for determining PE in relevant bilateral and multilateral tax treaties involving African countries seems like a good place to start. Also, applying the strategy element of the SRPC concept framed in Chapter 4 of this thesis, African developing and emerging economies must appeal to the self-interest (mutual benefit approach) as opposed to the mercy (victim mentality or tax aid-sourcing approach) of developed economies, in their digital tax negotiations.

Once majority agreement has been secured in the ECOWAS, the sub-regional body's position can then be escalated to the AU for further action. It is hoped that the members of ECOWAS (acting in unison) would be in a strategic position to secure majority agreement for a unified African digital tax approach at the AU. The AU is a continental body consisting of 55 jurisdictions in Africa. It was officially launched in 2002 as a successor to the Organization of African Unity ("**OAU**"), which was established in May 1963 and drove conversations on African unity from 1963 to 1999. In May 1963, 32 Heads of independent African states met in Addis Ababa, Ethiopia, to sign the Charter that created Africa's first post-independence continental institution, the

OAU.[459]

The OAU was the manifestation of the pan-African vision for an Africa that was united, free and in control of its own destiny. This was solemnized in the OAU Charter, which recognized that freedom, equality, justice and dignity were essential objectives for the achievement of the legitimate aspirations of the African people and that there was a need to promote understanding among Africa's people and foster cooperation among African states in response to the aspirations of Africans for brotherhood and solidarity, in a larger unity transcending ethnic and national differences. The guiding philosophy was that of Pan-Africanism which centred on African socialism and promoted African unity, the communal characteristics and practices of African communities, and a drive to embrace Africa's culture and common heritage. The main objectives of the OAU were to rid the continent of the remaining vestiges of colonization and apartheid; to promote unity and solidarity amongst African states; to coordinate and intensify cooperation for development; to safeguard the sovereignty and territorial integrity of member states; and to promote international cooperation amongst African countries.[460] The AU inherited these ideals.

In phase 1 of ODTMDEE, the goal of ECOWAS countries at the AU would be to secure a unified African digital tax position based on the conversations and resolutions reached at the ECOWAS. This should make the AU process faster due to the socio-politico-economic status of ECOWAS countries (especially Nigeria) in Africa. Key allies to be secured at the AU level would be South Africa, Egypt, Ethiopia, Kenya, Liberia, Morrocco, Tunisia, and Rwanda. Concerted efforts between these countries and ECOWAS member states would be vital to securing a uniform African

[459] AU, "About the African Union" (2024), online (blog): African Union <https://au.int/en/overview> (accessed 27 June 2024).
[460] Ibid.

digital tax position at the AU. This position can then be submitted for resolution at the UN, with a view to bringing developed (host) countries to the negotiating table with African developing countries. I further believe that while African developing and emerging economies are separately incapable (socio-politico-economically) to drive and successfully implement unilateral digital tax measures; the AU is strategically positioned to push a uniform African digital tax position at the UN. This should arguably bring developed (host) countries to the negotiating table. As noted earlier above, a collective blockage of access to Africa's large market would most likely bring the US and other relevant developed host countries to the negotiating table because the big tech companies in developed host countries want access to that market and would likely lobby or pressure their host countries to negotiate terms with Africa. Such negotiations could set the stage for achieving collectivist digital tax measures (both bilateral and multilateral) that are mutually beneficial to both African developing and emerging economies and their developed (host) country trade partners. The digital tax outcome of such a regional but collectivist approach would be pragmatic because it would secure international tax cooperation for implementation without jeopardizing the socio-politico-economic autonomy of African countries in the process.

Phase 2 of ODTMDEE proposes a redrafting of existing OECD and UN Model Tax Treaties to recognize a special definition of "*significant economic presence*" for digital tax purposes as one of the tests for determining the taxable presence of a non-resident entity within a contracting state under the PE rules specified in the treaties. This special definition of 'significant economic presence' for digital tax purposes should consider the economic realities of African low-income countries. Obviously, this conversation would already have been had at the phase 1 level of ODTMDEE. There is, however, a difference between phase 1 and phase 2. Phase 1 is a process-based approach focused on the '*how*' of developing a uniform African digital tax position at the AU and possibly bringing the developed (host) economies (represented by the OECD) to the

negotiating table with African developing and emerging economies at the UN. Phase 2, on the other hand, is a substance-based approach focused on the '*what*' of the uniform African digital tax position developed in Phase 1. This means that the foundations for phase 2 must already have been laid in phase 1. Essentially, phase 2 is the implementation (at the UN level) of the resolutions reached in phase 1 (at the ECOWAS and AU levels).

The 'significant economic presence' concept was proposed and explained by the OECD in Chapter 7.6 of the OECD Action 1 Report ("*Developing options to address the broader direct tax challenges of the digital economy*").[461] Obviously, this proposal is motivated by the digitalization of the global economy, which has made it seamlessly easy for businesses in one jurisdiction to generate revenues from the digital space of another without a physical connection in the latter jurisdiction. Indeed, recent technological advances have enabled businesses to be heavily engaged, without significant physical presence, in the economic life of other jurisdictions. Therefore, it is believed, especially amongst less technologically advanced economies, that technological expansion has rendered the existing nexus and profit allocation rules in international tax law and policy, less equitable and ineffective in capturing taxable incomes for source countries.[462]

Under the OECD's proposed significant economic presence concept, a taxable presence will arise based on factors that evidence a purposeful and sustained interaction with a tax jurisdiction via digital technology and other automated means. Revenue generated on a sustained basis appears to be the primary factor. Still, without more, such income is not sufficient to establish nexus – save when combined with other factors, such that revenue would then potentially be used to establish

[461] OECD, "Addressing the Tax Challenges of the Digital Economy, Action 1 – 2015 Final Report" (5 October 2015), online (blog): OECD's Online Library <https://www.oecd.org/ctp/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report-9789264241046-en.htm> (accessed 28 June 2024).
[462] Jude Odinkonigbo & Emmanuel Onyeabor, "Nigeria's Finance Act 2019 and the Significant Economic Presence concept: Prospects and Challenges" (2020/2021) 20:1 Uniben Law Journal 1.

nexus in the form of a 'significant economic presence' in the source country. In this context, one or more of the following factors may be considered relevant for constituting the kind of purposeful and sustained interaction with a source jurisdiction via digital technology and other automated means, that would be sufficient to create a significant economic presence[463]:

(a) The existence of a user base and the associated data input;

(b) The volume of digital content derived from the jurisdiction;

(c) Billing and collection in local currency or with a local form of payment;

(d) The maintenance of a website in a local language;

(e) Responsibility for the final delivery of goods to customers or the provision by the Non-Resident Company ("**NRC**") of other support services such as aftersales service or repairs and maintenance; or

(f) Sustained marketing and sales promotion activities, either online or otherwise, to attract customers.[464]

The OECD Action 1 Report notes that a link would have to be established between the revenue-generating activity of the NRC and its significant economic presence in the market jurisdiction.[465]

As earlier noted in Chapter 3 of this thesis, Nigeria's Companies Income Tax (Significant Economic Presence) Order 2020 (the "**Order**") is based on OECD's work. Under the Order, NRCs doing business in Nigeria's digital economy are deemed to have a significant economic presence in the country, in a relevant accounting year, if they –

[463] Jude Odinkonigbo & Emmanuel Onyeabor, *supra* note 462.
[464] Ibid.
[465] Ibid.

(i) derive gross turnover or income of more than ₦25,000,000 (Twenty-Five Million Naira)[466] or its foreign currency equivalent in an accounting period from their digital activities in Nigeria;

(ii) use Nigerian domain names (.ng) or register a website address in Nigeria; or

(iii) have purposeful and sustained interactions with persons in Nigeria by customizing their digital pages or platforms to target persons in Nigeria, including reflecting the prices of their products or services in Nigerian currency or providing options for billing or payment in Nigerian currency.

However, the tax treatment of digital incomes generated by NRCs covered by multilateral or bilateral treaties relating to digital taxation between Nigeria and any other country shall be exclusively governed by the relevant multilateral or bilateral treaty. The multilateral or bilateral treaty could be invoked to override the domestic legislation from the date it becomes effective.

To determine whether the ₦25,000,000 (Twenty-Five Million Naira) gross turnover or income threshold specified in the Order has been met, activities carried out by connected persons in that accounting year shall be aggregated. Connected persons include: (a) persons that are "associates" as applicable under Nigerian law; or (b) persons that are business associates in any form. Persons are deemed to be business associates, where: (i) one person participates directly or indirectly in the management, control, or in the capital of the other; or (ii) the person or persons participate directly or indirectly in the management, control, or in the capital of both enterprises.

[466] Roughly about US$16,622 (Sixteen Thousand, Six Hundred and Twenty-Two United States Dollars) or $22,914 CAD (Twenty-Two Thousand, Nine Hundred and Fourteen Canadian Dollars at the parallel market exchange rate of about ₦1,504 to US$1 and ₦1,091 to $1 CAD respectively, as of June 29, 2024.

NRCs providing technical, management, consultancy, or professional services in Nigeria will be deemed to have a significant economic presence if they earn any income or receive any payment from a person in Nigeria or from a fixed base or agent of an NRC in Nigeria. Technical service means any service of a specialized nature (including advertising, training, or personnel service) that is not professional, management, or consultancy service.

NRCs will not be deemed to have a significant economic presence in Nigeria, if: (i) payments are made to an employee of the person making the payment under a contract of employment; (ii) the payments are for teaching in an educational institution or for teaching by an educational institution; or (iii) payments are made by a foreign fixed base of a Nigerian company.

I had noted in Chapter 3 that the problem with unilateral digital taxes is that they effectively perform (at the national level) the PE redefinition function necessary for digital taxes to apply – whereas PE is an international tax concept. More importantly, Nigeria's digital tax threshold is roughly US$16,622 or $22,914 CAD based on the parallel market exchange rate of about ₦1,504 to US$1 and ₦1,091 to $1 CAD as of June 29, 2024. This means that the scope of Nigeria's digital tax regime is almost limitless – as arguably every NRC will meet the threshold. This is not practicable as most host countries would not accept such digital tax threshold for a source country. Recall my contention in Chapter 4 that political compromise is central to the negotiation of any pragmatic digital tax measure. The give-and-take nature of negotiations necessitates compromise. That compromise is determined by political considerations in negotiations between sovereign states. This is the argument of the 'political compromise' element of my SRPC concept formulated in Chapter 4. Nigeria's conception of 'significant economic presence' for digital tax purposes is impracticable for the simple reason that it is not the result of negotiations between source and host countries. It consequently left no room for the political compromise that will guarantee its

successful implementation. This spells failure for Nigeria's unilateral digital tax measure.

To circumvent this difficulty, I propose that the revenue threshold for 'significant economic presence' should be the result of robust negotiations between African source countries and developed host countries at the UN level. Both parties should be open to meeting each other half-way. While the revenue threshold in OECD's two-pillar solution is obviously too high for African developing and emerging economies, Nigeria's revenue threshold in its conception of 'significant economic presence' for digital tax purposes is ridiculously low and unacceptable. A starting point of negotiations between source and host countries at the UN could be the consideration of a digital tax revenue threshold that is somewhere between US$1,000,000 and US$3,000,000. While this revenue threshold may be initially considered low and unacceptable to some developed host countries, I reasonably believe that African source countries (acting in unison) may successfully muster the socio-politico-economic clout necessary to push this conversation at the UN. Recall my comment above that the revenue threshold of any fair and pragmatic digital tax measure between African developing source countries and developed host countries must take account of the economic realities of African low-income countries. An unreasonably high digital tax revenue threshold which does not take account of low-income countries' economic realities would be impracticable from the perspective of the developing and emerging host economies because they would reject it. The reasoning being that such high digital tax thresholds would wipe out the digital tax base of low-income countries such as Nigeria.

Application of political compromise in the negotiation process will result in the development of a mutually acceptable definition of '*significant economic presence*' for digital tax purposes between source and host countries at the UN. Once an agreement has been reached, the UN model tax treaty should be redrafted to recognize that definition of 'significant economic presence' as one of the

tests for determining the taxable presence of a non-resident entity within a contracting state under the PE rules specified in the treaty. The PE provisions of the OECD model tax treaty may also be updated to reflect this agreement. This will require further conversations at the OECD. Such conversations may not be successful, as African developing and emerging economies do not have reasonable representation at the OECD. The OECD Inclusive Framework on Base Erosion and Profit Shifting ("**BEPS**") does not count, as it is anything but inclusive. However, should an argument be successfully made for reflection of the UN agreement in the PE rules of the OECD model tax treaty, it would be a good development as most developed countries prefer to base their bilateral tax treaties with other countries on the OECD model. This notwithstanding, even if the UN agreement is not reflected in the OECD model tax treaty or not, what matters is that the agreement is reflected in the bilateral and multilateral tax treaties involving African developing and emerging economies. This brings us to Phase 3 of ODTMDEE.

Phase 3 of ODTMDEE proposes a reflection of the updated PE rules in relevant bilateral tax treaties with other countries such as Canada. Once an agreement has been reached between African developing source countries and developed host economies at the UN, the logical consequence is the reflection of that agreement in the bilateral and multilateral tax treaties involving African developing and emerging economies. This step will convert the agreement reached at the UN from theory to practice, as it is the step that will give the UN agreement the force of law in international tax law and policy.

Alternatively, Phase 3 of ODTMDEE could be eliminated, and Phase 2 will be the final step, where the UN agreement will simply be reflected in a multilateral tax agreement between source and host countries at the UN. The drawback with this approach is that multilateral tax treaties are more difficult to amend than bilateral tax treaties because they involve several parties. They also rob

state parties of the slight autonomy and discretion necessary to fine-tune the UN agreement (in non-substantial aspects) to suit their peculiarities, for effective implementation.

5.3 Likely Impact of International Tax Policymaking at the United Nations

Jefferson VanderWolk (Partner at Squire Patton Boggs [US] LLP in Washington) notes that the UN's decision to build a framework convention on international tax cooperation – whatever that may look like – requires stakeholders to ask whether the UN process is likely to be meaningful in practice. Will it result in real-world changes, or will it just be a talking shop? Is there potential for actual change in the taxation of cross-border activities? Will the new rules be developed through a process that considers economic effects beyond simply the amount of revenue raised?[467]

These questions are important because the UN's active involvement in international tax policymaking is significant for developing countries. As the Africa Group (led by Nigeria) had argued in favour of the UN Tax Resolution, shifting international tax policymaking away from the OECD to the UN may guarantee increased participation for developing and emerging economies. For one, developing and emerging economies have a significant representation at the UN. This is unlike the case at the OECD where most (if not all) of its members are developed economies. It is therefore no surprise that the UN model tax treaty is way more attractive to developing and emerging economies as its provisions are much more source country friendly than those of the OECD model tax treaty which are more favourable to developed (host) economies. While developed countries generally call the shots at the OECD – even within the so-called Inclusive

[467] Jefferson VanderWolk, "International Tax Policymaking at the United Nations: How Meaningful Will It Be?" (27 May 2024) 114 Tax Notes International 1385-1387, online (blog): 2024 Tax Analysts <Tax News, Tax Articles and Information - Tax Notes> (accessed 28 June 2024).

Framework on BEPS, decisions at the UN are generally made by majority vote which gives developing and emerging economies a fighting chance.[468] The successful adoption of the UN Tax Resolution despite united opposition by developed OECD countries is testament to this fact.

The UN Tax Resolution has arguably paved a pathway to achieving phase 1 of ODTMDEE. This may be a problem because there was no opportunity to have specific conversations about any uniform African digital tax position at either the ECOWAS or AU levels before the UN Tax Resolution was presented to the UN for adoption by the Africa Group (led by Nigeria). However, it is not too late. The conversations could still be raised at the Africa Group level in the UN following negotiations on the UN framework tax convention that will result from the UN Tax Resolution. Phases 2 and 3 of ODTMDEE could then proceed. I believe that the UN Tax Resolution presents an opportunity for implementing ODTMDEE. As Jefferson VanderWolk notes, the UN framework tax convention will serve as a legal structure under which substantive proposals on international taxation can be adopted and implemented, either in international law instruments, such as treaties, or in the domestic laws of participating countries.[469]

Admittedly, the UN framework tax convention formulation is convoluted. However, this does not take away from the fact that it presents a great opportunity for implementing ODTMDEE. The UN Committee of Tax Experts on International Cooperation in Tax Matters has done some work in developing skeletal terms of reference regarding the taxation of cross-border services. The Committee's work is focused on updating the UN model tax treaty. It is currently considering a significant change in the UN model tax treaty regarding Withholding Taxes ("**WHT**") on cross-border payments for services. The proposal is to adopt a new treaty article (called Article xx in the

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[468] Jefferson VanderWolk, *supra* note 467.
[469] Ibid.

proposal) that would allocate to the source country the right to impose WHT on the gross amount of outbound service fees of all kinds. The UN model tax treaty currently provides for those WHT rights on services income only on fees for technical services and fees for automated digital services (in addition to the usual provisions for withholding on outbound dividends, interests, and royalties).[470] Jefferson VanderWolk rightly notes that while this proposal may be rejected by most developed host countries, it indicates how developing countries are thinking about what their taxing rights should be.[471] More importantly, it is likely that the UN framework tax convention structure arising from the UN Tax Resolution may take over responsibility for work on updating the UN model tax treaty from the UN Committee of Tax Experts.[472] If this happens, it is possible that real conversations can be had on implementing ODTMDEE phases 2 and 3 in the UN framework tax convention. This should save a lot of time and expense as it eliminates phase 1 and absorbs phases 2 and 3 into a single phase of framework tax convention negotiations at the UN.

I reasonably believe that the UN Tax Resolution may not achieve Africa's bid for active inclusion in global tax policymaking – at least in respect of the equitable allocation of digital taxing rights – if ODTMDEE is not implemented. The convoluted and disparate processes for updating the UN model tax treaty and drafting the terms of reference for the UN framework tax convention, are already pointing to this possible outcome. A twenty-member ad hoc committee was charged with drafting terms of reference for the UN framework tax convention following the UN Tax Resolution. The "terms of reference" were expected to include several high-level topics (such as the objectives of the framework convention) that will ultimately be covered in the framework convention itself, which will be drafted in due course by another committee (which has not yet

[470] Jefferson VanderWolk, *supra* note 467.
[471] Ibid.
[472] Ibid.

been created). In addition, the terms of reference were expected to address practical issues such as the timeline for creating the framework convention and the funding of the work.[473]

On July 19, 2024, the UN Ad Hoc Committee published the revised draft terms of reference for the UN framework tax convention. These revised terms of reference will be the basis for the discussions and negotiations that will be had at the Second Session of the Committee, to be held at the UN headquarters in New York from July 29, 2024, to August 16, 2024. Thankfully, specific priority areas to be addressed in early protocols, as set forth in the revised terms of reference of July 18, 2024 (but published on July 19, 2024), include: (i) taxation of the digitalized and globalized economy; (ii) taxation of income derived from cross-border services; and (iii) tax-related illicit financial flows. It was also noted that (a) exchange of information for tax purposes, (b) mutual administrative assistance on tax matters, and (c) harmful tax practices may be the subject of future protocols under the terms of the UN framework tax convention.

The process for making these terms of reference, however, present little to no opportunities for either speed or real-time negotiations between countries on crucial matters like the equitable allocation of digital taxing rights, in the early development of the framework tax convention. (The UN Ad Hoc Committee is a twenty-member committee). Additionally, the UN Committee of Tax Experts that is responsible for updating the UN model tax treaty is made up of 25 individuals who are nominated by their home country but are said to be acting in a purely personal capacity.[474] This means that the Committee members are not formally accountable to anyone. While countries are not required to conform their tax policy to the decisions of the UN Committee of Tax Experts,[475]

[473] Jefferson VanderWolk, *supra* note 467.
[474] Ibid.
[475] Ibid.

the arrangement presents a problem. It makes it difficult for countries to negotiate on authoritative and binding terms at the early stages of the framework convention, if committee members are technically acting in their personal capacity without accountability to anyone – including their home countries. In any case, 20 members (in the case of the UN Ad Hoc Committee) or 25 members (for the UN Committee of Tax Experts) are not enough to represent all countries in the UN.

Interestingly, the final version of the revised terms of reference of July 18, 2024, referenced above, were adopted at the Second Session of the Ad Hoc Committee on the UN Tax Convention, held from July 29, 2024, to August 16, 2024, at the UN Headquarters in New York, US. The session concluded with the adoption of the final terms of reference, with 110 votes in favour, 8 votes against, and 44 abstentions. Russia, China, and Nigeria, alongside other African countries, voted in favour. The 44 abstentions were mostly EU and some OECD member countries, such as France, Germany, and Ireland. Curiously, the 8 countries that voted against were the US, Australia, UK, Canada, New Zealand, Japan, Israel, and the Republic of Korea. While many may consider the adoption of the final terms of reference as a leap towards the new global tax order and a very positive development for developing and emerging economies such as Nigeria, some others would suggest that we tone down a bit on the excitement. It is general knowledge that tax follows the money. So, the question would be how much money is represented globally by the countries which voted in favour, against, and those that abstained. Asides from Russia and China which voted in favour, most of the richest and politically influential countries in the world (such as the US, UK, Canada, Australia, Japan, France, and Germany) either voted against or abstained. This may present a problem for the implementation of the terms of reference in the UN framework tax convention. Regardless of these constraints, the adoption of the final terms of reference by a majority vote of 110 to 8 with 44 abstentions is a welcome development.

5.4 Conclusion

As hinted in Chapter 1, this thesis does not speak to the normative basis for digital taxation by source countries. My argument is rather that the restriction of source countries' taxation rights to physical presence was tenable in the past due to the difficulty of actively doing business in and earning large-scale income from a foreign country without having any form of physical presence in that country. That restriction is, however, no longer tenable today as digitalization has now made it possible to remotely do business and earn large-scale active business income from a foreign country without having any physical presence in the country. This means that it is now necessary to redefine PE rules in international tax law and policy to recognize 'digital presence' as an acceptable component of PE. I further argue that while stakeholders seem to agree on the need for a change in the allocation of taxing rights in a digital economy, they differ on the approach for achieving this required change. My thesis did not attempt to determine or critique the normative basis for source countries' taxation of the digital activities of NRCs within their territory. It rather focuses on identifying the appropriate process for exercising a source country's digital taxing rights in international tax law and policy - where the normative basis for the exercise of that right is assumed to already exist. A process would only be appropriate if it is practicable. If it is impracticable then it is inappropriate and should be abandoned. A digital tax process can only be practicable for a developing source country if it allows the source country to implement its digital tax measure with the buy-in of its developed cross-border trade partners but does not jeopardize the source country's socio-politico-economic autonomy in the negotiation process.

In making these arguments, I note that neither global consensus (contemplated in OECD's two-pillar solution) or unilateralism (represented by Nigeria's unilateral digital tax regime) are ideal

for African developing and emerging economies such as Nigeria. Both approaches to digital taxation are impracticable and are therefore unreasonable to the extent that they are not workable for developing countries. Unilateral digital measures are especially ill-advised for developing and emerging economies such as Nigeria because they alienate them from their developed cross-border trade partners. This deprives them of the international tax cooperation necessary for the effective implementation of their digital tax laws. Consequently, African developing countries need to look beyond the *Digital Tax Extremes* to more pragmatic solutions that are sustainable.

A block regional (but collectivist) approach which considers developed countries' concerns is more pragmatic. Hence my proposal of ODTMDEE. Developing and emerging source economies must employ '*strategic reasonable political compromise*' in the negotiation of their digital tax position with developed host countries. This approach to digital taxation should serve the dual purpose of securing the international tax cooperation necessary for the effective implementation of developing countries' digital tax laws without jeopardizing their socio-politico-economic autonomy in the negotiation process. I believe that this approach will be pragmatically sustainable.

The SRPC concept upon which my ODTMDEE proposal is based, is a framework by which developing and emerging economies may effectively achieve their digital tax objectives in a globalized and digitalized economy. This framework operates on three key elements: strategy, reasonableness, and political compromise. SRPC denounces unilateralism and urges African developing and emerging economies to opt instead for bilateralism, multilateralism, or a plurilateral approach at the very least. It further encourages them to appeal to the self-interest (mutual benefit approach) as opposed to the mercy (victim mentality or tax aid-sourcing approach) of developed economies, in their digital tax negotiations. They must unite to achieve the socio-politico-economic clout necessary to negotiate with developed economies from a place of strength.

Finally, the digital tax measure that results from these negotiations must be 'reasonable' in that they must be practicable or a have a functional utility to the implementing state. This means that it must be both administrable by the implementing state and 'fair' or acceptable to both the source and host countries. A digital tax measure has functional utility if it can be successfully enforced by the implementing state without jeopardizing the state's international relations with its key cross-border trade partners and the benefits of its implementation markedly outweigh the cost. Both SRPC and ODTMDEE proceed on the understanding that tax law generally (especially international tax law and policy) is a dynamic area where politics, law, economics, commerce, accountancy, and policymaking intersect.[476]

As noted earlier on in Chapters 1 and 4, my argument for rational pragmatism in the development of digital tax measures does not seek to diminish the importance of equity or fairness in the allocation of digital taxing rights between source and host countries in international tax law and policy. I reckon that there is already so much literature focusing on equitable or fair allocation of digital taxing rights, with very little if any literature that is focused on removing the practical impediments to the implementation of such equitable and fair allocation of digital taxing rights. My contribution to literature in this thesis is that rational pragmatism is as important as equity or fairness in setting and attaining the digital taxation goals of source countries – especially for developing and emerging economies like Nigeria. To my mind, it makes no practical sense to expend time and resources in developing unilateral digital tax measures that are unenforceable by the implementing country because they do not have the support of the host countries involved.

[476] Peter Harris & David Oliver, *International Commercial Tax* (Cambridge, UK: Cambridge University Press, 2010) Cambridge Tax Law Series.

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