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The Application of International Tax Treaties to Digital Services Taxes

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Abstract

As digital services and electronic commerce have become more prevalent aspects of the global economy, there have been concerns over how tax systems will adapt to this change. International tax treaties in particular seem to be outdated and unprepared for the digital economy. Many international tax treaties provide that businesses are to be taxed on their income only in jurisdictions where they have a sufficient physical presence. By establishing their European headquarters and digital servers in countries with low corporate income tax rates (such as Ireland) and then using those headquarters to provide digital services to the rest of Europe, large, sophisticated, multinational digital businesses have been able to generate much revenue from most European countries without paying significant taxes in those countries.

The issues surrounding digital tax laws made news headlines in the summer of 2019 when France passed a law that imposed a 3 percent tax on revenue earned from digital services in France. Scholars have suggested that this tax may violate existing tax treaties, arguing that it provides for the taxation of the income of businesses without a significant enough physical presence in the country imposing the tax. This Comment analyzes this potential violation with regards to the French digital services tax and the U.S.–France Treaty for the Prevention of Double Taxation. This Comment concludes that the French tax does not violate the Treaty because the tax is a consumption tax that falls outside the scope of the Treaty.

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I. INTRODUCTION

As digital services and electronic commerce have become more prevalent aspects of the global economy, there have been concerns over how tax systems will adapt to this change. International tax treaties in particular seem to be outdated and ill-equipped to adapt to the digital economy. Historically, these treaties have provided that businesses should be taxed in the jurisdiction where they have a physical presence.[1] For example, the U.S.–France Treaty for the Prevention of Double Taxation (U.S.–France Treaty) allows business profits to be taxed only if the business has a "permanent establishment" in the country.[2] Permanent establishments include places such as offices or factories but do not include facilities used solely for storage and delivery or subsidiaries.[3] The relevant provisions of the U.S.–France Treaty are typical across international tax treaties between other countries as well.[4]

It has been relatively easy for firms participating in electronic commerce to avoid creating a permanent establishment in a country while still doing much business in and generating significant revenue from the country. Large, sophisticated, multinational companies have often established their European headquarters in countries with low corporate income tax rates (such as Ireland).[5] This practice has contributed to the Base Erosion and Profit Shifting (BEPS) scheme, whereby companies "exploit gaps and mismatches in tax rules to artificially shift profits to locations with no/low tax rates and no/little economic activity."[6] Google is just one example of a business that has taken advantage of this phenomenon. For many years, Google issued its contracts for advertisements

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1 *See* Convention Between the Government of the United States of America and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, Fr.-U.S., Jan. 1, 1996, 1994 U.S.T. LEXIS 216 [hereinafter U.S.–France Treaty].

2 *Id.* art. 7.

3 *Id.* art. 5.

4 Many bilateral international tax treaties are based on the model treaty released by the Organization for Economic Cooperation and Development (OECD). *See* OECD PUBLISHING, MODEL TAX CONVENTION ON INCOME AND ON CAPITAL: CONDENSED VERSION 12 (2017), http://perma.cc/B8YR-VSCA [hereinafter OECD, MODEL TAX CONVENTION 2017]; *see also* CENTER FOR TAX POLICY & ADMINISTRATION, FINAL REPORT OF THE TECHNICAL ADVISORY GROUP ON MONITORING THE APPLICATION OF EXISTING TREATY NORMS FOR TAXING BUSINESS PROFITS: ARE THE CURRENT TREATY RULES FOR TAXING BUSINESS PROFITS APPROPRIATE FOR E-COMMERCE? 6, http://perma.cc/S3WF-UGCM.

5 Laurel Wamsley, *France Approves Tax on Big Tech, and U.S. Threatens to Retaliate*, NPR (July 11, 2019), http://perma.cc/H42P-44EZ.

6 *OECD/G20 Inclusive Framework on BEPS*, OECD (2019), http://perma.cc/D3U7-MXFG [hereinafter *OECD/G20 Inclusive Framework*].

in Europe from its European headquarters in Dublin, Ireland.[7] This allowed the profits from those contracts to be taxed in Ireland, rather than the countries in which the advertisements took place.[8] The Organisation for Economic Co-operation and Development (OECD) reports that governments lose between 100 and 240 billion USD annually as a result of BEPS tactics by multinational companies.[9] Furthermore, because it is particularly easy for digital service providers to avoid having a permanent establishment in a country while still generating much revenue there, some scholars argue that BEPS has contributed to the discrepancy in the effective tax rate of digital businesses and more traditional businesses—digital businesses pay an effective tax rate of 9.5 percent, while traditional businesses pay 23.2 percent.[10]

European countries (notably France) have called for reform in order to address the fact that large, multinational corporations are able to generate large amounts of revenue from their countries without being subject to the countries' taxes.[11] The OECD and the European Commission (EC) have both issued reports on digital taxes that outline the issue and propose possible solutions.[12] The EC has proposed a permanent solution that involves allowing countries to tax businesses that have a "digital presence" in the country even if they do not have a permanent establishment there.[13] A business would have a digital presence in a country if it met one of the following criteria: annual revenues of 7 million EUR in that country, more than 100,000 users in that country annually, or over 3,000 business contracts for digital services created annually.[14] The EC has also proposed an interim policy to be used until a permanent solution is implemented.[15] The OECD has "committed to continue working toward a consensus-based long-

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7 Romain Dillet, *Google to Pay $549 Million Fine and $510 Million in Back Taxes in France*, TECHCRUNCH (Sept. 12, 2019), http://perma.cc/B24J-AVH7.

8 *Id.*

9 *OECD/G20 Inclusive Framework*, *supra* note 6.

10 Wamsley, *supra* note 5.

11 *See* Liz Alderman, *France Moves to Tax Tech Giants, Stoking Fight with White House*, N.Y. TIMES (July 11, 2019), http://perma.cc/KHA5-FDAL.

12 *See* OECD/G20 BASE EROSION AND PROFIT SHARING PROJECT, OECD, TAX CHALLENGES ARISING FROM DIGITALIZATION—INTERIM REPORT 2018: INCLUSIVE FRAMEWORK ON BEPS (2018), http://perma.cc/G8AT-HEGM [hereinafter OECD, TAX CHALLENGES]; *Communication from the Commission to the European Parliament and the Council: A Fair and Efficient Tax System in the European Union for the Digital Single Market*, COM (2017) 547 final (Sep. 21, 2017), http://perma.cc/QFS9-ESEU; *Proposal for a Council Directive Laying Down Rules Relating to the Corporate Taxation of a Significant Digital Presence*, COM (2018) 147 final (Mar. 21, 2018), http://perma.cc/9P3K-U45P [hereinafter *Proposal for a Council Directive*].

13 *See Proposal for a Council Directive*, *supra* note 12.

14 *Id.* at 8.

15 *See id.*

term solution"[16] and has established a Program of Work for coming to a long-term solution.[17]

The issues surrounding digital tax laws made news headlines in the summer of 2019 when France passed a law imposing a 3 percent tax on revenue earned from digital services in France.[18] This tax applies to companies that earn more than 25 million EUR in French revenue and more than 750 million EUR in global revenue.[19] This law largely reflects the interim policy proposed by the EC.[20] The passage of this law generated strong reactions around the world, most notably with the U.S. challenging the law as discriminatory against American companies and threatening to impose tariffs on France in response.[21] The U.S. and France later reached a deal of sorts about the law, under which France promised to repeal the French tax, adopt the OECD solution, and refund any difference in tax amount once the OECD finalized its plans for a unified, international framework for overcoming the problems presented by BEPS.[22]

There are potential legal problems with both the French tax and the long-term solution proposed by the EC. Scholars have suggested that both likely violate existing tax treaties because they provide for the taxation of businesses without a "permanent establishment."[23] This Comment analyzes this potential violation with regards to the French digital services tax and the U.S.–France Treaty and concludes that the tax does not violate the Treaty. The U.S.–France Treaty's permanent establishment requirement applies only to income taxes on "profits of

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16 *International Community Agrees on a Road Map for Resolving the Tax Challenges Arising from Digitalisation of the Economy*, OECD (May 31, 2019), http://perma.cc/NK79-XUHU [hereinafter OECD, *International Community Agrees*]. The original deadline for reaching an agreement was the end of 2020; however, the COVID-19 pandemic has caused delays in negotiations, and the OECD now hopes to reach an agreement by mid-2021. *International Community Renews Commitment to Address Tax Challenges from Digitalisation of the Economy*, OECD (Oct. 12, 2020), http://perma.cc/H3BT-WQEB.

17 OECD/G20 INCLUSIVE FRAMEWORK ON BEPS, OECD, PROGRAMME OF WORK TO DEVELOP A CONSENSUS SOLUTION TO THE TAX CHALLENGES ARISING FROM THE DIGITALISATION OF THE ECONOMY (2019), http://perma.cc/9H8Z-3URD [hereinafter OECD, PROGRAMME OF WORK].

18 Wamsley, *supra* note 5. This Comment refers to this tax as the French digital services tax, the French digital tax, and the French tax interchangeably.

19 Alderman, *supra* note 11.

20 *See Fair Taxation of the Digital Economy*, EUR. COMM'N (Mar. 21, 2018), http://perma.cc/V87H-GXNK.

21 Wamsley, *supra* note 5; Alderman, *supra* note 11.

22 Hadas Gold, *US and France Reach Compromise on Digital Tax*, CNN BUS. (Aug. 26, 2019), http://perma.cc/54M3-AXJF.

23 *See, e.g.*, Vijay Govindarajan, Anup Srivastava, Hussein Warsame & Luminita Enache, *The Problem with France's Plan to Tax Digital Companies*, HARV. BUS. REV. (July 17, 2019), http://perma.cc/ZUP5-L9NP; Isabel Gottlieb & Hamza Ali, *Threat of Legal Challenges Hangs Over French Digital Tax*, BLOOMBERG TAX (July 11, 2019), http://perma.cc/2NXR-YMFW; Andrew Thompson & Louis D.C. Grandjouan, *Digital Economy Taxation: The OECD's Report and European Commission's Draft Directives*, 35 J. TAX'N INV. 23 (2018).

an enterprise of a Contracting State."[24] Because the French tax is more aptly characterized as a consumption tax on revenues rather than an income tax on profits, the French tax is likely outside the Treaty's scope and is therefore not subject to the permanent establishment requirements. When appropriately characterized as a consumption tax, the French tax does not violate the U.S.–France Treaty.

This Comment proceeds as follows: Section II provides an overview of international taxation principles, focusing on the historical desire to avoid double taxation and the relatively recent rise of BEPS. This Section also explores the differences between income taxes and consumption taxes. Section III provides an overview of international tax treaties, focusing on how they came to be as well as their primary purposes. This Section highlights the U.S.–France Treaty and its provisions that apply to the digital services tax analysis. Finally, Section IV applies principles of treaty law to the digital services tax and concludes that the French digital service tax does not violate the U.S.–France Treaty.

This Comment is timely because of France's recent action as well as discussions that other European countries will follow France's lead and impose digital taxes of their own.[25] As digital transactions become a more important part of the global economy, base erosion continues to impact governments' ability to raise revenue.[26] Additionally, the economic downturn caused by the COVID-19 pandemic is expected to drastically reduce most countries' tax revenues.[27] However, as many businesses and countries experience fiscal distress related to COVID-19, revenues and profits from many companies providing digital services have increased.[28] These circumstances could make taxes on digital services an appealing option for countries searching for a stable tax base and striving to combat base erosion. As countries enact and consider digital taxes, it is important for them to understand how they can change their tax laws and the effect those

24 U.S.–France Treaty, *supra* note 1, art. 7.

25 As of May 2020, in addition to France, Austria, Hungary, India, Italy, Turkey, and the United Kingdom have implemented their own versions of digital services taxes. The Czech Republic, Latvia, Norway, Poland, Slovakia, Slovenia, and Spain have published proposals for or announced intentions to implement digital services taxes of their own. DANIEL BUNN, ELKE ASEN & CRISTINA ENACHE, DIGITAL TAXATION AROUND THE WORLD 18–19 (2020), http://perma.cc/PVJ3-9JJS.

26 *See* Eli Hadzhieva, *Impact of Digitalisation on International Tax Matters*, POL'Y DEP'T FOR ECON., SCI. & QUALITY OF LIFE POLICIES 16 (2019), http://perma.cc/X754-3V6F.

27 *Special Series on COVID-19: Challenges in Forecasting Tax Revenue*, IMF (Apr. 20, 2020), https://perma.cc/XWQ4-D9P6; Michelle Harding & Hannah Simon, *Consumption Tax Revenues Under Covid-19: Lessons from the 2008 Global Financial Crisis*, OECD (Apr. 29, 2020), http://perma.cc/T2J7-43QH.

28 Daisuke Wakabayashi, Karen Weise, Jack Nicas & Mike Isaac, *The Economy Is in Record Decline, but Not for the Tech Giants*, N.Y. TIMES (July 30, 2020), http://perma.cc/XM6H-MK3Q; Laura He, *Zoom Profit Skyrockets 3,300% on Remote Work Trend*, CNN BUS. (Sep. 1, 2020), http://perma.cc/DEY9-HR33.

changes may have on treaty compliance. It is also important for countries to understand what types of changes they may need to make to their treaties in order to achieve their desired tax policy. Additionally, as the OECD works toward finalizing a proposed multilateral long-term solution, it will be helpful to have scholarly input and analysis.

While many scholars have noted the potential problems with digital services taxes[29] and suggested solutions for dealing with these problems,[30] there is need for greater study into the legality of these taxes under international tax treaties. This Comment's analysis of the legality of these taxes will provide a basis for evaluating proposed solutions under the current treaty requirements.

II. Overview of Principles of Taxation and International Taxation

A. Income Tax vs. Consumption Tax

This Subsection will explain the background principles necessary for understanding income taxes and consumption taxes and how they relate to broader tax goals.[31] Understanding the underlying theory behind these taxes and some of the important differences between them allows for evaluation of proposed and enacted taxes and the impact they are expected to have. Additionally, because international tax treaties often refer explicitly to "income taxes,"[32] understanding what makes a tax an income tax allows for evaluating whether a tax is covered by a treaty or not.

According to the Haig-Simons definition of income, "[p]ersonal income may be defined as the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and the end of the period in question."[33] This definition of income (as consumption plus change in net wealth) helps define the differences

29 *See* Monica Gianni, *OECD BEPS (In)Action 1: Factor Presence as a Solution to Tax Issues of the Digital Economy*, 72 TAX L. 255 (2018); Andrew D. Mitchell, Tania Voon & Jarrod Hepburn, *Taxing Tech: Risks of an Australian Digital Services Tax Under International Economic Law*, 20 MELB. J. INT'L L. 88 (2019); Govindarajan et al., *supra* note 23; Gottlieb & Ali, *supra* note 23; Thompson & Grandjouan, *supra* note 23.

30 *See* Gianni, *supra* note 29.

31 The most prominent types of taxes are income taxes, consumption taxes, and wealth taxes. Some combination of these taxes is used by nearly all countries around the world. *See* JOSEPH BANKMAN, DANIEL N. SHAVIRO, KIRK J. STARK & EDWARD D. KLEINBARD, FEDERAL INCOME TAXATION 51 (Wolters Kluwer, 18th ed. 2019). Wealth taxes are not implicated in the analysis of digital services taxes and international tax treaties, so this Subsection will focus on income taxes and consumption taxes.

32 *See, e.g.*, U.S.–France Treaty, *supra* note 1.

33 BANKMAN ET AL., *supra* note 31, at 52 (quoting HENRY SIMONS, PERSONAL INCOME TAXATION 50 (1938)).

between an income tax, a consumption tax, and a wealth tax. In broad strokes, an income tax is levied on everything that a taxpayer earns during the taxation period, regardless of whether the taxpayer spends what she earns or saves what she earns. Conversely, a consumption tax is levied only on what a taxpayer spends (consumes) during the taxation period. Income taxes differ from consumption taxes primarily in their treatment of savings (savings are taxed under an income tax but not under a consumption tax).[34] Wealth taxes (such as property taxes or estate taxes) are typically levied based on a taxpayer's total wealth holdings. The remainder of this Subsection will focus on the income tax and the consumption tax, as those are most relevant for the discussion of digital services taxes.

The primary types of income taxes include personal income taxes, which are levied on individuals' wages and investment income, and corporate income taxes, which are levied on the profits of corporations.

In contrast to income taxes, which are levied against both individuals and businesses, consumption taxes tend to affect only individuals.[35] "[O]nly sales to ultimate *consumers* are appropriately included in the base of a *consumption* tax."[36] There is an assumption that "*businesses*, as such, are never consumers" because a business purchases only that which is required for the business to prepare goods or services for the ultimate consumers (individuals).[37] Although consumption taxes are often remitted to the taxing authority by businesses rather than individuals, the ultimate burden of the tax is almost always paid by the individual consumers in the form of higher retail prices.[38]

The most common types of consumption taxes are sales taxes and value added taxes.[39] Sales taxes are "simply a tax on final sales by businesses to consumers."[40] Sales taxes can be levied on either the sale of goods or services but are more commonly levied on the sale of goods. The value added tax is a tax on the seller's "contribution to the value of the product."[41]

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34 Edward J. McCaffery, *Tax Policy Under a Hybrid Income-Consumption Tax*, 70 TEX. L. REV. 1145, 1149–50 (1992).

35 Ronald D. Aucutt, *The Vocabulary of Fundamental Tax Reform*, 31 U. MIAMI L. CTR. ON EST. PLAN. ¶ 401.2 (2019).

36 *Id.*

37 *Id.*

38 Julia Kagan, *Consumption Tax*, INVESTOPEDIA (July 31, 2020), http://perma.cc/K6HV-V5LM.

39 Aucutt, *supra* note 35, ¶ 401.1.

40 *Id.* ¶ 401.2.

41 *Id.* ¶ 401.3.

B. Double Taxation

The phenomenon of double taxation is not new and has been analyzed by scholars for centuries.[42] Double taxation, or "the taxation of the same person or the same thing twice over,"[43] stems from the increased complexity of trade, income earning, property holding, and other taxable transactions.[44] In the international context, cross-border transactions can give rise to taxes from two or more countries on the same underlying transaction.[45] The relevant countries compete with each other for taxing jurisdiction and both (or all) claim jurisdiction to levy their taxes.[46]

This phenomenon is further complicated by the fact that the different jurisdictions have different principles underlying their taxing claims.[47] The differing principles include taxing based on citizenship, temporary residence, permanent residence, location of property, and economic interest.[48] Without consensus on the principles outlining where and by which jurisdiction taxation should occur, there will continue to be double taxation. This concern is especially prevalent in international contexts because countries worry about protecting their tax sovereignty.[49]

Tax scholars and economists have criticized double taxation for centuries. The OECD has gone so far as to say that

> [the] harmful effects [of double taxation] on the exchange of goods and services and movements of capital, technology and persons are so well known that it is scarcely necessary to stress the importance of removing the obstacles that double taxation presents to the development of economic relations between countries.[50]

There are generally two lines of argument against double taxation. The first draws on normative notions of fairness. The second relies on empirical and economic arguments, including advocating for capitalistic free movement and economic prosperity.

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42 *See* EDWIN R. A. SELIGMAN, ESSAYS IN TAXATION (Macmillan Company, 9th ed. 1921).

43 *Id.* at 98.

44 *Id.*

45 *Id.* at 99.

46 *Id.*

47 *Id.* at 111.

48 *Id.* at 111–13.

49 Sunita Jogarajan, *Prelude to the International Tax Treaty Network: 1815–1914 Early Tax Treaties and the Conditions for Action*, 31 OXFORD J. LEGAL STUD. 679, 680 (2011).

50 OECD, MODEL TAX CONVENTION 2017, *supra* note 4, at 9.

First, double taxation is often criticized for being unjust.[51] For example, in cases where people live in one country and work in a different country, it is seen as an unfair burden that they might be required to pay tax on their income in two countries, given that people who live in the same country in which they work would only be required to pay tax on their income in one country.[52]

Second, double taxation is said to "hinder the free movement of capital, technology and persons" around the world.[53] The taxation of the same underlying transaction by two different taxing authorities can create a disincentive to participate in that transaction. Tax policy is often used to intentionally shape economic behavior; for example, many countries have implemented tax laws designed to incentivize investment in environmentally-friendly technology.[54] However, uncoordinated tax policies that have not been carefully and intentionally designed have the potential to distort economic behavior in unintended and undesired ways. This risk is especially prevalent when separate and sovereign taxing authorities independently tax the same transaction. Uncoordinated double taxation could cause businesses to avoid cross-border transactions that would otherwise have positive impacts on the economy. Furthermore, "[d]ouble taxation is often cited as a major obstacle to unfettered economic progress."[55] Scholars argue that "double taxation represents an unfair burden on existing investment and an arbitrary barrier to the free flow of international capital, goods and persons."[56] Therefore, eliminating double taxation "facilitate[s] international trade by minimizing tax barriers in the exchange of goods and services across national boundaries."[57]

Depending on the taxing authorities' policy goals and desired results of taxation, double taxation is not necessarily always a problem.[58] However, the type of double taxation by two or more different sovereign countries that occurs in the context of international transactions and multinational companies is typically not a type of double taxation that is the result of a specific policy goal but rather is the result of a lack of coordination between different countries. Therefore, it makes

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51 SELIGMAN, *supra* note 42, at 114.

52 Jogarajan, *supra* note 49, at 690.

53 *Id.* at 680.

54 *Renewable Energy Explained: Incentives*, U.S. ENERGY INFO. ADMIN. (Nov. 22, 2019), http://perma.cc/YAU8-RT29; Ayodele O. Ogunlana & Nataliya N. Goryunova, *Tax Incentives for Renewable Energy: The European Experience*, THE EUR. PROC. SOC. & BEHAV. SCI. (2017), http://perma.cc/J2EL-JQSP.

55 Tsilly Dagan, *The Tax Treaties Myth*, 32 N.Y.U. J. INT'L L. & POL. 939, 942 (2000).

56 H. David Rosenbloom & Stanley I. Langbein, *United States Treaty Policy: An Overview*, 19 COLUM. J. TRANSNAT'L L. 359, 365 (1981).

57 Richard L. Doernberg, *Overriding Tax Treaties: The U.S. Perspective*, 9 EMORY INT'L L. REV. 71, 71 (1995).

58 Dagan, *supra* note 55, at 942 n.6.

sense to criticize double taxation in the international context. It also makes sense for countries to take steps to reduce and eliminate any international double taxation of the same underlying transaction, as doing so will encourage more international transactions.

C. Base Erosion and Profit Shifting

The rapid development of digital services and electronic commerce creates difficulty for countries as they attempt to maintain fair levels and methods of taxation.[59] The OECD reports that governments lose between 100 and 240 billion USD annually as a result of BEPS tactics by multinational companies.[60] BEPS occurs when companies "exploit gaps and mismatches in tax rules to artificially shift profits to locations with no/low tax rates and no/little economic activity."[61] Such tactics are generally not illegal, but they are widely considered to be unfair.

An example of how a company is able to shift profits will be illustrative for understanding the problem posed by BEPS. Google is just one example of a business that has taken advantage of profit shifting. For many years, Google issued its contracts for advertisements in Europe from its Irish subsidiary located in Dublin, Ireland.[62] The revenues from selling advertisements in other European countries were collected by Google's Irish subsidiary, but the Irish subsidiary had no permanent establishments in these other European countries.[63] This allowed the profits from those advertisements to be taxed in Ireland rather than the country in which the advertisement took place.[64] Because Ireland has one of the lowest corporate income tax rates in Europe at 12.5 percent (for comparison, France has a corporate income tax rate of 34.4 percent),[65] having profits taxed in Ireland rather than the other European countries allowed Google to reduce its overall tax liability. Overall tax liability is reduced even further by transferring the revenue from the first Irish subsidiary to a second subsidiary located in Bermuda but incorporated in Ireland.[66] This revenue transfer is accomplished by selling Google's technology and IP to the second subsidiary located in Bermuda and having that subsidiary license the technology to the first Irish subsidiary.[67] The

59 Hadzhieva, *supra* note 26, at 16.

60 *OECD/G20 Inclusive Framework*, supra note 6.

61 *Id.*

62 Dillet, *supra* note 7.

63 Jeremy Kahn, *Google's 'Dutch Sandwich' Shielded 16 Billion Euros from Tax*, BLOOMBERG TECH. (Jan. 2, 2018), http://perma.cc/XT6T-WYY2.

64 Dillet, *supra* note 7.

65 Elke Asen, *Corporate Income Tax Rates in Europe*, TAX FOUND. (Feb. 7, 2019), http://perma.cc/PTZ9-7B58.

66 Kahn, *supra* note 63.

67 Roger Royse, *Double Irish Tax Sandwich*, ROYSE L. (Nov. 1, 2013), http://perma.cc/V2L3-9EJQ.

first Irish subsidiary then pays royalties to the subsidiary located in Bermuda, which greatly reduces the profits of the first Irish subsidiary. This results in the Irish subsidiary having little or no profits and the subsidiary located in Bermuda having nearly all of the revenue generated from the sale of the European advertisements.[68] Due to the operation of the tax laws in Ireland and Bermuda—the Bermuda taxing authority treats the second subsidiary as located in Ireland because it is incorporated in Ireland, and the Irish taxing authority treats it as located in Bermuda because its management and control are located in Bermuda—the revenue now located in the second subsidiary in Bermuda is not subject to tax in either Ireland or Bermuda.[69] This tactic, known as a "Double Irish Tax Sandwich" or simply a "Double Irish," is not technically illegal—in 2017, the Paris administrative court ruled that Google did not act illegally by using this technique.[70]

The exact financial effect of such profit shifting tactics is difficult to calculate because of differences in tax deductions allowed and tax credits provided in different countries, but it is not difficult to imagine how shifting profits to countries with lower tax rates would generate tax savings for a business. For one potential measure of the success of BEPS techniques, France has previously alleged that Google owed French taxing authorities 1.12 billion EUR in back taxes for the period between 2005–2010.[71] Google eventually settled disputes with French authorities for taxes from 2005 to 2018 by paying a 500 million EUR fine as well as 465 million EUR in back taxes.[72]

While BEPS does not apply only to digital service businesses, the ease with which digital businesses are able to use these tactics has received much attention. Some argue that this practice has contributed to the discrepancy in the effective tax rate of digital businesses and more traditional businesses—digital businesses pay an effective tax rate of 9.5 percent, while traditional businesses pay 23.2 percent.[73]

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68 *Id.*

69 *Id.*

70 Gaspard Sebag, *Google Spared $1.3 Billion Tax Bill with Victory in French Court*, BLOOMBERG TECH. (July 12, 2017), http://perma.cc/32KN-Z26G.

71 *Id.*

72 Dillet, *supra* note 7.

73 Hadzhieva, *supra* note 26. *But see, e.g.*, MATTHIAS BAUER, DIGITAL COMPANIES AND THEIR FAIR SHARE OF TAXES: MYTHS AND MISCONCEPTIONS 7 (ECIPE Occasional Paper No. 3, 2018), http://perma.cc/842F-U7N3 ("[The European Commission's] selective use of firms and [its] obscure way of estimating effective corporate tax rates may . . . be convenient for the suggestion that traditional businesses pay higher rates than digital businesses. Yet it is also a misleading way to frame problems of international taxation. In fact, it is difficult to find the supporting evidence that digital firms (irrespective of their definition) and their profits are a big reserve of potential tax

III. INTERNATIONAL TAX TREATIES

Bilateral tax treaties are the most popular mechanism for addressing international double taxation.[74] As of 2011, there were over 3,000 different bilateral tax treaties in force.[75] The first bilateral tax treaties were largely based on a theory of reciprocity.[76] Reciprocity in an international economic context is a way of ensuring that both countries grant the same privileges to citizens of the other country and thereby place citizens of both countries "upon an equal basis in certain branches of commerce."[77] The early bilateral tax treaties also alleviated double taxation by "allocating taxing rights for different types of income between jurisdictions."[78] Taxing rights were allocated "based on the source of income or the residence of the taxpayer."[79] These essential principles found in the very first international tax treaties (reciprocity and allocation based on source and residence) continue to be the principles that underlie modern tax treaties.[80]

Subsection A of this Section will provide a historical overview of bilateral tax treaties from the first recorded treaty to modern day treaties. It will focus on the purpose of these treaties and the extent to which the purpose of these treaties has changed or remained the same. Subsection B will then turn toward the U.S.–France Treaty for the Prevention of Double Taxation, describing the purpose and scope of the Treaty and the requirements for taxation under the Treaty. Finally, Subsection C will briefly describe the tax treaty between Ireland and France and the treaty between the Netherlands and France. Because many multinational companies based in the U.S. have operating subsidiaries to service Europe in Ireland or the Netherlands, the relevant tax treaties when analyzing the French digital services tax may often be those between Ireland and France or the Netherlands and France.

A. Purpose

Beginning with the very first recorded international treaty on the topic of taxation (an 1843 agreement between France and Belgium), a primary factor

revenues. Industry data rather reveal that 1) profitability levels are highly diverse among digital firms as well as less digital and non-digital corporations, and that 2) traditional sectors also show a similar variation in profitability and effective tax rates.").

74 Jogarajan, *supra* note 49, at 680.

75 *Id.*

76 *Id.* at 683.

77 *Id.* at 682 (quoting JAMES LAURENCE LAUGHLIN & HENRY PARKER WILLIS, RECIPROCITY 1 (Baker & Taylor Company 1903)).

78 *Id.* at 683.

79 *Id.* at 683–84.

80 *Id.*

motivating the agreement was the promotion and maintenance of significant economic benefit.[81] Allowing Belgium access to markets throughout France benefited the economies of both Belgium and France, and the 1843 agreement facilitated this access by regulating the transfer of information between the two governments to "assist the effective and regular collection of taxes imposed by the laws of the two countries."[82] Modern tax treaties continue to include information-sharing clauses.

The first recorded international treaty entered to prevent double taxation was an 1899 agreement between the Austro-Hungarian Empire and Prussia.[83] This agreement was designed to prevent double taxation in cases of dual nationality or residence in border areas, which was perceived to be unfair to border residents.[84] This agreement allocated taxing rights by requiring the countries to levy personal taxes only on individuals with permanent residence in that country and business taxes only on businesses with permanent establishments in that country. This treaty was made in part with the goal of establishing strong political and economic relations between the Austro-Hungarian Empire and Prussia, as evidenced by other trade agreements between the countries that implemented favorable terms and attempted to strengthen the alliance.[85] Prussia, the economically dominant country, wanted to firmly establish its economic control by creating an alliance, and the Austro-Hungarian Empire was eager to have greater access to the Prussian economy.[86] As this first treaty demonstrates,

> [t]he political context of the early treaties highlights the fact that, although countries may be concerned with the burden of double taxation on their citizens and double non-taxation, action to address these issues does not take place in isolation and is likely to be part of broader political and economic relationships.[87]

As countries shifted away from the view that the primary purpose of the income tax was government financing (especially of wars) to the view that its primary purpose was justice and wealth redistribution, they became more concerned with double taxation and worked to eliminate it.[88] Because double taxation is often seen as unjust, a desire to design a just taxing system could lead to a desire to avoid double taxation, especially the double taxation of individuals. Eliminating double

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81 *Id.* at 687–88.

82 *Id.* at 687 (quoting Convention Regulating the Relations Between the Administrative Services of France and Belgium, Fr.-Belg., art. 1, Aug. 21, 1843).

83 *Id.* at 690.

84 *Id.*

85 *Id.* at 691–92.

86 *Id.* at 694.

87 *Id.*

88 *Id.* at 698.

taxation of individuals is largely what the earliest treaties aimed to do by reducing the tax burdens on border residents.

Tax treaties today play largely the same role that the earliest treaties played—that is, "facilitating economic integration" by "enabling the movement of people between states without the burden of double taxation."[89] This historical analysis is relevant because tax treaties today are motivated by economic and political factors just as they were in 1899.[90] "Tax treaties do not exist in a vacuum and consideration of economic factors and political motivation will always be relevant."[91] Like the earliest treaties, the primary purposes of modern tax treaties are the prevention of double taxation and the facilitation of information sharing.[92] Modern tax treaties also aim to combat tax evasion and fraud.[93]

According to the introduction to the OECD's Model Tax Convention on Income and on Capital (the OECD's model convention), modern tax treaties have two primary purposes.[94] First, tax treaties aim to "remov[e] the obstacles that double taxation presents to the development of economic relations between countries."[95] Second, tax treaties are intended to "improve administrative co-operation in tax matters, notably though exchange of information and assistance in collection of taxes, for the purpose of preventing tax evasion and avoidance."[96]

To further these purposes of removing double taxation and preventing tax evasion, there have been movements toward standardization of bilateral and multilateral tax treaties. This has led to the development of model treaties that are intended to be used as templates for countries drafting bilateral and multilateral treaties. Because the problems of double taxation and tax evasion are often identical or extremely similar even across jurisdictions, countries can use common solutions to combat these problems.[97] The first model bilateral convention was established in 1928 by members of the League of Nations; it was followed by the Model Convention of Mexico in 1943 and the Model Convention of London in 1946, but none of these models was fully accepted.[98] In 1956 the OECD began

89 *Id.* at 706.

90 *Id.* at 706–07.

91 *Id.* at 707.

92 *See* Dagan, *supra* note 55, at 942 n.7 (collecting sources); U.S.–France Treaty, *supra* note 1; *cf.* Elizabeth A. Owens, *United States Income Tax Treaties: Their Role in Relieving Double Taxation*, 17 RUTGERS L. REV. 428, 430 (1963); Dagan, *supra* note 55, at 978.

93 Michael J. McIntyre, *Model Tax Treaties: A Comparison of the UN and OECD Models*, WAYNE ST. U. L. SCH. at 2, http://perma.cc/GQ3W-HNUG.

94 OECD, MODEL TAX CONVENTION 2017, *supra* note 4, at 9.

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.* at 9–10.

working on a model convention that would be accepted by all member countries, which resulted in the 1963 Draft Double Taxation Convention on Income and Capital.[99] This model convention has since been updated a number of times, with the most recent amendments in 2017.[100]

The OECD's model convention has had a significant impact. Since 1963, "OECD member countries have largely conformed to the Model Convention when concluding or revising bilateral conventions."[101] The model convention has influenced non-member countries as well, serving as the basis for negotiations of bilateral treaties between member countries and non-member countries as well as between two non-member countries.[102] The model convention also served as the basis for the United Nation's Model Double Taxation Convention between Developed and Developing Counties.[103] Finally, the commentaries to the model convention have been generally accepted as a guide to the interpretation and enforcement of bilateral treaties.[104]

The widespread use of the OECD's model convention has furthered the historic purposes of avoiding double taxation and facilitating information sharing as well as the more modern purposes of avoiding tax evasion, tax avoidance, and tax fraud.

B. U.S.–France Tax Treaty

The starting point for an analysis of whether the French digital tax violates the U.S.–France Treaty for the Prevention of Double Taxation is the text of the Treaty itself. This Subsection begins by describing the purpose of the U.S.–France Treaty. It then turns to the scope of the Treaty as described in Article 2. It concludes by describing the Treaty requirements for taxation of commercial profits as established in Article 7, including the definition of a permanent establishment as defined in Article 5.

1. The primary purpose of this Treaty is the prevention of double taxation.

The stated purpose of the U.S.–France Treaty is the "avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital."[105] Furthermore, the letter of submittal from the U.S. State Department

99 *Id.* at 10.

100 *Id.* at 11.

101 *Id.* at 12.

102 *Id.*

103 *Id.*

104 *Id.*

105 U.S.–France Treaty, *supra* note 1.

for the Treaty notes that the Treaty "also provides for administrative cooperation between the tax authorities of the two countries in applying the [Treaty] and the taxes covered by the [Treaty]."[106]

The U.S.–France Treaty was updated in 1996 to replace the 1967 income tax treaty between the U.S. and France.[107] Periodic updates to international tax treaties such as this one are required to reflect changes in domestic taxation law and policies and address new problems in cross-border transactions that arise in the years between the tax treaties. The letter of transmittal from the U.S. President to the U.S. Senate also states that the 1996 Treaty "more accurately reflects current income tax treaty policies of the [U.S. and France]."[108] The U.S. State Department noted that an important improvement to the 1996 Treaty was the strengthening of the compliance aspects of the Treaty.[109] This strengthened compliance was achieved by updating the provisions concerning exchange of information and the provisions concerning associated enterprises.[110]

The primary purpose of this Treaty, the avoidance of double taxation, is achieved in part through restrictions on when the U.S. or France is allowed to tax a certain entity (described in Section III.C.3 below) and in part through Article 24. Article 24 requires that the U.S. allow taxpayers in the U.S. to claim credits against their U.S. income tax for certain taxes paid to France and that France allow taxpayers in France to claim credits against their French income tax for certain taxes paid to the U.S.[111] By agreeing to only tax entities in accordance with the Treaty and by allowing credits for foreign taxes paid, the U.S.–France Treaty prevents a significant number of cases of double taxation.

2. The scope of the U.S.–France Treaty includes income taxes and wealth taxes but does not mention consumption taxes.

Under Article 2, the U.S. taxes that are subject to the Treaty include federal income taxes (except social security taxes) and excise taxes on certain insurance premiums.[112] The scope of French taxes covered by the Treaty is somewhat broader. Article 2 states that "all taxes imposed on behalf of the State [of France], irrespective of the manner in which they are levied, on total income, on total capital, or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, as well as taxes on capital

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106 *Id.* at Department of State Letter of Submittal.

107 *Id.*

108 *Id.* at Presidential Letter of Transmittal.

109 *Id.* at Department of State Letter of Submittal.

110 *Id.*

111 *Id.* art. 24.

112 *Id.* art. 2.

appreciation" are subject to the Treaty.[113] Article 2 specifically notes that France's income tax, company tax, tax on salaries, and wealth tax are all included.[114] Notably, the Treaty does not mention consumption taxes (such as France's value added tax or the U.S.'s sales taxes). These taxes are therefore presumably not included in the scope of the Treaty and are unaffected by any of the Treaty requirements.

3. A country is allowed to levy a tax on business profits only when the business has a "permanent establishment" in the country.

Article 7 of the Treaty provides that

> [t]he profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.[115]

A permanent establishment is defined in Article 5 of the Treaty as "a fixed place of business through which the business of an enterprise is wholly or partly carried on."[116] In particular, a permanent establishment includes "(a) a place of management; (b) a branch; (c) an office; (d) a factory; (e) a workshop; and (f) a mine, an oil or gas well, a quarry, or any other place of extraction of natural resources."[117] The following do not constitute a permanent establishment:

> (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 of collecting information, for the enterprise;
>
> (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;
>
> (f) the maintenance of a fixed place of business solely for any combination of the activities mentioned in subparagraphs (a) to (e), provided that the overall

113 *Id.*

114 *Id.*

115 *Id.* art. 7.

116 *Id.* art. 5.

117 *Id.*

> activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.[118]

Importantly, the permanent establishment requirement only applies when a country wishes to tax the "profits of an enterprise of a Contracting State." The Treaty does not provide an explicit definition of profits, but it does note that "[i]n determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are reasonably connected with such profits, including executive and general administrative expenses, whether incurred in the State in which the permanent establishment is situated or elsewhere."[119]

C. Other Relevant Tax Treaties

It is important to note that the relevant treaty is the treaty between the country where the operating entity or subsidiary is based (which is not necessarily the country where the parent corporation is located) and the country imposing the tax.[120] Because many multinational companies based in the U.S. have operating subsidiaries in Ireland or the Netherlands that service Europe, the relevant tax treaties may often be those between Ireland and France or the Netherlands and France.[121]

1. The Ireland-France Treaty is substantially similar to the U.S.–France Treaty.

The current tax treaty in effect between Ireland and France is the 1970 Double Taxation Treaty between Ireland and France (the Ireland-France Treaty). This Ireland-France Treaty uses much of the same language that is found in the U.S.–France Treaty.[122] The stated purpose of the Ireland-France Treaty is "to avoid, so far as possible, double taxation and to prevent fiscal evasion in the matter of taxes on income."[123] The most relevant provisions of the Ireland-France Treaty are Article 1 (describing the scope of the agreement), Article 2 (defining "permanent establishment"), and Article 4 (providing for the taxation of commercial profits).

The Ireland-France Treaty applies to "taxes on income," which are broadly defined as "all taxes imposed on total income or on the elements of income."[124]

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118 *Id.*

119 *Id.* art. 7.

120 Thompson & Grandjouan, *supra* note 23.

121 *Id.*

122 *See* Double Taxation Treaty between Ireland and France: Convention between Ireland and France for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Fr.-Ir., Jul. 14, 1970.

123 *Id.*

124 *Id.* art. 1.

Article 1 specifically lists the French individual income tax, complementary tax, and tax on companies as well as the Irish income tax and corporate profits tax.[125] Much like the U.S.–France Treaty, the Ireland-France Treaty does not mention consumption taxes.

Article 2 of the Ireland-France Treaty uses the same language as the U.S.–France Treaty to define "permanent establishment" as "a fixed place of business in which the business of an enterprise is wholly or partly carried on."[126] The Ireland-France Treaty also uses the same examples of permanent establishments as the U.S.–France Treaty, with the addition of (g):

> (a) a place of management;
>
> (b) a branch;
>
> (c) an office;
>
> (d) a factory;
>
> (e) a workshop;
>
> (f) a mine, quarry or other place of extraction of natural resources;
>
> (g) a building site or construction or assembly project which exists for more than twelve months.[127]

The Ireland-France Treaty's specific exclusions from the definition of permanent establishments are slightly different from the U.S.–France Treaty's exclusions:

> (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;
>
> (e) the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or for similar activities which have a preparatory or auxiliary character, for the enterprise.[128]

Article 4 of the Ireland-France Treaty provides that "[t]he industrial and commercial profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein."[129] It also states that the tax

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125 *Id.*

126 *Id.* art. 2.

127 *Id.*

128 *Id.*

129 *Id.* art. 4

shall be imposed only on the amount of profits "as is attributable to that permanent establishment" with deductions allowed for "expenses which are incurred for the purposes of the permanent establishment."[130] Much like the U.S.–France Treaty, the Ireland-France Treaty does not provide an explicit definition of "profits."

2. The Netherlands-France Treaty is substantially similar to the U.S.–France Treaty.

The current tax treaty in effect between the Netherlands and France is the 1973 Tax Treaty, as amended by the 2004 Protocol (the Netherlands-France Treaty).[131] The relevant provisions of the Netherlands-France Treaty are Article 2 (describing the taxes covered by the agreement), Article 5 (defining "permanent establishment"), and Article 7 (providing for the taxation of business profits).

The Netherlands-France Treaty applies to "taxes on income and on fortune," which are defined as "all taxes imposed on total income, on total fortune or on elements of income or of fortune."[132] Article 2 specifically lists the Netherlands's income tax, wages tax, corporation tax, dividends tax, and fortunes tax as well as the French income tax and company tax.[133] Just like the U.S.–France Treaty and the Ireland-France Treaty, the Netherlands-France Treaty does not mention any consumption taxes.

"Permanent establishment" is defined as "a fixed place of business in which the business of the enterprise is wholly or partly carried on."[134] The Netherlands-France Treaty uses the same examples and same specific exclusions of permanent establishments as the Ireland-France Treaty.[135]

The Netherlands-France Treaty also uses the same language as the Ireland-France Treaty to describe when "[t]he profits of an enterprise" are taxable.[136]

The fact that the U.S.–France Treaty, Ireland-France Treaty, and Netherlands-France Treaty do not vary in any significant ways is not surprising given the widespread use of the OECD model convention as a basis for bilateral tax treaties.[137] Because of the similarity of the treaties' relevant text, this Comment's analysis will proceed using the text of the U.S.–France Treaty.

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130 *Id.*

131 *See* Convention Between the Government of the French Republic and the Government of the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Fortune, Fr.-Neth., Mar. 16, 1973.

132 *Id.* art. 2.

133 *Id.*

134 *Id.* art. 5.

135 *Id.*

136 *Id.* art. 7.

137 OECD, MODEL TAX CONVENTION 2017, *supra* note 4, at 12.

IV. APPLICATION—DO DIGITAL SERVICE TAXES VIOLATE INTERNATIONAL TAX TREATIES?

A. Defining Digital Services and Digital Business

Defining digital business is more complicated than it may first appear. The spread of technology and the digitalization of the economy have affected businesses in every sector and every market. In addition to the exponential growth of the digital economy, the entire economy is going digital at a rapid pace.[138] The percentage of businesses with a web presence increased from 2009 to 2017 in nearly all OECD countries, and 95 percent of businesses in OECD countries benefit from a high-speed internet connection.[139] The World Economic Forum estimates that the value of the digital transformation will reach 100 trillion USD by 2025.[140] Digitalization has facilitated an increased number of businesses providing services rather than tangible goods.[141] Technological innovations, such as machine learning, are facilitating the digitalization of traditional businesses such as retailers, manufacturers, publishers, and health care providers.[142] Digitalization has also facilitated the globalization of businesses by making it easier for formerly domestic businesses to interact digitally with customers around the world.[143] As digitalization becomes more and more ubiquitous, even small firms are becoming capable of reaching customers worldwide.[144] In a broad sense, the digital economy can be defined as "all activities that use digiti[z]ed data," which would encompass, in essence, the entire modern economy.[145] More narrowly defined, the digital economy is comprised of "online platforms, and activities that owe their existence to such platforms."[146]

1. 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.

According to the OECD's 2018 Base Erosion and Profit Shifting Interim Report, the three most salient and common features of digitalized businesses are

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138 Hadzhieva, *supra* note 26, at 14.

139 OECD, TAX CHALLENGES, *supra* note 12, at 14.

140 Hadzhieva, *supra* note 26, at 14.

141 OECD, TAX CHALLENGES, *supra* note 12, at 38.

142 Hadzhieva, *supra* note 26, at 14.

143 OECD, TAX CHALLENGES, *supra* note 12, at 52.

144 *Id.*

145 Hadzhieva, *supra* note 26, at 14.

146 *Id.*

cross-jurisdictional scale without mass, the heavy reliance on intangible assets, and the importance of data, user participation, and network effects.[147] Cross-jurisdictional scale without mass refers to the fact that digitalization "allows some highly digitali[z]ed enterprises to be heavily involved in the economic life of a jurisdiction without any, or any significant, physical presence."[148] Heavy reliance on intangible assets means that investments in IP and "the intense use of IP assets such as software and algorithms supporting [ ] platforms, websites, and many other crucial functions" are important aspects of the business models of many digital businesses.[149] Data, user-generated content, and network effects from increased participation are also central to the business models of highly digitalized businesses; in fact, some digital businesses, such as social media networks, would not exist without a high level of user participation.[150] These three characteristics are not exclusive to digital businesses, but they are more prevalent among digital businesses and are helpful for defining what counts as a digital business.

2. The three main business models for digital businesses are the value network, the value shop, and the value chain.

A common way of characterizing traditional businesses is based on their business model, especially where the business generates value. Because existing tax systems are based on the principle of taxing profits where value is created,[151] understanding how value creation in a digital business differs from that of a traditional business will be helpful for defining what counts as a digital business for tax purposes.

Digital businesses can take the general form of three different business models: the value network, the value shop, and the value chain. Highly digitalized businesses often take the business model form of value networks.[152] In a value network, value is created by organizing and facilitating an exchange between users through the business's mediating technology.[153] This type of business model leads to revenue generation that often differs from non-digital businesses.

> Revenue in value networks may be generated through subscription fees (e.g., LinkedIn Premium) or pay-as-you-go fees when services are consumed (e.g., Airbnb, BlaBlaCar). In other cases, such as Instagram, Facebook, Twitter and Weibo, the business may, in what may be perceived by some countries as a type of barter transaction, offer access to the platform without a demand for financial compensation upon the user providing some input valuable to the

147 OECD, TAX CHALLENGES, *supra* note 12, at 24.

148 *Id.*

149 *Id.*

150 *Id.*

151 Hadzhieva, *supra* note 26, at 19; *Proposal for a Council Directive*, *supra* note 12.

152 OECD, TAX CHALLENGES, *supra* note 12, at 38.

153 *Id.*

> platform operator. Such input could be personal information about the user's interests that can be employed to generate revenue from targeted advertising. It could also be content accessible by other users, which increases the platform's utility and value.[154]

The second type of business model that is common among digital businesses is the value shop.[155] In a value shop, a business uses its technology to solve a specific customer demand or problem, such as specialized data analysis, software development, or cloud computing.[156] The final type of business model, the value chain, is less common among digital businesses. In a value chain, a business designs, produces, markets, delivers, and supports its products.[157] The value chain most often describes traditional businesses that produce tangible goods, but can also include businesses that operate as resellers of goods and businesses that produce intangible goods or services such as movies, games, music, or software.[158] Additionally, as the business landscape and global economy increase in complexity, many digital businesses span several of these three general business models.[159] "For example, Amazon's retail business is considered a value chain . . . whereas Amazon Marketplace, which links buyers and sellers in order for them to trade, is considered a value network, and Amazon Web Services is considered a value shop."[160]

3. A definition of digital business for tax purposes must consider these features and business models and the problems they create for taxing authorities.

The most salient features of digital businesses, combined with the use of new business models such as value networks, create certain problems for taxing authorities as they attempt to tax these businesses. Cross-jurisdictional scale without mass allows "a growing number of businesses [to] have an economic presence in a jurisdiction without having a physical presence."[161] As noted in Section III of this Comment, a lack of a physical presence could lead to an inability to tax such business's income under current bilateral tax treaties. Heavy reliance on intangible assets means that "[t]he location in which a business' intangible assets are controlled/managed can [ ] have a material impact on where that business' profits are subject to tax" regardless of where those IP rights are used

154 *Id.* at 39.

155 *Id.* at 40.

156 *Id.*

157 *Id.* at 38.

158 *Id.* at 38–39.

159 *Id.* at 42.

160 *Id.*

161 *Id.* at 51.

to generate revenue.[162] Heavy reliance on intangibles also makes it easier for "companies to structure themselves to minimi[z]e their tax liabilities and makes it more cumbersome for tax authorities to assess how income from such assets should be identified, valued and allocated amongst different parts of multinational groups."[163] The importance of data, user participation, and network effects, especially when used in a value network business model, can lead to barter transactions in which the digital business provides non-financial compensation (for example, data hosting, email services, or digital entertainment) to users in exchange for user-generated content and the ability to collect the users' data.[164] Today's income tax systems rarely capture this type of barter exchange (in which no cash payment is made on either side of the transaction), but many believe that this type of transaction should be subject to taxation.[165] By way of summary, the EC notes that

> [t]he application of the current corporate tax rules to the digital economy has led to a misalignment between the place where the profits are taxed and the place where value is created. In particular, the current rules no longer fit the present context where online trading across borders with no physical presence has been facilitated, where businesses largely rely on hard-to-value intangible assets, and where user generated content and data collection have become core activities for the value creation of digital businesses.[166]

A definition of digital services must consider each of these characteristics of digital businesses and business models and the problems they create for taxing authorities. Additionally, the perfect definition would consider that the characteristics of digital businesses and business models are not exclusive to digital businesses nor comprehensive of digital businesses that pose problems for the existing tax systems. Not all digital businesses reflect the characteristics described above, and sometimes non-digital businesses can have those characteristics. For example, a traditional manufacturing business can have cross-jurisdictional scale without mass by selling products in countries where it does not have a manufacturing site.[167] Additionally, non-digital businesses can use the value network and value shop business models, and digital businesses can use the value chain business model. For example, a traditional employment agency uses the value network business model by bringing together employers and job seekers.[168]

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162 *Id.* at 52.

163 Hadzhieva, *supra* note 26, at 17.

164 OECD, TAX CHALLENGES, *supra* note 12, at 58–59.

165 *Id.* at 59.

166 *Proposal for a Council Directive*, *supra* note 12, at 1.

167 OECD, TAX CHALLENGES, *supra* note 12, at 38.

168 *Id.*

4. The EC's definition of digital services accounts for the wide variance in the characteristics and business models of digital businesses.

The EC considered these problems in defining digital businesses in its proposed solution to the taxation challenges posed by digital businesses.[169] The EC defines "digital services" as "services which are delivered over the internet or an electronic network and the nature of which renders their supply essentially automated and involving minimal human intervention, and impossible to ensure in the absence of information technology."[170] Its proposed definition explicitly includes:

> (a) the supply of digitized products generally, including software and changes to or upgrades of software;
>
> (b) services providing or supporting a business or personal presence on an electronic network such as a website or a webpage;
>
> (c) services automatically generated from a computer via the internet or an electronic network, in response to specific data input by the recipient;
>
> (d) the transfer for consideration of the right to put goods or services up for sale on an internet site operating as an online market on which potential buyers make their bids by an automated procedure and on which the parties are notified of a sale by electronic mail automatically generated from a computer;
>
> (e) Internet Service Packages (ISP) of information in which the telecommunications component forms an ancillary and subordinate part, in other words packages going beyond mere internet access and including other elements such as content pages giving access to news, weather or travel reports, playgrounds, website hosting, access to online debates or any other similar elements . . . .[171]

According to the EC's guidance on this definition, "involving minimal human intervention" refers to the amount of human service provided by the business "without any regard to the level of human intervention on the side of the user."[172] A business that "initially sets up a system, regularly maintains the system, or repairs it in cases of problems linked with its functioning" will be considered to involve only a "minimal human intervention" and thus be providing a digital service.[173] Additionally, "the sale of goods or other services which is facilitated by using the internet or an electronic network" is explicitly excluded from the definition of digital services.[174] According to the EC's guidance, "giving access [ ] to a digital

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169 *Proposal for a Council Directive*, *supra* note 12.

170 *Id.* at 14.

171 *Id.* at 14–15.

172 *Id.* at 7.

173 *Id.*

174 *Id.* at 15.

marketplace for buying and selling cars is a digital service, but the sale of a car itself via such a website is not."[175]

This definition of digital services appears to recognize and account for the difference between truly digital businesses and traditional businesses that have adopted some aspects of digitalization. By excluding the mere sale of goods or services over the internet and requiring only minimal human intervention, the definition excludes many businesses that might involve some aspects of digitalization or digital service (such as a manufacturer with an online webstore) but whose traditional business models of producing and selling goods do not pose the same problems to the tax system that truly digital businesses pose.

The EC's proposed solution to BEPS uses the term "significant digital presence" to describe when a digital business has enough of a presence in a country to be subject to taxes in that country.[176] The EC proposed three different ways for a business to meet the significant digital presence test. A business would have a significant digital presence in a country if 1) the business's revenues from providing digital services to users in the country exceed 7 million EUR in the tax period, 2) the number of users of the business's digital services in the country exceeds 100,000 in the tax period or 3) if the business's number of business-to-business contracts for digital services exceeds 3,000 in the tax period.[177]

These three tests for significant digital presence were intended to "reflect the reliance of digital businesses on a large user base, user engagement and user's contributions as well as the value created by users for these businesses."[178] The criteria therefore reflect the most salient characteristics of digital businesses. Additionally, the use of three different criteria reflects an understanding that digital businesses can assume various different business models[179] and tries to capture as many of these different models as possible. Finally, the minimum thresholds were designed to leave out trivial cases where profits from a digital presence are not even expected to be large enough to cover the cost of tax compliance.[180]

B. Description of Enacted and Proposed Digital Services Taxes

The French digital tax law imposes a 3 percent tax on revenue earned from digital services in France on all companies that earn more than 25 million EUR in

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175 *Id.* at 7.

176 *Id.* at 2.

177 *Id.* at 8.

178 *Id.* at 7–8.

179 *Id.*

180 *Id.*

French revenue and more than 750 million EUR in global revenue.[181] This law would affect over 24 companies, many of which are not French-based.[182] The passage of this law generated strong reactions around the world, most notably with the U.S. challenging the law as discriminatory against American companies and threatening to impose tariffs on France in response.[183] The U.S. and France later reached a deal of sorts about the law, under which France promised to repeal the law and refund any difference in tax amount once the OECD finalized its plans for a unified, international framework for the taxing of digital companies.[184]

As noted above, the EC's proposed permanent solution would allow a country to tax a business without a permanent establishment as long as that business had annual revenues of at least 7 million EUR in that country, more than 100,000 users in that country annually, or over 3,000 business contracts for digital services created annually.[185] This solution may require the amendment of most bilateral and multilateral tax treaties which still require a business to have a physical location in the country in order for that country to tax the business.

The OECD has "committed to continue working toward a consensus-based long-term solution"[186] and has established a Program of Work for coming to a long-term solution.[187] The Program of Work focuses on two major areas in which change and consensus is needed: 1) nexus requirements and profit allocation and 2) ensuring that a minimum global level of tax is paid.[188]

C. Analysis

Several scholars have pointed out that these proposed digital tax laws may violate bilateral and multilateral tax treaties.[189] It seems clear that companies falling under the proposed digital taxes may not meet the permanent establishment requirement under Articles 5 and 7 of the U.S.–France Treaty.

However, before the issue of permanent establishment arises, there is a more basic question of how to classify these digital taxes. The permanent establishment requirement applies only to taxes on "profits of an enterprise of a Contracting

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181 Wamsley, *supra* note 5.

182 Alderman, *supra* note 11.

183 Wamsley, *supra* note 5; Alderman, *supra* note 11.

184 Gold, *supra* note 22.

185 *See Proposal for a Council Directive*, *supra* note 12, art. 4.

186 OECD, *International Community Agrees*, *supra* note 16.

187 OECD, PROGRAMME OF WORK, *supra* note 17.

188 *Id.*

189 *See* Govindarajan et al., *supra* note 23; Gottlieb & Ali, *supra* note 23; Thompson & Grandjouan, *supra* note 23.

State."[190] The French digital tax is a tax on revenue, rather than income. It is not immediately clear that such a tax would be categorized as a tax on "business profits."

1. Under the typical understanding of the term "profits," the French tax is not a tax on profits.

Article 7 does not include an explicit definition of "profits,"[191] but the analysis must begin with whether the digital services tax on revenue qualifies as a tax on profits or not. Article 3 states that when the U.S. or France is applying the Treaty, any undefined terms will "have the meaning which [they have] under the taxation laws of that State."[192] The typical understanding of profit is revenue less expenses required to earn that revenue. Revenue refers to "the total amount of money the business receives . . . for its products and services."[193] Income, or profits, refers to what remains after expenses are subtracted from revenue.[194] This understanding is reflected in the U.S.'s income tax law which allows deductions for "all the ordinary and necessary business expenses" of the business.[195] This understanding is also reflected in France's corporate tax law (l'impôt sur les sociétés) which taxes profits (les bénéfices) earned in France and allows deductions for normal business expenses.[196] This understanding of profits is also reflected in Article 7 of the Treaty, which notes that the countries shall allow deductions for "expenses which are reasonably connected with such profits[.]"[197] The French digital tax allows no such deduction of expenses. Given this understanding of the difference between revenue and profit, it seems unlikely that the French digital tax's explicit tax on *revenues* without a deduction for any expenses would be considered a tax on business profits.

In further support of this argument that the French digital tax is not a tax on business profits, sales taxes are generally levied on the total sales prices, which is equal to the total revenues, from the goods or services being taxed.[198] Sales taxes are classified as consumption taxes rather than income taxes (see Section II.A

190 U.S.–France Treaty, *supra* note 1, art. 7.

191 *See id.*

192 U.S.–France Treaty, *supra* note 1, art. 3.

193 Jane Caror et al., *Income vs. Revenue*, DIFFEN, http://perma.cc/UY9M-T5BL.

194 *Id.*; Claire Boyte-White, *Revenue vs. Income: What's the Difference?*, INVESTOPEDIA (Apr. 14, 2019), http://perma.cc/48KD-P42Y.

195 26 U.S.C. § 162(a).

196 *Impôt sur les Sociétés*, DIRECTION GÉNÉRALE DES FINANCES PUBLIQUES, http://perma.cc/Q858-V9HG; *Overview of the French Tax System*, DIRECTION GÉNÉRALE DES FINANCES PUBLIQUES 14 (2017), http://perma.cc/4NUU-8ZRM; Code Général des Impôts [General Tax Code] art. 39.

197 U.S.–France Treaty, *supra* note 1, art. 7.

198 Aucutt, *supra* note 35, ¶ 401.2.

above). The French tax on revenue seems more like a sales tax than an income tax. This characterization as a consumption tax seems especially apt considering that, shortly after France announced its digital services tax, Amazon announced that it would increase the Amazon Marketplace fees it charges its sellers by 3 percent (which Amazon then expects to be passed on to consumers in the form of higher prices).[199] This method of passing taxes through to the ultimate individual consumer is a hallmark of consumption taxes (rather than income taxes). These considerations would seem to imply that the French digital tax is not a tax on business profits under Article 7 of the Treaty.

2. Revenue was likely not intended to be considered an "element of income" under the Treaty.

One counterargument to the conclusion that the French tax is not within the scope of the Treaty is based on an understanding of the term "element of income." Article 2 of the Treaty states that "all [French] taxes imposed on behalf of the State, irrespective of the manner in which they are levied, on total income, on total capital, or on *elements of income* or of capital" are subject to the Treaty.[200] Revenue as a whole could be considered an element of income because income equals revenue less expenses. This would imply that a tax on revenue would be subject to the Treaty.

However, bilateral tax treaties that are based on the OECD's model convention should be interpreted using the commentaries to the model convention.[201] The commentaries to the 1992 OECD Model Tax Convention, which was the model in effect when the 1996 U.S.–France Tax Treaty was signed and ratified, refer to "items of income" several times, but never refer to revenue as an "item of income."[202] The Model Tax Convention commentaries explicitly acknowledge "dividends,"[203] "interest,"[204] "royalties,"[205] "wages,"[206] and "salaries"[207] as items or classes of income that are subject to the Treaty. Each of these items is an element of income, in the sense that each is a component included in the calculation of income. Yet each of these items is much narrower

199 Simon Chandler, *Amazon Makes Marketplace Sellers Pay for French Digital Tax*, FORBES (Aug. 19, 2019), http://perma.cc/24DE-MNZZ.

200 U.S.–France Treaty, *supra* note 1, art. 2 (emphasis added).

201 OECD PUBLISHING, MODEL TAX CONVENTION ON INCOME AND ON CAPITAL: CONDENSED VERSION 7 (1992), http://perma.cc/M69R-QCH8.

202 *Id.* at 12–13, 53.

203 *Id.* at 12.

204 *Id.*

205 *Id.* at 13.

206 *Id.* at 53.

207 *Id.*

than the broad term "revenue." If the drafters of the Model Tax Convention had intended that taxes on revenue be considered taxes on "elements of income" and thus subject to the Treaty, it seems likely that the commentary would have listed "revenue" when it listed the other items and classes of income that are subject to the Treaty. This leads to the inference that, although revenue is involved in the calculation of income and therefore may technically be considered an element or item of income, the parties to the Treaty did not intend for revenue to be considered an element of income. Therefore, it seems likely that taxes on revenue were intended to be outside the scope of the Treaty and not subject to the permanent establishment requirement.

3. The Treaty would likely be interpreted to give effect to the parties' intents, which would mean that the French tax is not within the scope of the Treaty.

A second counterargument to the conclusion that the French tax is outside the scope of the Treaty is based on the purpose of the Treaty. The purpose of this Treaty is the "avoidance of double taxation and the prevention of fiscal evasion."[208] One could argue that if France taxed the revenues of these companies, but those same revenues were later taxed as income by the U.S., one of the primary purposes of the Treaty would be frustrated. A broad reading of the Treaty in light of the Treaty's purpose would imply that the French tax on revenue should be covered by the Treaty. The Vienna Convention on the Law of Treaties would seem to support such a broad reading. The Vienna Convention provides guidelines for the interpretation of international treaties and states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[209] This differs from the contractual, or intentionalism, approach by focusing on the broad goals of the treaty rather than the subjective intent of the parties.[210] This broad reading could lead to an interpretation that, in light of the goal of preventing double taxation, the French digital tax is prohibited.

However, because a tax on revenues is likely to be passed onto the final consumer and is only collected by the taxing authority from the business for ease of collection purposes, there is arguably no double taxation in the typical sense because the tax burden is borne by different entities (the revenue tax is borne by the individual consumers and the income tax is borne by the business). Across a wide range of empirical analyses, it has been found that anywhere from 60 percent

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208 U.S.–France Treaty, *supra* note 1; *see* Rebecca M. Kysar, *Interpreting Tax Treaties*, 101 IOWA L. REV. 1387 (2016) (suggesting that tax treaties should be interpreted in a "pragmatic fashion").

209 Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

210 Kysar, *supra* note 208, at 1402–03.

to over 100 percent of sales taxes are passed on to the final consumer.[211] Shortly after the French tax was announced, Amazon announced that it would pass the tax completely on to its third-party sellers in the form of higher fees.[212] A study by Deloitte about the ultimate effects of the French tax estimated that large digital businesses would be able to shift, on average, 96 percent of the tax burden to individual consumers and businesses who use their digital platforms.[213] The study estimated that individual consumers would bear 57 percent of the ultimate tax burden.[214] To the extent that the French tax is viewed as being imposed primarily on the final consumers, there would be no double taxation and thus no need to interpret the Treaty in such a broad manner.

Additionally, U.S. courts generally take a contractual, rather than statutory, approach to interpreting international tax treaties and, thus, attempt to interpret treaties to give effect to the parties' intentions.[215] The Vienna Convention was signed by the U.S. on April 24, 1970, but the U.S. Senate has never ratified the convention.[216] The U.S. State Department notes that the U.S. "considers many of the provisions of the [Vienna Convention] to constitute customary international law on the law of treaties."[217] However, the U.S. Supreme Court "has only cited to [the Vienna Convention] twice and in an incidental fashion," which leads some to question its authority in the U.S.[218] Using the contractual approach favored by U.S. courts, the "primary object of interpretation is to ascertain the meaning intended by the parties rather than focus simply on the text."[219]

France is neither a party nor a signatory to the Vienna Convention,[220] and French judges do not explicitly refer to the Vienna Convention when interpreting treaties.[221] Although scholars have found it difficult "to determine positively the

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211 JULIEN PELLEFIGUE, THE FRENCH DIGITAL SERVICE TAX: AN ECONOMIC IMPACT ASSESSMENT 10–11 (2019), http://perma.cc/MC5L-MFQY.

212 Chandler, *supra* note 199.

213 Pellefigue, *supra* note 211, at 27–28.

214 *Id.* at 27.

215 Kysar, *supra* note 208, at 1397; *see* United States v. Stuart, 489 U.S. 353 (1989); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993); Olympic Airways v. Husain, 540 U.S. 644, 656–57 (2004).

216 Kysar, *supra* note 208, at 1402.

217 *Vienna Convention on the Law of Treaties*, U.S. DEP'T OF STATE (Jan. 20, 2017), http://perma.cc/5BNB-ZHZV.

218 Kysar, *supra* note 208, at 1402.

219 *Id.* at 1397 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 325, reporters' note 4 (A.L.I. 1986) (internal quotation marks omitted)).

220 Vienna Convention, *supra* note 209.

221 Martin A. Rogoff, *Application of Treaties and Decisions of International Tribunals in the United States and France: Reflections on Recent Practice*, 58 ME. L. REV. 405, 455–56, 455 n.290 (2006).

methods of interpretation of French judges,"[222] French courts do consider the intent of the treaty framers[223] as well as the treaty's purpose.[224]

Using an intentionalism approach, it seems that the U.S.–France Treaty would not be read to apply to the French digital tax. The Treaty makes no mention of any consumption taxes levied by either the U.S. or France and does not seem to be intended to disrupt consumption taxes in either countries (for example, neither the French value added tax nor U.S. sales taxes are affected by the Treaty). Furthermore, it is generally understood that consumption taxes can be imposed by the state in which the consumption occurs.[225] Therefore, it seems likely that the intent of the parties was that consumption taxes would fall outside of the scope of the U.S.–France Treaty and that each country would be free to impose consumption taxes without the restraints of the Treaty (and therefore without the permanent establishment requirement).

4. The French tax does not come within the scope of the U.S.–France Treaty and therefore does not violate the Treaty.

The French tax seems most aptly characterized as a consumption tax and therefore outside the scope of international tax treaties. Despite the counterarguments, it seems most likely that the French digital service tax does not constitute a tax on "business profits" under Article 7 of the Treaty. Under the typical meaning of "profits" and given the specific terms of the Treaty, the French digital services tax does not fall within this understanding. Even considering the Treaty's inclusion of an "element of income" within the Treaty's scope, it seems most likely that the tax imposed on revenue does not fall within the meaning of an element of income. Application of an intentionalism approach to interpreting the Treaty would seem to lead to the conclusion that the Treaty was not intended to reach consumption taxes such as a tax on revenues. The French digital tax seems to be most aptly characterized as a consumption tax on the provision of digital services that falls outside the scope of the U.S.–France Treaty and therefore is not in violation of international tax treaties.[226]

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222 *Id.* at 455 n.290 (quoting Emmanuel Decaux, Pierre Michel Eisemann, Valerie Goessel-Le Bihan & Brigitte Stem., *France*, *in* L'INTÉGRATION DU DROIT INTERNATIONAL ET COMMUNAUTAIRE DANS L'ORDRE JURIDIQUE NATIONAL: ÉTUDE DE LA PRATIQUE EN EUROPE 241, 269 (Pierre Michel Eisemann ed., 1996)).

223 *Id.* at 450.

224 *Id.* at 455; Vienna Convention, *supra* note 209, art. 31 (stating that "[a] treaty shall be interpreted in good faith . . . in the light of its object and purpose.").

225 Walter Hellerstein, *Jurisdiction to Tax Income and Consumption in The New Economy: A Theoretical and Comparative Perspective*, 38 GA. L. REV. 1, 52–53 (2003).

226 *See generally*, Patricia A. Brown, Professor, U. Miami L. Sch., Do Tax Treaties Matter in a Post-BEPS World?, Remarks at The University of Chicago Law School's 72nd Annual Federal Tax Conference, Session 1 (Nov. 8, 2019).

V. CONCLUSION

The prevalence of digital services in the modern economy has generated controversy about where and how much digital businesses should be taxed. As multinational organizations, such as the OECD and EC, work toward agreeable solutions, many countries (notably France) have become impatient and continue to enact—or threaten to enact—their own unilateral taxes on digital businesses.[227] Such unilateral action has drawn criticism for allegedly further complicating this already muddled area of international tax law, increasing compliance burdens, increasing double taxation, and adversely impacting global investments and technological developments.[228] Additionally, scholars have noted that these digital taxes may violate existing law by violating international tax treaties, constituting illegal state aid, violating non-discrimination clauses of national constitutions, and/or violating the E.U.'s fundamental freedom to provide services.[229] Questions of illegal state aid, constitutionality, and European fundamental freedom are beyond the scope of this Comment,[230] but this Comment argues that the French digital tax does not violate existing international tax treaties. Because the French tax is a tax on revenues rather than profits, it is most aptly characterized as a consumption tax rather than an income tax and thus does not fall within the scope of the international treaties for the prevention of double taxation. Because many bilateral tax treaties are based on the OECD Model Tax Convention (including the U.S.–France Treaty), the analysis in this Comment can be applied to a wide array of international tax treaties and could be useful if other countries follow France in instituting taxes on digital businesses. Although there are still open questions about the legality of the French tax and similar taxes, it seems likely that they do not violate existing international tax treaties.

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227 Wamsley, *supra* note 5; OECD, PROGRAMME OF WORK, *supra* note 17, at 7.

228 OECD, PROGRAMME OF WORK, *supra* note 17, at 7.

229 Govindarajan et al., *supra* note 23; Gottlieb & Ali, *supra* note 23.

230 For an analysis of whether digital tax laws violate the E.U.'s fundamental freedoms, see Ruth Mason & Leopoldo Parada, *International Spotlight: The Legality of Digital Taxes in Europe*, 40 VA. TAX REV. 175 (2020) (concluding that such taxes do violate E.U. law because, as applied, they discriminate on the basis of nationality).