International Economic Law and The Challenges in Imposing the Digital Tax in Developing African Countries

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The entire idea of international economic law (IEL) is being and has been transformed by digitalisation. Trading of goods and supplies of services online is resulting in economic gains and wealth creation but is not being tapped by the tax authorities. This is because the understanding of tax being sourced through digital transactions has not been effectively dealt with by legislation. However, this is now under consideration by the OECD, the African Tax and Administration Forum (ATAF) and the European Commission *frameworks. So, does Africa have a position in tapping the digital tax under these contemporary developments in IEL?*

Digitalisation is changing the way we understand IEL. New streams of revenue generation resulting from online or digital economic activities remains untapped and unapplied towards steering economic growth. Despite the fact that these new digital models have been met with novel regulatory and tax approaches globally, they are proving problematic in terms of identifying the activity upon which tax should be based. This is because traditional tax rules do not contemplate digital aspects as sources of taxable income. The role of IEL in the digitalisation of the economy therefore, merits consideration, specifically in the area of domestic resource mobilisation as a factor for economic growth especially in Africa.

There is a growing global consensus that the digital economy is relatively undertaxed when compared with traditional businesses. Certain inherent characteristics such as reliance on cross border provision of services without physical presence, easy transfers of intangible assets, and novel ways to create value make it particularly easy for enterprises to limit their tax liabilities and sometimes utilise this forum to evade taxation. In order to provide a solution to this problem, domestic states, regional blocs and international bodies have recommended the reform of the corporate tax framework to align it with income generating transactions within the digital economy. The latter has been updated in European Member States to consider the changes resulting from digitalization, with a move in particular toward a destination-based system. This means that the country from where the income is generated – through, for example, digital advertising – is the proper state to tax such income.

African states, however, are unable to benefit from this system since the bilateral treaties signed with countries whose companies have a digital presence in African markets (for example Jumia, Airbnb and Uber) do not recognize digital presence as a permanent establishment to trigger taxation. Online platforms providing services to users in the form of contacting independent taxi service providers and decentralized financial transactions or money transfers, without physical presence have created a mismatch between tax rules and digitalization. This has resulted in domestic states losing revenue and an economic presence. It has resulted in political differences on the question of which state is to tax income earned through the digital economy. This means that there is a gap in general policy recommendations on taxing the digital economy. Although academic works have addressed the challenges of taxing the digital economy, there has been little systematic description on what policy recommendations ought to be made that would provide an effective template for developing African countries to rely on in enacting their own laws.

At both the global and domestic level, imposing the digital tax is top on the agenda for governments. However, efforts towards unilateral measures have been curbed on the understanding that a harmonised universal framework for imposing the digital tax will prove more beneficial. Digitalisation has thus challenged the concept of tax sovereignty. States from both the global south and north are re-examining and debating the extent to which they should cede control over their digital tax policies to achieve global economic efficiency in an interdependent world. IEL affects domestic policies and law, and domestic politics recursively affects international relations and thus IEL. What role does and should IEL play in regulating transnational taxation in a rapidly digitalizing world?

International trade and economic integration agreements support globalization and in turn digitalisation (since the latter is the resulting effect of the former) which has excessively constrained national policy space in the governance of the digital tax. It has done this by a web of multilateral, plurilateral and bilateral trade, investment and economic integration agreements between the OECD and the developing world. These agreements regulate intellectual property rights, the establishment and operation of services such as finance, and the administrative process, and importantly the right to tax. Shaffer argues that markets require rules to facilitate economic exchange, create stability and provide a sense of legitimacy. Each state then provides the requisite regulatory framework within which the markets operate either physically or digitally. Economically, the state enables the mobilisation of resources. Politically, the state fosters a liberal market and legally, the state creates laws and institutions to enable the efficient running of the market. In this triad model, the generation of tax revenue which also results from online business activities becomes critical to ensure economic prosperity for the state that has allowed its territory to be the source of global commerce. The key challenge, however, has been to raise this digital tax.

There are specific salient features of digital businesses that are particularly pertinent to taxation challenges. These features have also been highlighted by the OECD, ATAF and the EC. Digital enterprises rely heavily on intangible assets, particularly intellectual property, that are often hard to value. Furthermore, user participation, user generated content, network effects (for example, when users are the building blocks of networks) and data collection and mining are common for highly digitalized businesses. While they are precious assets in a digital economy and help to generate profits, it is difficult to value and tax these aspects.

While valuing intangible assets is very difficult, they can be moved around the globe instantaneously in the digital world and this provides opportunities for aggressive tax planning. Although permanent establishment exists, by shifting intangible assets to low tax jurisdictions companies can lower their effective tax rates significantly. Despite recognition of these challenges at the international level, the outcome of the work of bodies such as the OECD has been limited and there is not yet for example even a common understanding of the concept of '*value creation*' in relation to the digital economy. All this creates a challenging disconnect between where the value is created, and taxes are paid. In addition, it affects revenue generation in Africa. Hence, the need to explore these challenges becomes imperative.

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