

# Taxing Multinational Enterprises Under ‘Unitary Taxation’: Possible Implications for SDGs Implementation Programmes

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**Abstract:** *Corporate income tax payable by corporations, particularly the multinational enterprises (MNEs) forms one of the important sources of domestic taxation. Nevertheless, there is allegation of widespread tax avoidance by MNEs through exploiting the gaps and loopholes in the existing taxation system. Regulatory measures are being taken to prevent these tax avoidances, both at the domestic and international levels but no effective outcome is seen yet. In this context of the failure of the present taxation system, different alternative options are emerging, one of which is unitary taxation system. There is consensus among international tax practitioners and scholars that unitary system, if implemented worldwide, could tackle the tax avoidance by MNEs effectively and ensure the fair share of corporate income tax to those countries where the MNEs run their actual business activities. Consequently, it is proposed in this study that if the governments get more tax revenues under unitary taxation system, they can use this money for Sustainable Development Goals (SDGs) implementation programmes as SDGs implementation programmes need huge amount of finance in addition to other courses of action.*

**Keywords:** Corporate Income Tax, Multinational Enterprises (MNEs), Tax Avoidance, International Double Taxation, SDGs, Unitary Taxation.

## 1. Introduction

Taxation is the process of imposing and collecting tax which is a compulsory exaction of money imposed on citizens by the government.<sup>1</sup> Such exaction of money is justified worldwide mainly by three rationales: means of provision for public expenditure; ways of distributing wealth in the society; and means

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<sup>1</sup> Newman U Richards, ‘Sustainable development goals and taxation in Nigeria’ (2020) Commonwealth Law Bulletin <<https://doi.org/10.1080/03050718.2020.1818594>> accessed 20 June 2024.

of economic stabilisation.<sup>2</sup> However, there are contrary philosophies as well disfavoring the idea of taxation.<sup>3</sup>

Typically, tax bases of a country comprise different type of tax such as personal income tax, value added tax (VAT), and corporate income tax (CIT). CIT is the tax paid by corporations on their business profits. The corporations paying CIT can be domestic corporations or MNEs (also known as transnational corporations, TNCs).<sup>4</sup> In contemporary globalised world, MNEs are the major global actors due to their influential position in international trade and investment. For example, in 2018, only 17 global financial multinationals collectively managed 41.1 trillion USD, more than half of the global Gross Domestic Product (GDP) value.<sup>5</sup> As per a report of 2018, around 60,000 MNEs with 500,000 subsidiaries were in operation worldwide,<sup>6</sup> which is anticipated to increase manifold at present. By taking advantage of their transnational business operations, MNEs also enjoy preferable position in matters of taxation which is essentially territorial, compared to the domestic corporations.<sup>7</sup> By taking resort to different tax planning strategies they avoid paying taxes against the profits they made from their worldwide businesses.<sup>8</sup> Accordingly, prevention of tax avoidance by MNEs is a global concern and the world community is taking different regulatory measures but with little success. Different alternative systems are also emerging in such scenarios. Unitary taxation is one of them. Under this system, tax avoidance by MNEs is expected to be tackled successfully and the governments are expected to get more tax revenues.

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<sup>2</sup> Lynne Oats and Emer Mulligan, *Principles of International Taxation* (7<sup>th</sup> edn, Bloomsbury Professional 2019) 35.

<sup>3</sup> For example, Austrian-British economist and philosopher Friedrich A Hayek rejected the redistributive role of taxation and termed 'taxation of private property' as 'attack on civilisation'; American philosopher Robert Nozick equated 'taxation of earnings' with 'forced labour'. For details, see Friedrich A Hayek, *The Constitution of Liberty* (University of Chicago Press 1960) 306; Robert Nozick, *Anarchy, State, and Utopia* (Basic Books Inc 1974) 169.

<sup>4</sup> Organisation for Economic Co-operation and Development (OECD) defines MNE as '[C]ompanies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another'; See OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing 2011) 17.

<sup>5</sup> William I Robinson, *Global Police State* (Pluto Press 2020) 1.

<sup>6</sup> SciencesPo, 'Multinational Corporations' (World Atlas of Global Issues, 28 September 2018) <<https://espace-mondial-atlas.sciencespo.fr/en/topic-strategies-of-transnational-actors/article-3A11-EN-multinational-corporations.html>> accessed 1 August 2024.

<sup>7</sup> Sarah Godar, 'Multinational enterprises' profits and activity: What do we know?' (*EUTAX Observatory*, 19 May 2021) < <https://www.taxobservatory.eu/repository/mnes-profits-and-activity/>> accessed 2 August 2024.

<sup>8</sup> *ibid.*

On the other hand, in 2015, the world leaders have agreed to seventeen SDGs such as ending poverty and hunger, protecting the planet and ensuring global peace and prosperity to be achieved by 2030. For implementing such massive plans of action, the funding need is also emphasised, which was identified as 3.3 to 4.5 trillion USD per year in 2018.<sup>9</sup> Another recent estimate of UNCTAD stated that the annual funding need ranges from 5.4 trillion to 6.4 trillion USD from 2023 to 2030.<sup>10</sup>

In the aforementioned background, the present study will address two basic questions: *Firstly*, how far is unitary taxation a true alternative of existing system to taxing multinational enterprises? *Secondly*, what possible implications may unitary taxation create for SDGs implementation programmes?

The importance of the study lies in the fact that though there are plenty of separate studies on both issues, no comprehensive study is found connecting these two ideas except the brief work of Ezenagu.<sup>11</sup> He has briefly discussed the correlation in a policy brief by highlighting the tax avoidance practices adopted by the Canadian mining companies operating in African countries and how unitary taxation can help in this regard.

In answering the two questions raised, the study tries to accommodate two broad ideas in a single frame i.e. SDGs and taxation of MNEs under unitary taxation, each of which demands separate studies. Nevertheless, the study is undertaken to introduce a new way of connecting two apparently different concepts, which would expedite the developments of both concepts. The study is a doctrinal (non-empirical) one which mainly uses secondary sources of data such as books, journal articles, reports, working papers etc.

In answering the research questions raised herein, the study will be comprised of six sections. The first section is the introductory section outlining the background of the study, the research questions to be addressed, methodology etc. The second section will give a brief overview of the SDGs programmes and the relationship between SDGs programmes and taxation. This will be followed by the third section which would give a detailed overview of the existing taxation system to MNEs with particular emphasis on tax avoidance practices adopted by

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<sup>9</sup> United Nations Sustainable Development Group, 'Unlocking SDG Financing: Findings from Early Adopters' (July 2018) <<https://unsdg.un.org/resources/unlocking-sdg-financing-findings-early-adopters>> accessed 5 August 2024.

<sup>10</sup> UNCTAD, 'The costs of achieving the SDGs: About' <<https://unctad.org/sdg-costing/about>> accessed 5 August 2024.

<sup>11</sup> Alexander Ezenagu, 'Unitary Taxation of Multinationals: Implications for Sustainable Development' (Centre for Int. Governance Innovation Policy Brief No 4, November 2019) <[https://www.cigionline.org/static/documents/documents/SDG%20PB%20no.4\\_0.pdf](https://www.cigionline.org/static/documents/documents/SDG%20PB%20no.4_0.pdf)> accessed 4 August 2024.

the MNEs and an evaluation of the regulatory responses to tackle these practices. The fourth section would delineate the alternative proposal to existing system of taxing MNEs i.e. unitary taxation with emphasis on the distinctiveness of this system and ways of transition to it. The fifth section would establish the link of the concept of unitary taxation with SDGs issue by showing the possible implications of unitary taxation for SDGs. The last section would conclude the study by summarising the main findings.

## **2. Relationship between SDGs and Taxation**

### **2.1 Brief Overview on SDGs**

Any discussion on SDGs cannot be fully appreciated without understanding its precursor, Millennium Development Goals (MDGs).<sup>12</sup> The concept of MDGs developed during 1990s and early 2000s due to the realisation by the world community of their responsibilities towards world's populations.<sup>13</sup> Such realisation did not come by choice, rather as an implied response to the worldwide criticisms of uneven distribution of benefits of globalisation and its impact on the world's vulnerable.<sup>14</sup> Formally the adoption of MDGs was preceded by a series of summits and conferences held during 1990s under the auspices of United Nations (UN) and the OECD articulation of a set of 'international development goals' under the heading 'Shaping the 21<sup>st</sup> Century Strategy' in 1996.<sup>15</sup>

Following the adoption of the UN Millennium Declaration in the UN Millennium Summit 2000, an expert group was convened to formulate the MDGs.<sup>16</sup> After formulating the goals centring on 'human development';<sup>17</sup> it was presented as an annex to a report from the Secretary General to the UN General Assembly (UNGA) in September 2001. The MDGs were considered to have been adopt-

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<sup>12</sup> Stephen Morton, David Pencheon and Neil Squires, 'Sustainable Development Goals (SDGs), and their implementation' (2017) 124 British Medical Bulletin 81, 83.

<sup>13</sup> This realisation is reflected in the United Nations Millennium Declaration, General Assembly resolution 55/2 of 8 September 2000, paragraph 2.

<sup>14</sup> Jane Briant Carant, 'Unheard voices: a critical discourse analysis of the Millennium Development Goals' evolution into the Sustainable Development Goals' (2017)38(1) Third World Quarterly 16.

<sup>15</sup> Mitu Sengupta, 'The Sustainable Development Goals: An Assessment of Ambition' [2016] *E-International Relations* <<https://www.e-ir.info/2016/01/18/the-sustainable-development-goals-an-assessment-of-ambition/>> accessed 12 June 2024.

<sup>16</sup> *ibid.*

<sup>17</sup> Human Development Report 1997 defines human developments as 'a process of widening people' choices as well as raising the level of wellbeing achieved', for details see UNDP, Human Development Report (OUP 1997) 15.

ed formally with the acceptance of this report.<sup>18</sup> The MDGs encompassed eight goals, namely eradicating extreme poverty and hunger, achieving universal primary education, promoting gender equality and empowering women, improving maternal health, reducing child mortality, combating diseases like HIV/AIDS, ensuring environmental sustainability and developing a global partnership for development to be achieved by 2015.<sup>19</sup> Though the concept of MDGs was praised for reaching consensus on certain global development agendas by the world leaders, it was criticised rigorously from different quarters on several counts.<sup>20</sup> The foremost criticisms were: inclusion of extraordinarily narrow agendas, devised in a top-down manner without a democratic process of consultation in adoption; insufficient groundwork in selecting the priorities and in evaluating performance; simplistic vision without going into depth of those issues; and missing some of the pressing contemporary global challenges such as unemployment and wage disparity, climate change, financial market volatility etc.<sup>21</sup>

With the approaching of MDGs target year 2015, an Open Working Group (OWG) with representatives from UN member countries was set up in the Rio+20 summit in 2012 to decide on the post-MDGs course of action.<sup>22</sup> Unlike the MDGs that had been criticised for being set in the technocratic process, the formulation of the new agendas was consciously set up as a process of political negotiations amongst states through a process of intense diplomatic negotiations, open multi-stakeholder debates, and structured dialogue with major interest groups.<sup>23</sup> After thirteen rounds of thematic consultations with national governments, civil society, and the private sector, the OWG completed its mandate in July 2014.<sup>24</sup> It publishing a draft text with seventeen goals and one hundred and sixty-nine targets under the banner ‘Sustainable Development Goals’ to be achieved by 2030 and as a replacement of MDGs.<sup>25</sup> This report culminated into the unanimous adoption of the SDGs by the UNGA at the UN Sustainable Development Summit 2015.<sup>26</sup>

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<sup>18</sup> Sengupta (n 15).

<sup>19</sup> For details on MDGs, see UN, ‘United Nations Millennium Development Goals and Beyond 2015’ <<https://www.un.org/millenniumgoals/bkgd.shtml>> accessed 10 June 2024.

<sup>20</sup> Sakiko Fukuda-Parr, ‘From the Millennium Development Goals to the Sustainable Development Goals: shifts in purpose, concept, and politics of global goal setting for development’ (2016) 24(1) *Gender & Development* 43, 45.

<sup>21</sup> For details, see Morton, Pencheon and Squires (n 12) 82; Fukuda-Parr (n 20) 45-46; Sengupta (n 15); Carant (n 14).

<sup>22</sup> Ranjula Bali Swain, ‘A critical analysis of the Sustainable Development Goals’ in Walter Leal Filho (eds), *Handbook of Sustainability Science and Research* (Springer 2018) 341.

<sup>23</sup> *ibid.*

<sup>24</sup> Sengupta (n 15).

<sup>25</sup> *ibid.*

<sup>26</sup> UNGA Res 70/1 ‘Transforming our world: the 2030 Agenda for Sustainable Development’ (25

The adoption of these SDGs was thought to be the shift of global focus on ‘sustainable development’<sup>27</sup> from the idea of ‘human development’.<sup>28</sup> In contrast to MDGs, SDGs are broader in scope being applicable to all countries and more detailed in content, covering three dimensions of sustainable development: economic growth, social inclusion, and environmental protection.<sup>29</sup> Another uniqueness of SDGs over the MDGs is its focus on means of implementation such as the mobilisation of financial resources, capacity-building and technology transfer, policy change, institutional transformation and global co-operation.<sup>30</sup>

In a nutshell, SDGs are a set of global plans of action for the next fifteen years from 2015 centring on five key elements (known as 5 Ps): People, Planet, Prosperity, Peace, and Partnership. An overview of these 17 SDGs with their targets and indicators<sup>31</sup> can be found in Appendix 1.

Although the SDGs were formulated after much deliberation for about three years, these are not free from loopholes. In the view of Easterly, who is most critical of SDGs, SDGs have three fundamental fallacies: they are more focused on commitments rather than actions; recommended actions are merely the ways inducing progress; and there is absence of specification as to who is going to undertake actions.<sup>32</sup> He also termed certain SDGs targets as merely unattainable such as ending poverty in all its forms and dimensions, universal health coverage, ending all preventable deaths before 2030, ending all forms of discrimination against all women and girls everywhere, and achieving full and productive employment and decent work for all women and men.<sup>33</sup>

Moreover, among the targets in each goal, there are ‘process target’ in addition to ‘outcome target’ which cannot be quantified, measured and monitored. For example, as to target 11c (supporting LDCs financially and technically in building sustainable and resilient buildings utilising local materials), even the UN

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September 2015) UN Doc A/RES/70/1.

<sup>27</sup> Brundtland Commission’s Report, 1987 defined sustainable development as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’, for details see World Commission on Environment and Development, *Our Common Future* (OUP 1987).

<sup>28</sup> Sengupta (n 15).

<sup>29</sup> Morton, Pencheon and Squires (n 12) 83.

<sup>30</sup> *ibid.*

<sup>31</sup> Targets are the specific goals to be achieved within each goal and the indicators are the parameters for evaluating performance in each target; for details, see UN, ‘Sustainable Development’ <<https://sdgs.un.org/goals>> accessed 15 June 2021; UN, ‘SDG indicators’ <<https://unstats.un.org/sdgs/indicators/database/>> accessed 15 June 2024.

<sup>32</sup> William Easterly, ‘The Trouble with the Sustainable Development Goal’ (2015) 114(775) *Current History* 322.

<sup>33</sup> *ibid.*

failed to propose any performance indicator. Furthermore, though many goals are reinforcing, they are conflicting as well. For example, measures to promote access to food (Goal 2), water (Goal 6), and energy (Goal 7) if applied in an untenable manner, they can run counter to the notion of sustainable consumption and production (Goal 12), climate action (Goal 13), endanger life below water (Goal 14) and life on land (Goal 15).<sup>34</sup> Also, agricultural expansion (goal 2) may lead to deforestation and habitat degradation (goal 15). Moreover, due to broadness of agendas in each goal, implementation programme may face selectivity, simplification, and arbitrary national adaptation.<sup>35</sup>

As to the implementation of the SDGs, it is stated in the UN SDG Progress Report 2020 that except some progress in certain goals, the world is not on track to deliver its commitments to sustainable development by 2030.<sup>36</sup> Challenges in implementing the SDGs vary from region to region and country to country. However, one common challenge is the need for finance, particularly for the developing, LDCs and poor countries. For example, it was expressed in the ‘Asia and the Pacific SDG Progress Report 2019’ that ‘an estimated additional 1.5 trillion USD per year is needed to meet the SDGs in Asia’.<sup>37</sup> In such circumstance, taxation can play a vital role as a source of funding for SDGs; this topic will be highlighted in the next sub-section.

## 2.2 Relationship between SDGs Implementation and Taxation

As is mentioned in the last paragraph of the preceding sub-section, implementation of a voluminous development agenda like SDGs requires enormous financial resources. This fact is repeatedly articulated in a number of studies, reports and scholarly literatures from general and regional perspectives.<sup>38</sup>

<sup>34</sup> Xin Zhou and Mustafa Moïnuddin, *Sustainable Development Goals Interlinkages and Network Analysis: A practical tool for SDG integration and policy coherence* (IGES 2017) 4.

<sup>35</sup> Fukuda-Parr (n 20) 50.

<sup>36</sup> UN, ‘Report of the Secretary-General: Progress towards the Sustainable Development Goals’ (28 April 2020) UN Doc E/2020/57.

<sup>37</sup> Dorothee Fischer, ‘The challenges of implementing the Sustainable Development Goals in Asia’ (*EU Capacity4dev*, 27 January 2020) <<https://europa.eu/capacity4dev/articles/challenges-implementing-sustainable-development-goals-asia>> accessed 18 June 2024.

<sup>38</sup> For example, UNCTAD, *Investing in the SDGs: An Action Plan* (UNCTAD World Investment Report 2014); Carthal Long and Mark Miller ‘Taxation and the Sustainable Goals: Do Good Things happen to those who Tax More’ (ODI, 22 May 2017) <<https://www.odi.org/publications>> accessed 8 June 2024; ESCAP, *Tax policy for sustainable development in Asia and the Pacific* (UN, 2018); Temidayo Olabode Akenroye, Håvard Mogleiv Nygård and Ama Eyo, ‘Towards implementation of sustainable development goals (SDG) in developing nations: A useful funding framework’ (2018) 21(1) *International Area Studies Review* 3-5; Platform for Collaboration on Tax (PCT), *Taxation and SDGs* (Conference Report, 2018) 9-15; UN, ‘Financing for Sustainable Development Report 2019’ xvii <<https://www.un.org/development/desa/>>



The finance need is even more obvious for some SDGs (goals 1-4, 6, 7, 9, 11, and 13), as is identified in two separate studies of UNCTAD and Platform for Collaboration on Tax (PCT), a joint initiative of UN, IMF, OECD and WB.<sup>39</sup> Peter Thomson, the then President of the UNGA for 2016-2017 stated at his opening remarks of inaugurating ‘SDG Financing Lab’ that “financing the Sustainable Development Goals will require annual spending of around US\$6 trillion, or US\$90 trillion over 15 years”.<sup>40</sup>

For managing this huge finance needs, SDG 17 (target 17.1) puts emphasis on strengthening domestic resource mobilisation by improving domestic capacity for tax and other revenue collection in addition to other sources of finances. This fact underscores the importance of taxation in SDGs implementing programmes, which was also confirmed by the Addis Ababa Action Agenda (AAAA).<sup>41</sup> Taxation as a major source of funding for SDGs is also identified in a number of scholarly literatures.<sup>42</sup> UN Committee of Experts on International Cooperation in Tax Matters stated in a study of 2018 that “Taxation is one of the most important ways in which developing countries can mobilize domestic resources for investment in sustainable development”.<sup>43</sup>

Therefore, the importance of taxation as a source of funding for SDGs

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publications> accessed 10 June 2024; Eghosa Osa Ekhatior, ‘Barriers to Implementation of SDGs in Africa: The Need for Effective Business and Government Collaboration’ (*Afronomics Law Blog*, 29 November 2019) <<https://www.afronomicslaw.org/>> accessed 18 June 2024; Siobhán Airey, ‘Taxation Untapped: the potential of the UN Sustainable Development Goals to promote progressive International Tax Reform’ (2020) UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 6; Newman U Richards, ‘Sustainable development goals and taxation in Nigeria’ (2020) Commonwealth Law Bulletin <<https://doi.org/10.1080/03050718.2020.1818594>> accessed 20 June 2024.

<sup>39</sup> UNCTAD (n 38); Platform for Collaboration on Tax (PCT) (n 38).

<sup>40</sup> UN, ‘Opening of SDG Financing Lab’ (2017) <<https://www.un.org/pga/71/2017/04/18/opening-of-sdg-financing-lab/>> accessed 21 June 2024.

<sup>41</sup> For details, see UNGA Res 69/313 (27 July 2015) UN Doc A/RES/69/313, ANNEX para 22.

<sup>42</sup> Irma Johanna Mosquera Valderrama, Dries Lesage and Wouter Lips, ‘Tax and Development: The Link between International Taxation, the Base Erosion Profit Shifting Project and the 2030 Sustainable Development Agenda’ (2018) UNU-CRIS, Working Paper Series 4; Martin Hearson, ‘Fair tax for development’ (*UNA-UK*, 19 June 2019) <<https://www.sustainablegoals.org.uk/fair-tax-for-development/>> accessed 23 June 2024; Alice Pirlot, ‘A Legal Analysis of the Mutual Interactions between the UN Sustainable Development Goals (SDGs) & Taxation’ in Cécile Brokelind, Servaas van Thiel (eds) *Tax Sustainability in an EU and International Context* (IBFD 2020) 87; Edward Hainsworth and Rauda Amer, Implementation and Imagination: The role of taxation in achieving the Sustainable Development Goals’ (ICSD, September 2020) <<https://ic-sd.org/wpcontent/uploads/2020/11/Edward-Hainsworth.pdf>> accessed 23 July 2024.

<sup>43</sup> UN Committee of Experts on International Cooperation in Tax Matters, ‘The role of taxation and domestic resource mobilization in the implementation of the Sustainable Development Goals’ (3 October 2018) UN Doc E/C.18/2018/CRP.19.



implementation programme is beyond doubt. As stated in the introductory section, among different types of taxes collected by states, corporate income tax (CIT) remains a key source of government revenues,<sup>44</sup> particularly for the low-income countries, which is on average 16% compared to 8% for high-income countries.<sup>45</sup> Although CIT paid by MNEs comprises an important source of domestic taxation, MNEs are not paying their due taxes under the existing international taxation system by taking resort to different avoidance mechanisms despite numerous regulatory responses; these issues will be addressed in the next section.

### 3. Brief Overview of Existing Taxation System to MNEs

#### 3.1 Existing System of Taxing MNEs

Though the operations of MNEs are transnational, there is nothing like international taxation system for multinationals, rather the system is territorial where domestic tax authorities impose taxes on each component of the group.<sup>46</sup> Existing taxation system applicable to MNEs can be characterised by three principles, separate-enterprise arms-length principle (SE-ALP), residence principle and source principle.

From legal point of view, MNE has no existence of its own, rather constitutes a group of legally separated companies operating cross-border (usually one parent company or holding company and numerous affiliated subsidiary companies).<sup>47</sup> In consonance with this legal form, all the companies belonging to the same group are held separately liable for their taxable incomes and in determining pricing for transactions amongst the affiliated group members, arm's-length principle i.e. to treat the intra-firm transactions as if these were between independent enterprises engaged in open market transactions is followed.<sup>48</sup>

Due to transnational nature of MNEs' business activities, two jurisdictions are involved in the taxation matter i.e. resident country and source country. There is no uniformity as to the determination of resident country for tax purposes

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<sup>44</sup> OECD, 'Corporate tax remains a key revenue source, despite falling rates worldwide' <<https://www.oecd.org/tax/corporate-tax-remains-a-key-revenue-source-despite-falling-rates-worldwide.htm>> accessed 25 June 2024.

<sup>45</sup> Sol Picciotto, 'Taxing Multinational Enterprises as Unitary Firms' (2016) ICTD Working Paper No 53, 7.

<sup>46</sup> Peter T Muchlinski, *Multinational Enterprises and the Law* (3<sup>rd</sup> edn, OUP 2021) 256.

<sup>47</sup> For details on legal forms of MNE, see Muchlinski (n 46) chapter 2.

<sup>48</sup> Yuri Biondi, 'The Firm as an Enterprise Entity and the Tax Avoidance Conundrum: Perspectives from Accounting Theory and Policy' (2017) 7(1) *Accounting, Economics, and Law: A Convivial* 3.

worldwide.<sup>49</sup> Some countries use the ‘incorporation test’ i.e. the place of incorporation of the company for determining the residence of a company such as USA and others use the ‘control and management test’ i.e. the principal place of management and control of the company such as UK.<sup>50</sup>

On the other hand, source country is the country wherefrom income arises i.e. places where the company undertakes its business activities and earns taxable incomes. The territorial nature of taxation gives taxing rights to both countries. While the source country applies its taxing rights over active incomes (incomes from business activities within the territory), resident country applies its taxing rights over passive incomes (worldwide incomes generated from investment).<sup>51</sup> The resident country cannot tax the passive income until the income is remitted (not deferred) to the resident country.<sup>52</sup> Countries may use any of these systems or both. The interactions of these two jurisdictions in the taxation matter of MNEs bring the risk of international double taxation, which issues will be discussed in the next sub-section.

### 3.2 International Double Taxation and the Relief thereof

International double taxation (IDT) arises where the same income and/or the same taxpayer is taxed in more than one jurisdiction due to the overlap of residence and source principles.<sup>53</sup> For example, where non-resident subsidiaries of MNE group are liable to tax on their undistributed profits in the host state and the parent is liable to tax on profits remitted by the subsidiaries in the home state. IDT can be of two types, juridical (imposition of comparable taxes on the same taxpayer in respect of same subject matter for identical periods by two or more jurisdictions) and economic (imposition of tax by different jurisdictions on the same item of income in the hands of different entities within a MNE group through transfer pricing adjustments).<sup>54</sup>

Though IDT is not unique to MNEs, they are more exposed to it due to their cross-border business activities having significant consequences.<sup>55</sup> Due to IDT, MNEs can suffer unequal tax treatment in comparison to the domestic investors which would work as disincentive against foreign investments by MNEs, thereby,

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<sup>49</sup> Sol Picciotto, *Regulating Global Corporate Capitalism* (CUP 2011) 216.

<sup>50</sup> *ibid.*

<sup>51</sup> Reuven S Avi-Yonah, *Advanced Introduction to International Tax Law* (2nd edn, Edward Elgar Publishing 2019) 4.

<sup>52</sup> *ibid.*

<sup>53</sup> Oats and Mulligan (n 2) 81.

<sup>54</sup> For details, see Michael Kobetsky, *International Taxation of Permanent Establishments: Principles and Policy* (CUP 2011) 44.

<sup>55</sup> Muchlinski (n 46) 257.

inhibiting international trade and investment.<sup>56</sup>

To give reliefs against IDT, countries resort to two types of regulatory measures, unilateral measures under national laws and bilateral measures under international laws. Unilateral measures consists of three reliefs: group income provisions where companies within a MNE group can elect to submit consolidated accounts, thereby getting the chance to offset taxes paid in different jurisdictions;<sup>57</sup> tax credit where credit is given for taxes paid in the host state against the tax liability in the home state; and tax exemption where home state relinquishes tax (n 39) 32 課税権を行使する国は、課税を受ける国に税金を支払う。<sup>58</sup>

Bilateral reliefs are given by entering into treaties, known as Double Taxation Avoidance Agreement (DTAA) whose primary objective is to prevent IDT by allocating taxing rights regarding taxpayers and items of income between the treaty parties.<sup>59</sup> As methods of avoiding IDT, DTAAs include both exemption and tax credit provisions. DTAAs also include mutual agreement procedure to resolve disputes between the treaty parties in this respect.<sup>60</sup>

These DTAAs are either based on the OECD Model Tax Convention on Income and on Capital (OECD Model) or UN Model Tax Treaty (UN Model).<sup>61</sup> These models are almost similar except some basic differences, for example, while OECD Model emphasises interests of the resident countries, UN Model favours the interests of the source countries.<sup>62</sup> Accordingly, developed countries (mostly residents of MNEs) favour the OECD model in comparison to UN Model and as such, OECD Model is the dominant one. For example, by 2008 there were approximately 3,000 DTAAs in operation based on OECD Model.<sup>63</sup>

The successes of these DTAAs in eliminating IDT are difficult to assess except as treating these as signalling cooperation among states in this regard. Between the treaty parties, benefits from DTAA depends on reciprocity in trade and investment, as is stated by Kobetsky, 'If trade and investment flows between

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<sup>56</sup> *ibid*; Kobetsky (n 54).

<sup>57</sup> For details on group income provisions of different countries, see PWC, 'Worldwide Tax Summaries' <<https://taxsummaries.pwc.com/>> accessed 10 July 2024.

<sup>58</sup> For details, see Muchlinski (n 46) 257-258; R M Bird and D J S Breen, 'The Interjurisdictional Allocation of Income and the Unitary Taxation Debate' (1986) 34 *Can Tax J* 1377, 1385.

<sup>59</sup> Kobetsky (n 54) 45.

<sup>60</sup> *ibid*, 46-47.

<sup>61</sup> Development of model treaties began in the 1920s under the auspices of League of Nations. For details on history and typical contents of a DTTA, see Brian J Arnold, 'An introduction to tax treaties' <[https://www.un.org/files/TT\\_Introduction\\_Eng](https://www.un.org/files/TT_Introduction_Eng)> accessed 13 July 2024.

<sup>62</sup> Kobetsky (n 54) 51.

<sup>63</sup> *ibid*, 44.

treaty partner countries are dissimilar, which is likely to occur in tax treaties between developed and developing countries, the benefits from the operation of the tax treaty will be unequal'.<sup>64</sup>

As is seen in the foregoing sub-sections, taxation rules applicable to MNEs are diverse and devoid of any uniformity, which ultimately create opportunities of manipulation by the MNEs in reducing their tax burdens; these issues will be addressed in the next sub-section.

### 3.3 Tax Avoidance<sup>65</sup> by MNEs

Though there is uncertainty about the magnitude of tax avoidance by the MNEs every year, there are some estimated figures, for example, Global Financial Integrity estimated that during the years 2003-12, corporate tax avoidance by MNEs accounted for a significant amount of all illicit financial outflows from less developed countries amounting to 6.6 trillion USD;<sup>66</sup> an IMF study of 2015 projected that OECD countries may be losing 400 billion USD in tax revenue each year due to profit shifting, with non-OECD countries losing a further 200 billion USD.<sup>67</sup> Apart from the loss of revenues, tax avoidance has another consequence of creating disproportionate tax burden on those taxpayers who are unable to structure their affairs to avoid taxation, such as domestic corporations, wage-earning employees, or taxpayers who do not avoid taxes.<sup>68</sup>

As shown, from legal point of view each unit of MNEs are separate legal person, nevertheless they are integrated business networks from business organisation perspectives. Differences in these two perspectives coupled with divergence in tax rules and tax competition<sup>69</sup> among states create ample

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<sup>64</sup> *ibid*, 50.

<sup>65</sup> The term 'tax avoidance' is difficult to define due to its blurring line with the term 'tax evasion' where tax is reduced or eliminated through illegal means. For scholarly debates on this, see Prem Sikka, 'Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance' (2010) 34 (3-4) *Accounting Forum* 153; John Hasseldine and Gregory Morris, 'Corporate social responsibility and tax avoidance: A comment and reflection' (2013) 37 (1) *Accounting Forum* 1; Prem Sikka, 'Smoke and Mirrors: Corporate Social Responsibility and Tax Avoidance- A Reply to Hasseldine and Morris' (2013) 37(1) *Accounting Forum* 15. In this study, the term 'tax avoidance' will be used to include all the initiatives (legal or illegal) through which tax avoidance is done by eroding the tax bases and shifting the profits which ultimately lessens or eliminates the tax liability of MNEs.

<sup>66</sup> Dev Kar and Joseph Spanjers, 'Illicit Financial Flows from Developing Countries: 2003-2012' (GGI, December 2014) <<https://www.gfintegrity.org/wp-content/uploads/2014/12/Illicit-Financial-Flows-from-Developing-Countries-2003-2012.pdf>> accessed 24 June 2024.

<sup>67</sup> Ernesto Crivelli, Ruud De Mooij and Michael Keen, 'Base Erosion, Profit Shifting and Developing Countries' (2015) IMF Working Paper WP/15/118.

<sup>68</sup> Kobetsky (n 54) 38.

<sup>69</sup> TJN defines 'tax competition' as a euphemistic term for cutting corporate tax rates and

opportunities of tax avoidance for the MNEs to be described below, which can be termed as ‘Base Erosion and Profit Shifting’ (BEPS)<sup>70</sup> together:

(i) Corporate restructuring

Taking advantage of separate legal entity and residence rules of taxation, MNEs sometimes structure themselves in such a way, therefore producing ‘stateless income’<sup>71</sup> with zero tax liability. For example, before 2017 almost all the income of Apple Inc. was booked to Apple’s Irish subsidiary, incorporated in Ireland but managed through Apple’s worldwide headquarters in California, USA. This made the company an Irish resident for US tax purpose which follows ‘incorporation test’ for determining residence and a US resident for Irish tax purpose which follows ‘management and control test’ for residence. Ultimately this made Apple’s income being a case of ‘double non-taxation.’<sup>72</sup> A similar attempt was taken by US pharmaceutical company Pfizer Inc. in 2016 through merging with Irish company, Allergan PLC and making the Irish company its parent for reducing its exposure to US tax.<sup>73</sup> Kleinbard had shown another complex corporate structure by Google Inc. which he named ‘Double Irish Dutch Sandwich’ model through which Google shifted the tax bases from the countries where incomes were generated to elsewhere, thereby producing stateless income.<sup>74</sup>

(ii) Transfer pricing manipulation (TPM)

Transfer prices are the ‘prices at which an enterprise transfers physical goods and intangible property or provides services to associated enterprises’.<sup>75</sup> Today’s MNEs being integrated internally, intra-firm transactions increased manifold,<sup>76</sup> necessitating transfer pricing for those transactions. MNEs can easily

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deregulating by states to attract foreign investment, see TJN, ‘What is tax competition?’ <<https://taxjustice.net/faq/what-is-tax-competition/>> accessed 15 July 2024.

<sup>70</sup> OECD named all the tax planning strategies used by MNEs to exploit gaps and mismatches in tax rules for tax avoidance as ‘BEPS’.

<sup>71</sup> Kleinbard used this term to denote those incomes of MNEs which ultimately are beyond the purview of taxation by any state. For details, see Edward D Kleinbard, ‘Stateless Income’ (2011) 11(9) Florida Tax Review 699, 701.

<sup>72</sup> Avi-Yonah (n 51) 11.

<sup>73</sup> The deal was not signed after Obama administration introduced rules curbing such practices. For details, see Caroline Humer and Ankur Banerjee, ‘Pfizer, Allergan scrap \$160 billion deal after U.S. tax rule change’ (REUTERS, 26 April 2016) <<https://www.reuters.com/article/us-allergan-m-a-pfizer-idUSKCN0X3188>> accessed 25 July 2024.

<sup>74</sup> Kleinbard (n 71) 706.

<sup>75</sup> OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD 2010) preface para 11.

<sup>76</sup> As per an study of UNCTAD in 2016, intra-firm transactions were estimated to have accounted for about one-third of global exports, see Csilla Lakatos and Franziska Ohnsorge, ‘Arm’s-Length

manipulate these transfer-pricing by taking advantage of separate entity principle. As is illustrated by Muchlinski that an MNE can reduce its overall tax liability by resorting to (i) under-invoicing a sale transaction from a subsidiary in a country having higher corporate tax rate to a subsidiary situated in a country having lower corporate tax and (ii) over-invoicing a sale transaction from the later subsidiary to the former subsidiary, thereby reducing the profit of the first subsidiary in both situations.<sup>77</sup> For example, in an empirical study by Wier in South Africa between the periods of 2011-15, he found overpricing at the rate of 8% in imports from low-tax country affiliates in South Africa.<sup>78</sup> This TPM is a significant avoidance technique in the hands of MNEs and is consequently one of the major global tax issues.<sup>79</sup>

### (iii) Use of tax heavens and like jurisdictions

Use of tax heaven is central to many tax avoidance strategies practiced by MNEs.<sup>80</sup> They use these jurisdictions to shelter income from tax in both home and host states and to maintain strict commercial secrecy. OECD characterises countries as tax heaven having five features: charging no or nominal taxes on foreign owned wealth deposits; maintaining financial secrecy; lack of transparency; lack of effective exchange of information; and requiring no substantial economic activities.<sup>81</sup> Muchlinski differentiates certain jurisdictions who offer Special Purpose Entities (SPEs) as tax planning mechanism such as Netherlands, Ireland, and Luxemburg from outright tax heavens such as Bermuda and the Cayman Islands.<sup>82</sup> Though these jurisdictions are independent of each other but in reality they form an integrated network with complementary specialisation in different stages of wealth management.<sup>83</sup> MNEs use tax heavens<sup>84</sup> in a number of ways, for example, establishment of intermediate holding companies in papers without having any economic activities therein for getting the benefit from tax deferral in the home state; TPM by cross-invoicing sales through tax heaven affiliates;

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Trade: A Source of Post-Crisis Trade Weakness' (2017) WBG Policy Research Working Paper No 8144, 1.

<sup>77</sup> Muchlinski (n 46) 266-67.

<sup>78</sup> Ludvig Wier, 'International tax avoidance and development' (*VoxDev*, 20 April 2020) <<https://voxddev.org/topic/public-economics/international-tax-avoidance-and-development>> accessed 19 July 2024.

<sup>79</sup> Kobetsky (n 43) 71.

<sup>80</sup> Muchlinski (n 46) 271.

<sup>81</sup> OECD, *Harmful Tax Competition: An Emerging Global Issue* (OECD Publishing 1998) 23.

<sup>82</sup> Muchlinski (n 46) 264.

<sup>83</sup> *ibid.*

<sup>84</sup> The term tax heaven is used to mean both tax heaven and like jurisdictions offering SPEs in the subsequent places.



holding IPRs and ownership of management service in the hands of tax heaven affiliates; ‘thin capitalisation’<sup>85</sup> from tax heaven affiliates; and altering the character of incomes such as dividend payable to parent company being converted into loan or premium taken from parent company by insuring the assets through creating insurance company in the tax heaven.<sup>86</sup>

(iv) Tax arbitrage among different jurisdictions through treaty shopping<sup>87</sup>

This is another strategy of MNEs to avoid taxation both in home and host state by taking advantage of DTAAAs which were supposed to guard against double taxation only.<sup>88</sup> For avoiding home country taxation, MNEs form entities called ‘base entities’ in countries where tax is exempted on a foreign income due to having a tax treaty with the resident country of parent company and book the income in that base entity before the income is remitted to the parent.<sup>89</sup> In the same way, for avoiding host country taxation, MNEs form entities called ‘conduit entities’ in countries where tax is exempted due to having a tax treaty with the source country and book all the incomes of the host country affiliate into that conduit entity, ultimately getting the chance of tax avoidance.<sup>90</sup>

In all these instances, the role of states cannot be ignored; this will be highlighted in the following sub-section.

### 3.4 State Complicity

Tax avoidance strategies cannot be successfully applied by MNEs without the participation of states, as is stated by Muchlinski, “the complicity of governments around the world in the process of creating ‘stateless income’ cannot be ignored”.<sup>91</sup> Home states of MNEs formulate their policies<sup>92</sup> for facilitating outward foreign investment, whereas host states try to facilitate inward investment by creating

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<sup>85</sup> Thin capitalisation denotes the strategy to finance affiliates through a relatively high level of debt compared to equity finance. This strategy would ultimately yield interest income to the tax heaven affiliate and deductible expense to the borrower affiliate, usually situated in high-tax jurisdictions. For details, see Carsten Wendt, *A Common Tax Base for Multinational Enterprises in the European Union* (Gabler 2009) 97.

<sup>86</sup> Muchlinski (n 46), 271-72.

<sup>87</sup> Treaty shopping means accessing the benefits of favourable tax treaties as a tactic of tax avoidance.

<sup>88</sup> Kobetsky (n 54) 29.

<sup>89</sup> Picciotto (n 49) 228-30.

<sup>90</sup> *ibid.*

<sup>91</sup> Muchlinski (n 46) 261.

<sup>92</sup> For example, home countries allow tax deferral for long periods facilitating tax avoidance by MNE group.

favourable environment including aggressive tax incentives.<sup>93</sup> The establishment of tax haven and like jurisdictions is another glaring example of state complicity where states do so for getting administrative fees for the use of tax haven facilities and private income from professional groups established for providing legal, accounting, commercial and other services in tax heavens. The case of *Ireland v Commission* is a good example of state complicity. In this case, the European commission accused Ireland of granting illegal tax benefits to Apple Inc. in 2016 and ordered Apple to pay 13 billion Euros with interest, in unpaid taxes from 2004-14 to Irish tax authority. But the Irish authority denied the allegation, rejected the fine and appealed against the ruling along with Apple Inc. Ultimately the European General Court struck down the EU tax decision as illegal in 2020.<sup>94</sup>

At one hand, states are playing role (direct or indirect) in creating tax avoidance opportunities, they are taking resort to different regulatory measures for tackling tax avoidance on the other hand, which raises the question of effectiveness of these measures; these issues will be addressed next.

### 3.5 Regulatory Responses and their Effectiveness

Regulatory measures taken by states for preventing tax avoidance strategies (BEPS) are both unilateral and reciprocal, as will be discussed below.

#### (i) Unilateral regulatory responses

Different countries are taking regulatory measures for tackling BEPS mostly in consonance with the global standards according to their capacity which is essentially linked with the level of development.<sup>95</sup> For countering BEPS based on TPM, countries are taking numerous profit reallocation measures. For example, section 482 of the US Internal Revenue Code provides detailed rules for allocation of diverted incomes out of USA through transfer mispricing.<sup>96</sup> Another option 'Destination-based cash-flow tax'<sup>97</sup> is also proposed in recent years to prevent

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<sup>93</sup> Muchlinski (n 46).

<sup>94</sup> General Court of the European Union, 'Judgment in Cases T-778/16, Ireland v Commission, and T-892/16, Apple Sales International and Apple Operations Europe v Commission' (Press Release No 90/20, Luxembourg, 15 July 2020) <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-07/cp200090en.pdf>> accessed 12 August 2024.

<sup>95</sup> Wier (n 78).

<sup>96</sup> This jurisdiction (USA) is chosen being one of the oldest systems, regularly undergoing changes to cope up with the development of tax avoidance techniques. For details on section 482, see Legal Information Institute (LII), '26 CFR § 1.482-0 - Outline of regulations under section 482' <<https://www.law.cornell.edu/cfr/text/26/1.482-0>> accessed 10 July 2024.

<sup>97</sup> A taxation system where tax is imposed in the place where the goods or services are purchased. For details, see Shafik Hebous, Alexander Klemm and Saila Stausholm, 'Revenue Implications of Destination-Based Cash-Flow Taxation' (2019) IMF Working Paper WP/19/7.

TPM.<sup>98</sup> For tackling the problems of tax heaven, states are taking measures like enacting specialised laws that control income sheltering in tax heaven; rules allowing less deferral and denial of tax deductibles etc. As an illustration, USA has introduced the concept of 'Controlled Foreign Corporation' (CFC) which would treat non-USA affiliates as USA resident for tax purposes if USA shareholders hold more than 50% voting rights in those affiliates.<sup>99</sup>

It is difficult to assess the functioning of these unilateral measures in absence of empirical data, nevertheless, their effectiveness is questionable on some specific points such as difficulties in administering transfer pricing regulations (to be discussed later); lack of information and non-cooperation of MNEs; and jurisdictional conflicts in gathering information and reallocation adjustments.

## (ii) Reciprocal (transnational) regulatory responses

The applicable regulatory measures at the transnational level are developed mostly under the auspices of two inter-governmental organisations, UN and OECD. Though the reciprocal measures cover different areas of mutual cooperation, issues of TPM and tax heaven are the two main areas of concern.

At the transnational level, TPM by MNEs was first addressed in a study of the Fiscal Committee of the League of Nations, 1933 coordinated by Mitchell D Carroll (the US representative), with national reports from 27 countries.<sup>100</sup> For preventing TPM, the Carroll report recommended adjusting the intra-firm transactions on the basis of Arm's-length principle (ALP).<sup>101</sup> This recommendation was accepted by the League of Nations' Fiscal Committee in 1935 and found its place in the subsequent model treaties.<sup>102</sup> OECD recommended this ALP for countering TPM in their first guidelines on TPM in 1979.<sup>103</sup> This was later replaced by new guidelines in 1995 and is being revised from time to time.<sup>104</sup> UN Committee of Experts also published guidelines on transfer pricing in 2013 which was later revised in 2017. Though the UN guidelines are said to be for the developing countries, except certain specific provisions for developing countries,

<sup>98</sup> The Republican Party proposed this for USA in their 2016 policy paper, see Muchlinski (n 46) 294.

<sup>99</sup> For details, see Muchlinski (n 46) 285-287.

<sup>100</sup> Sol Picciotto, 'International tax, regulatory arbitrage and the growth of transnational corporations' (2018) 25(3) *Transnational Corporations* 27, 30.

<sup>101</sup> *ibid.*

<sup>102</sup> *ibid.*, 31.

<sup>103</sup> OECD, *Transfer Pricing and Multinational Enterprises* (OECD Publishing, May 1979).

<sup>104</sup> OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD Publishing, July 1995). The available latest version is of 2022.

the two guidelines are similar in contents.<sup>105</sup> Under these guidelines, five methods are recommended for transfer pricing adjustments based on ALP (comparable uncontrolled price method, resale price method, cost-plus method, transactional net margin method and transactional profit-split method).<sup>106</sup>

For countering tax haven problems, OECD introduced its policy in 1998 advocating international cooperation for eliminating harmful tax practices by tax haven jurisdictions which OECD termed ‘harmful preferential tax regime’.<sup>107</sup> OECD recommended mainly three actions in this regard: refraining from adopting new legislative or administrative measures facilitating harmful tax practices; identifying harmful tax practices in existing system; and removing them.<sup>108</sup>

All these guidelines and recommendations were subsequently placed in OECD and G20 countries’ joint initiative ‘OECD/G20 BEPS’ project 2013 under 15 action plans.<sup>109</sup> Apart from the OECD and G20 countries, 139 developing countries are also included in the initiative under ‘OECD/G20 Inclusive Framework on BEPS’ for collaborating on the implementation.<sup>110</sup> To facilitate the implementation of these action plans, a multilateral convention was concluded in 2016 with 95 signatories, which came into force on 1 July 2018.<sup>111</sup> The latest development in the transnational regulatory regime is the agreement among G7 countries as to the payment of a minimum tax at the rate of 15% by the MNEs in each country where they do business to be implemented by 2023.<sup>112</sup>

Now, these transnational regulatory measures are commendable as multilateral effort in preventing BEPS but their effectiveness is questionable in reality.

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<sup>105</sup> For example, the 2017 version keeps provision on capacity-building for developing countries. For details, see UN, *United Nations Practical Manual on Transfer Pricing for Developing Countries* (UN Publishing, 2017).

<sup>106</sup> For details, see OECD Guidelines 2017 and UN Manual 2017.

<sup>107</sup> OECD, *Harmful Tax Competition: An Emerging Global Issue* (OECD Publishing 1998) 56.

<sup>108</sup> *ibid*, 37-58.

<sup>109</sup> For details, see OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD Publishing 2013).

<sup>110</sup> OECD, ‘What is BEPS’ <<https://www.oecd.org/tax/beps/about/>> accessed 20 July 2024.

<sup>111</sup> The convention mainly tries to modify the provisions of bilateral or regional tax agreements in order to implement the BEPS action plans and to stop ‘treaty shopping’ and to make dispute settlement more effective including the introduction of ‘arbitration’. For details, see OECD, ‘Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEP’ <<https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm>> accessed 27 July 2024.

<sup>112</sup> Phillip Inman and Michael Savage, ‘Rishi Sunak announces ‘historic agreement’ by G7 on tax reform’ (*The Guardian*, 5 June 2021) <<https://www.theguardian.com/world/2021/jun/05/rishi-sunak-announces-historic-agreement-by-g7-on-tax-reform>> accessed 29 July 2024.

As to the rules on transfer pricing based on ALP, there are several shortcomings. Firstly, there are enormous burdens upon the tax authorities in administering ALP based transfer pricing on a case-by-case basis due to complex and voluminous intra-firm transactions, accelerated by increasing globalisation, sophisticated communication systems and advanced high speed information technologies.<sup>113</sup> This is particularly problematic for poor countries as these measures require substantial staffs with a high level of expertise, which are beyond their capacity.<sup>114</sup> Secondly, though ALP bases on comparable market prices for adjusting intra-firm transactions, comparable prices are rarely available, especially for intangible properties such as IPRs, management services and in case of e-commerce transactions. This makes the comparison most difficult and arbitrary either in the hands of the taxpayers or the tax authorities.<sup>115</sup> Thirdly, lack of certainty in the process often creates differences between MNEs and tax authorities giving rise to litigations.<sup>116</sup> Fourthly, imbalanced transfer pricing adjustments among countries may give rise the risk of double-taxation (economic IDT).<sup>117</sup> Lastly, ALP does not reflect the economic reality of MNEs as integrated business enjoying economic benefits of integration such as cost saving through economies of scale.<sup>118</sup>

As to regulations targeting tax heaven jurisdictions, there is no enforcement mechanism except blacklisting them as ‘unco-operative jurisdictions’ and imposing coordinated defensive measures by the OECD countries.<sup>119</sup> As a matter of fact, after 2009 no jurisdiction was listed unco-operative after commitment by some previously listed countries to implement the OECD standards of transparency and effective exchange of information.<sup>120</sup>

The success of OECD/G20 BEPS project is also questionable on several counts such as being a ‘patch-up’ approach instead of a comprehensive one; non-address of tax competition among states; and absence of a binding framework for

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<sup>113</sup> Kobetsky (n 54) 76.

<sup>114</sup> Picciotto (n 49) 253.

<sup>115</sup> This fact is highlighted in numerous domestic and international studies. For details, see US General Accounting Office Report of 1981 and 1992; US Department of the Treasury Report 2002; ECOSOC, Report of the Secretary General on Eleventh Meeting of the Ad Hoc Group of Experts on International Cooperation in Tax Matters (11 November 2004) UN Doc E/2004/51, para 38.

<sup>116</sup> US General Accounting Office Report of 1992, 47-48.

<sup>117</sup> Kobetsky (n 54) 75.

<sup>118</sup> T Scott Newlon, ‘Transfer Pricing and Income Shifting in Integrated Economies’ in Sijbren Cnossen (edn) *Taxing Capital Income in the European Union* (OUP 2000) 214, 216.

<sup>119</sup> OECD, ‘List of Unco-operative Tax Havens’ <<https://www.oecd.org/countries/andorra/list-of-unco-operative-tax-havens.htm>> accessed 29 July 2024.

<sup>120</sup> *ibid.*

implementation.<sup>121</sup> Regarding the latest G7 Agreement on minimum tax, though it can be praised as a good start, it may not be implemented without worldwide consensus among tax authorities.<sup>122</sup> The possible reaction of MNEs cannot be ignored as well.

Another effort under the auspices of OECD is the development of Pillar Two GloBE Rules for ending the so-called race-to-the bottom with countries competing on tax rates to obtain inward investment by fixing a minimum tax rate i.e. 15% on the profits of in-scope<sup>123</sup> MNEs across all jurisdictions where they operate.<sup>124</sup> It is hoped that under this framework MNEs would be discouraged to shift profits to low-tax jurisdictions, which is one of the tax avoidance practices adopted by MNEs. However, the framework is not free from limitations. Firstly, as the framework is applicable to MNEs with a certain annual global turnover, the MNEs will be lured to adopt different strategies to minimise their gross turnover. Secondly, as the implementation of this framework is voluntary, jurisdictions known as tax heavens will be less interested in embracing this framework.

As a whole, the regulatory responses are not making any significant changes in the behaviour of MNEs due to the fundamental flaws in the international taxation rules of dealing MNEs under SE-ALP, as is identified in a GATJ paper:

The fundamental flaw of these rules is that they have been interpreted to require taxation of MNEs as if their various constituent entities are independent of each other and dealing 'at arm's length'. This creates a perverse incentive to create complex and fragmented corporate structures, locating affiliates in convenient jurisdictions to minimise tax.<sup>125</sup>

In this unsatisfactory state of taxation to MNEs, unitary taxation with for-

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<sup>121</sup> Global Alliance for Tax Justice (GATJ), 'Evaluation of the G20/OECD Base Erosion and Profit Shifting (BEPS) Project' <<https://www.taxjustice.net/wp-content/uploads/2015/09/GATJ-BEPS-2015.pdf>> accessed 30 July 2024.

<sup>122</sup> In their ministerial meeting in July 2021, though G20 countries expressed their support for global minimum tax, they did not agree to the rate proposed by G7 agreement. For details, see KPMG, 'G20 finance ministers reiterate support for global minimum tax' (KPMG, 13 July 2021) <<https://home.kpmg/ca/en/home/insights/2021/07/g20-reiterates-support-for-global-minimum-tax.html>> accessed 2 August 2024.

<sup>123</sup> The rule is not intended for all MNEs, MNE groups with revenue exceeding 750 million euros are within scope.

<sup>124</sup> For details, see OECD Pillars, 'Pillar Two GloBE Rules: Summary' <<https://oecdpillars.com/pillar-tab/overview/>> accessed 30 November 2024.

<sup>125</sup> GATJ (n 119). A similar conclusion was drawn by Picciotto who stated '[I]t is the inappropriate nature of the SE-ALP at the heart of the international tax system that provides the perverse incentives for TNCs to devise these elaborate corporate structure', see Sol Picciotto, 'Towards Unitary Taxation: Combined Reporting and Formulary Apportionment' in Thomas Pogge and Krishen Mehta (edn) *Global Tax Fairness* (OUP 2016) 222.



mula apportionment (shortly called unitary taxation) is thought to be an improvement over the existing system, which issues will be discussed in the next section.

## **4. Unitary Taxation as an Alternative for Taxing Global Income of MNEs**

### **4.1 Explanation of the Concept**

Against the existing system of taxing MNEs, unitary taxation (UT) has been recommended as an appropriate alternative by a number of NGOs working on tax issues and academics working in this area.<sup>126</sup> It is a taxation system where each MNE doing unitary business with all its subsidiaries would be treated as a unit for tax purposes regardless of the geographical and juridical location of the individual subsidiaries; the net profit would be calculated group-wide; and then the taxing rights on this consolidated profit would be distributed among all the jurisdictions where the MNE group had genuine economic presence by using a particular apportionment formula.<sup>127</sup> Though UT as an alternative to existing SE-ALP approach has got attention in recent times mostly through academic writings and works of some NGOs, unitary taxation (though not exactly in the same form as is used here) has been practiced beforehand in some areas within the federal states such as Canada, Switzerland and USA .<sup>128</sup>

A workable UT system is based on certain essential elements, to be described below. UT system starts with the identification of a unitary business of the MNE group. All the related entities in a corporate group under common control or direction (direct or indirect, whether through ownership or otherwise) and engaged in same or related activities will be deemed a unitary business for the purpose of taxation excluding franchisees or outsourcing entities.<sup>129</sup>

The second important element is the submission of a ‘Combined and Country by Country Report’ (CaCbCR) by the MNE group to each tax authority where the MNE has its business presence. This report would form the basis of a UT system. The report must include (i) details about the corporate group defined as unitary business; (ii) consolidated worldwide accounts of the MNE eliminating

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<sup>126</sup> NGOs include Tax Justice Network (TJN), Global Alliance for Tax Justice (GATJ) and International Centre for Tax and Development (ICTD). Among the academics, Sol Picciotto is the pioneer of this concept. Academics supporting the concept include Reuven Avi-Yonah, Prem Sikka, Michael C Durst, Richard Murphy, Michael Kobetsky, George Turner, Alex Cobham, Simon Loretz, Daniel Bertossa and Edward D Kleinbard.

<sup>127</sup> Sol Picciotto, ‘Towards Unitary taxation of Transnational Corporations’ (*TJN*, 9 December 2012) <[https://www.taxjustice.net/cms/upload/pdf/Towards\\_Unitary\\_Taxation\\_1-1.pdf](https://www.taxjustice.net/cms/upload/pdf/Towards_Unitary_Taxation_1-1.pdf)> accessed 2 August 2024.

<sup>128</sup> *ibid*, 2-3.

<sup>129</sup> *ibid*, 10.

all internal intra-firm transactions; and (iii) data on its physical assets, employees, sales (by destination) in each country where it has a business presence.<sup>130</sup>

The third element, which is at the heart of UT, is the determination of appropriate formula for apportionment of taxing rights among jurisdictions where MNE has business presence based on the consensus of those jurisdictions.<sup>131</sup> For making the apportionment formula an objective one, the proponents of UT suggested for a 3-factor formula based on production and consumer markets: assets, labour and sales factors.<sup>132</sup> Firstly, assets factor would include physical assets located or used in the concerned jurisdictions, excluding exclusive intangibles having no nexus with any geographical location.<sup>133</sup> The argument is that this exclusion would not affect the MNEs as they would be taxed upon their net income i.e. maintenance costs of intangibles such as IPRs would be deducted in calculating net income irrespective of legal ownership.<sup>134</sup> Secondly, labour factor includes all employees, whether appointed directly or under sub-contract if their service is controlled by the MNE affiliates and assessment would be based on actual place of work.<sup>135</sup> For employees working in different places, they would be allocated according to the number of days spent in each jurisdiction.<sup>136</sup> Thirdly, sales factor would be destination-based i.e. regarding sale of goods, allocation will be based on the location of the purchasers and in case of sale of services, allocation will be on the basis of the location of the clients or consumers. All sales will be considered including digital sales (the direct sales to retail customers via local websites).<sup>137</sup> Ideally the weighting scale among these three factors should be equal; however, it can be modified based on consensus among the concerned jurisdictions.<sup>138</sup>

This determination of allocation formula is different from attribution of income to different jurisdictions based on the legal presence of individual subsidiaries, as is done under the existing system. The factors used in the formula simply measure the extent of the activities of the MNE in each country where it does business, in order to determine the taxing rights of each jurisdiction based on

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<sup>130</sup> Picciotto (n 125) 227.

<sup>131</sup> *ibid.*

<sup>132</sup> *ibid.*

<sup>133</sup> For details, see Sol Picciotto and Daniel Bertossa, 'Taxing Multinationals: A New Approach' (PSI, October 2019) 18-19 <[https://pop-umbrella.s3.amazonaws.com/uploads/9dacd52a-6987-4dcb-a90c-4a1146f4a342\\_Taxing%20Multinationals.pdf](https://pop-umbrella.s3.amazonaws.com/uploads/9dacd52a-6987-4dcb-a90c-4a1146f4a342_Taxing%20Multinationals.pdf)> accessed 28 July 2024.

<sup>134</sup> *ibid.*

<sup>135</sup> *ibid.*

<sup>136</sup> For details, see Picciotto and Bertossa (n 133).

<sup>137</sup> For details, *ibid.*

<sup>138</sup> Picciotto (n 127) 12.

‘value creation’ criteria.<sup>139</sup> After taxable income is attributed, each jurisdiction is at liberty to impose tax at the rate determined by it.<sup>140</sup>

The last element in this system is a procedure for resolving conflicts between MNEs and tax authorities and between jurisdictions, which should be open and transparent to the extent possible.<sup>141</sup>

After delineating an outline of UT system in this section, now the pertinent question is: how is UT system different from the existing system? Also, is this system going to make any differences in addressing the tax avoidance by MNEs? These two questions will be addressed in the next sub-section.

#### 4.2 Effectiveness of the UT System over the Existing one

The fundamental flaws as identified in the existing taxation system<sup>142</sup> are believed to be resolved in UT system as it reflects the economic reality of MNE by treating a MNE and its subsidiaries as a unit and seeking to allocate its net profit among jurisdictions on a fair and agreed basis for taxation purpose.<sup>143</sup>

Specifically regarding tax avoidance strategies, UT would provide a much more effective basis for dealing with the key problems posed by SE-ALP.<sup>144</sup> Transfer pricing problem could be resolved easily as all intra-firm transactions are disregarded and net profits of MNE are taxed in UT.<sup>145</sup> Incentives to shift profits by forming complex structures in tax heavens and like jurisdictions would also be removed under UT system as there is no advantage in so doing due to disregard of individual entities within a MNE group and allocation of profits for taxation on the basis of real economic activities in a taxing jurisdiction.<sup>146</sup> Though MNEs may still choose to shift their real investment and economic activities in tax heavens but “there would be no pressure to tacitly facilitate tax avoidance in ways that

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<sup>139</sup> Picciotto (n 125) 226-27.

<sup>140</sup> *ibid.*

<sup>141</sup> *ibid.*, 232.

<sup>142</sup> In its 2013 BEPS Action Plan, the OECD opined that “Fundamental changes are needed to effectively prevent double non-taxation, as well as cases of no or low taxation associated with practices that *artificially segregate taxable income from the activities that generate it* (emphasis added)”, see OECD (n 107), 13.

<sup>143</sup> Kobetsky (n 54) 404.

<sup>144</sup> Picciotto (n 125) 226.

<sup>145</sup> Jamie Morgan, ‘Corporation tax as a problem of MNC organisational circuits: The case for unitary taxation’ (2016) 18(2) *The British Journal of Politics and International Relations* 463, 472.

<sup>146</sup> *ibid.*

create net losses to all states” as is stated by Morgan.<sup>147</sup>

As to overall benefits to the parties involved, one of the advantages of UT over the SE-ALP is that it would reduce the compliance costs for MNEs and the administrative costs for tax authorities as there is no need to examine numerous transactions between affiliates to determine whether these were at arm’s length prices.<sup>148</sup> It also simplifies the profit allocation between countries and provides greater certainty for taxpayers.<sup>149</sup> Irrespective of developed and developing countries, all governments would be benefited by getting fair share of taxation from MNEs as base erosion and profit shifting can be guarded against effectively in UT.

Picciotto and Bertossa cited the example of Amazon to illustrate this point. Amazon paid 5 million USD as tax in UK for the year 2017 although it had gained around 8.6 billion USD from UK sales. This is because the UK subsidiaries were assigned only low-margin activities such as order fulfillment and customer support; whereas the sales revenues were attributed to its Luxembourg entity which had no or minimal economic activities therein.<sup>150</sup> Under UT, the scenario would be different as profits for taxation purpose would be attributed to each jurisdiction based on economic activities undertaken by MNEs therein measured by assets, labour and sales factors; accordingly UK’s share of corporate taxation would increase.<sup>151</sup>

Another advantage of UT system is its disregard of jurisdictional dissimilarities in taxation. As seen in the third section, jurisdictional dissimilarities in taxation (residence principle and source principle) creates opportunities for tax avoidance to MNEs. Unitary taxation stands in a better position in this regard as jurisdictional dissimilarities will be disregarded in this system by treating MNE as a unit and apportioning the taxation right to each country based on the economic activities undertaken in that country as explained in sub-section 4.1.

Though in theory UT is believed to be a superior approach<sup>152</sup> for taxing

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<sup>147</sup> *ibid.*

<sup>148</sup> Kobetsky (n 54) 404.

<sup>149</sup> *ibid.*

<sup>150</sup> Picciotto and Bertossa (n 131) 13. See also, Heather Self, ‘Self’s assessment: will Labour make the tech giants pay their ‘fair share’?’ (Tax Journal, 4 November 2019) <<https://www.taxjournal.com/articles/self-s-assessment-will-labour-make-the-tech-giants-pay-their-fair-share>> accessed 10 August 2024.

<sup>151</sup> *ibid.*

<sup>152</sup> After evaluating all the alternative approaches against existing taxation such as residence-based worldwide taxation, destination-based cash-flow taxation, and unitary taxation with formulary apportionment, the Independent Commission for the Reform

MNEs by addressing the major tax avoidance strategies present in the existing taxation system, this is not a panacea.<sup>153</sup> It has some implementation challenges, to be addressed in the next sub-section.

#### 4.3 Addressing the Challenges of Implementation

As stated in the previous sub-section, worldwide implementation of UT system is not easy, having a number of implementation challenges. The first and foremost challenge is the reaching of political consensus among countries for shifting to UT system. Oppositions would certainly come from the tax heavens and other countries benefiting from the current system.<sup>154</sup> Possible resistance from the professional groups such as accounting firms, law firms and financial advisory firms cannot be overlooked who are also the beneficiaries of the present anomalous system because they are assigned by the MNEs for developing tax planning schemes resulting in tax avoidance strategies.<sup>155</sup> Oppositions are most likely to come from the MNEs as well.<sup>156</sup> Due to their strong influence in policy making both national and international,<sup>157</sup> even if they decide not to oppose the system altogether, ‘they could lobby for concessions and exemptions in a unitary system’ as is stated by Morgan.<sup>158</sup>

Apart from these challenges from the interested groups, there are some practical implementation challenges. OECD identifies two such challenges: firstly, they fear that the system may lead to double taxation if different countries adopt inconsistent apportionment factors and weighting scales and secondly, they caution that universal UT would require significant information-gathering, both for MNEs and tax authorities which seems difficult to obtain.<sup>159</sup> Another practical difficulty is the existence of hundreds of bilateral treaties containing several rules of the current taxation system. Without determining the fate of these treaties, it

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of International Corporate Taxation (ICRICT) concluded in their 2018 study that the third option is clearly the best. For details, see Picciotto and Bertossa (n 133) 22.

<sup>153</sup> Ezenagu (n 11).

<sup>154</sup> Cobham A and Loretz S, ‘International Distribution of the Corporate Tax Base: Implications of Different Apportionment Factors under Unitary Taxation’ (2014) ICTD Working Paper 27, 8. See also, Picciotto (n 125) 14; Self (n 148); Morgan (n 145) 474.

<sup>155</sup> Biondi (n 48).

<sup>156</sup> Picciotto (n 127) 14.

<sup>157</sup> For example, in 2004 a coalition of 93 corporations spent 282.7 million USD on a concerted lobbying for passing a ‘tax holiday scheme’ by US Congress and got it passed in their favour. For details, see Thomas Pogge and Krishen Mehta, ‘Introduction: The Moral Significance of Tax-Motivated Illicit Financial Outflows’ in Thomas Pogge and Krishen Mehta (edn) *Global Tax Fairness* (OUP 2016) 5 (footnote 8).

<sup>158</sup> Morgan (n 145) 474.

<sup>159</sup> Muchlinski (n 46) 296.

would be difficult to shift to UT.<sup>160</sup>

However, as said by Muchlinski, “these obstacles could be overcome”;<sup>161</sup> therefore the way forward in facing these implementation challenges will be highlighted in the next sub-section.

#### 4.4 Way Forward for Moving to the UT System

As to the challenges identified in the previous sub-section, most of the challenges, particularly, the practical challenges listed above, can be resolved if political consensus is reached towards shifting to UT system. Reaching such consensus is tough but not impossible.<sup>162</sup> Examples of such political consensus are evident in some particular areas of international taxation which can be considered as positive move towards transition to UT. In 2019, the OECD/G20 proposed the adoption of ‘formulary apportionment method’ as a new initiative for tackling BEPS in e-commerce (digital economy).<sup>163</sup> In this method, profit to be allocated to each jurisdiction has to be determined from group profit of the MNE and then it has to be apportioned between jurisdictions by selecting appropriate allocation formula.<sup>164</sup> The adoption of ‘Country-by-Country reporting’ (CbCR) in OECD/G20 Action Plan 2013 (action 13) is another sign of shifting attitude of OECD/G20.<sup>165</sup> Under this reporting system, all large MNEs<sup>166</sup> are required to prepare a CbCR with aggregate data on the global allocation of income, profit, taxes paid and economic activity among tax jurisdictions in which it operates.<sup>167</sup> This is to be shared with tax administrations in these jurisdictions, for use in high level transfer pricing and BEPS risk assessments.<sup>168</sup> In these two instances the OECD has had to compromise the SE-ALP standard advocated for decades.

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<sup>160</sup> Michael C Durst, ‘A Practical Approach to a Transition to Formulary Apportionment’ in Sol Picciotto (edn) *Taxing Multinationals as Unitary Firms* (ICTD 2017) 48.

<sup>161</sup> Muchlinski (n 46) 296.

<sup>162</sup> Picciotto (n 125) 234.

<sup>163</sup> OECD, ‘Programme of Work to Develop a Consensus Solution to the Tax Challenges Arising from the Digitalisation of the Economy’ (OECD/G20 Inclusive Framework on BEPS, OECD, 2019) <[www.oecd.org/tax/beps/programme-of-work-to-develop-a-consensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.htm](http://www.oecd.org/tax/beps/programme-of-work-to-develop-a-consensus-solution-to-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.htm)> accessed 12 August 2024.

<sup>164</sup> *ibid*.

<sup>165</sup> The OECD/G20 Inclusive Framework includes 139 jurisdictions.

<sup>166</sup> Countries have discretion in determining the threshold of ‘large MNEs’. For example, in USA, MNEs having 850 million USD or more as annual turnover are required to submit CbC report. For details, see UNC Tax Center, ‘Brief overview of Country-by-Country Reporting (CbCR)’ <<https://tax.unc.edu/index.php/country-by-country-translational-research/brief-overview-of-country-by-country-reporting-cbcr/>> accessed 15 August 2024.

<sup>167</sup> OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD Publishing 2013) Action 13.

<sup>168</sup> *ibid*.



The third optimistic fact towards shifting to UT is the European Commission's proposal for harmonising the corporate tax rules applicable to MNEs within the EU.<sup>169</sup> The proposal for consolidated tax base named as 'Common Consolidated Corporate Tax Base' (CCCTB) was first proposed in 2001 and then a detailed study was carried out from 2004 to 2008 through a working group comprising national tax officials, business representatives and tax experts.<sup>170</sup> The commission published its first draft in 2011, which was opposed by many European countries as being too ambitious.<sup>171</sup> Then the commission re-launched the amended proposal in 2016 which is currently under discussion.<sup>172</sup> The amended CCCTB proposal, if implemented, would apply to all MNEs within the EU. Under this scheme, group-income of MNEs within the EU would be consolidated by eliminating all internal transactions among affiliates, and then the net profit will be apportioned for taxation between the participating states.<sup>173</sup> The apportionment formula proposed by the Commission is based on three factors: one-third for assets (excluding intangibles), one-third for sales, and one-third for labour.<sup>174</sup> Common rules for tax interactions with third states, rules for combating the use of tax havens and general anti-avoidance rules are also included in the proposal.<sup>175</sup>

Therefore, if worldwide transition to UT follows in future ensuing the positive moves stated above, all the countries will be benefitted except some tax heaven and like jurisdictions. Moreover, the countries may be placed in a better position to implement the SDG programmes; this possibility will be discussed in the next section.

## **5. Possible Implications of Unitary Taxation to MNEs for SDG Implementation Programmes**

The inevitability of funding needs for implementing SDG programmes and the role of taxation, particularly corporate income tax (CIT) in this regard has been addressed in the second section. But as delineated in the third section, the countries are deprived of their right share of CIT due to rampant tax avoidance strategies (known as BEPS) adopted by the corporations, especially the MNEs.

The funding need of Bangladesh for SDGs and the profit-shifting practice

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<sup>169</sup> Carsten Wendt, *A Common Tax Base for Multinational Enterprises in the European Union* (Gabler 2009) 103.

<sup>170</sup> Picciotto (n 126) 15.

<sup>171</sup> Morgan (n 144) 476.

<sup>172</sup> EC, 'Common Consolidated Corporate Tax Base (CCCTB)' <[https://ec.europa.eu/taxation\\_customs/common-consolidated-corporate-tax-base-ccctb\\_en](https://ec.europa.eu/taxation_customs/common-consolidated-corporate-tax-base-ccctb_en)> accessed 21 August 2024.

<sup>173</sup> Wendt (n 169) 108.

<sup>174</sup> *ibid*, 190.

<sup>175</sup> *ibid*, 154.

of British American Tobacco (BAT) Bangladesh can be cited to illustrate the above-mentioned point. As per the government estimation of 2017, the annual cost of achieving the SDGs targets is 66.32 billion USD and Bangladesh needs 928.48 billion USD for the period of 2017-2030 to implement the SDGs targets.<sup>176</sup> Along with other sources of funding, CIT from operative MNEs in Bangladesh could have formed an important source of funding for SDGs implementation programme, unless the MNEs had not shifted their taxable profits from Bangladesh to elsewhere. As per a study of Tax Justice Network (TJN) of 2019, BAT PLC shifted 21 million USD taxable incomes between 2014-2016 from BAT Bangladesh (a tobacco producing subsidiary) to BAT Holdings Ltd, a UK-based subsidiary (running no real economic activities), thereby causing the host country to have lost 5.8 million USD in tax revenue.<sup>177</sup> This profit-shifting was done via different tax avoidance strategies: payment of royalty for using IPR; fee and IT charge for using other intangibles owned by BAT Holdings Ltd, UK; and interest for loan given to BAT Bangladesh from BAT Holdings Ltd, UK.<sup>178</sup>

Hence, curbing the BEPS tactics is indispensable for generating much-needed revenues for SDG programmes, as is stated by Airey, “[R]evenue loss from global tax avoidance by MNCs constitutes a significant source of lost public revenue, money that could be put towards meeting the funding gap needed to progress the SDGs”.<sup>179</sup> Though the global community is taking numerous regulatory measures to tackle these BEPS practices, they have failed to yield any change in the behaviour of the MNEs, as is shown in the third section. In such a backdrop, a new approach named ‘unitary taxation with formulary apportionment’ for taxing MNEs has been proposed in section four, which is believed to be able to tackle the tax avoidance strategies by MNEs.

It is hoped that implementation of unitary taxation would place the international taxation of MNEs on a sounder basis and increase the public revenue of each individual country in a fair manner i.e. based on contribution of each country in generating the profits of multinational enterprises. Ultimately, the governments, particularly from the less developed economies will be in a better position to use these revenues for SDG implementation programmes as is stated

<sup>176</sup> GED, Bangladesh Planning Commission, ‘SDGs Financing Strategy: Bangladesh Perspective’ (SDGs Publication No 7, June 2017) <<https://pksf-bd.org/web/wp-content/uploads/2018/11/2.-SDGs-Financing-Strategy-Bangladesh-Perspective.pdf>> accessed 29 July 2024.

<sup>177</sup> TJN, ‘Ashes to Ashes: How British American Tobacco avoids taxes in low and middle income countries’ (20 April 2019), 17 <[https://www.taxjustice.net/wp-content/uploads/2019/04/Ashes-to-ashes\\_How-British-American-Tobacco-Avoids-Tax-in-Low-and-Middle-Income-Countries\\_Tax-Justice-Network\\_2019.pdf](https://www.taxjustice.net/wp-content/uploads/2019/04/Ashes-to-ashes_How-British-American-Tobacco-Avoids-Tax-in-Low-and-Middle-Income-Countries_Tax-Justice-Network_2019.pdf)> accessed 30 July 2024.

<sup>178</sup> *ibid.*

<sup>179</sup> Siobhan Airey, ‘Taxation Untapped: the potential of the UN Sustainable Development Goals to promote progressive International Tax Reform’ (2020) UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 6, 3.

by Ezenagu, “If African countries are to achieve the SDGs, there is an urgent need for a new international tax system that aligns where economic activities occur with where profits are taxed”.<sup>180</sup>

Taking the above-mentioned example of BAT PLC and Bangladesh, Bangladesh would have got more tax revenues under UT system which it could use for SDGs implementation programmes. Because under UT system, BAT PLC’s worldwide profit would be taxable eliminating all internal transactions and profit-shifting arrangements among subsidiaries. Then the participating jurisdictions would exercise their taxing rights on this worldwide profit to the extent of genuine economic activities undertaken in each jurisdiction measured by assets, labours and sales factors.<sup>181</sup>

While this co-relation between SDGs and unitary taxation is proposed on the belief that if governments get more tax revenues from multinationals they would spend that money for SDGs implementation programmes, the caveat has to be kept in mind that the governments may not spend the extra money for SDGs implementation programme.

Moreover, unitary taxation can contribute in achieving SDG target 16.4 (significantly reducing illicit financial flows). Adoption of unitary taxation would tackle tax avoidance practices which often give rise to illicit finances. Also unitary taxation system would reduce the incentives for creating tax heavens where illicit finances are sheltered. By contributing in declining illicit money and abridging creation of tax heaven jurisdictions, unitary taxation would be helpful for achieving SDG target 16.4.

Furthermore, unitary taxation, which is based on the idea of treating MNE group as an unit, if adopted worldwide, can open avenues of ‘access to justice’ to those who are victims of transnational tort committed by subsidiaries of MNEs but deprived of legal remedies from MNE group or the parent company due to separate legal personality doctrine.<sup>182</sup>

## 6. Conclusion

The present study tried to shed light on two emerging issues of the present time, one is taxing MNEs under unitary taxation for preventing their widespread tax avoidance practices and the other is SDGs implementation.

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<sup>180</sup> Ezenagu (n 11).

<sup>181</sup> For understanding how unitary taxation can ensure fair share of taxation among participating jurisdictions from MNE’s activities, see Mark Bou Mansour, ‘Unitary tax explained: infographic’ (*TJN*, 21 November 2019) <<https://taxjustice.net/2019/11/21/unitary-tax-explained-infographic/>> accessed 30 July 2024.

<sup>182</sup> This is an idea which can be developed in separate studies but out of purview of the present study.

From the study it is found that by taking resort to the gaps and mismatches in the existing international taxation system, MNEs avoid paying their right share of taxes both in the home state (state of residency) and the host state (state of doing business). The main tax avoidance strategies comprise: corporate restructuring; transfer pricing manipulation (TPM); use of tax heavens and like jurisdictions; and tax arbitrage among different jurisdictions through treaty shopping. The states play dual role in this regard, sometimes they are found compliciting with MNEs in creating these BEPS strategies while they are also taking numerous unilateral and reciprocal regulatory measures to tackle them. But as found, the regulatory measures remain largely ineffective in preventing these BEPS practices due to the fundamental flaws in the international taxation system which treats each component of a MNE group as separate legal entity dealing with each other at arm's-length price.

In such a background, an alternative system named 'unitary taxation with formulary apportionment' has been proposed, which is believed to be capable of overcoming the loopholes of the existing taxation system. The distinctiveness of this system is that it treats MNE as a group, eliminating all intra-firm transactions and divides the net profit among jurisdictions for taxation purpose on the basis of a formula consisting of assets, sales and labour factors. This arrangement would ultimately ensure fair taxation of MNEs' global income and increase the tax revenues of all countries including the home countries of MNEs (mostly the developed countries) and the host countries (mostly the developing and poor countries). Though the world community is yet to come to a consensus for adopting this taxation system worldwide, there is global acceptance in some particular areas and in regional level within the EU.

On the other hand, it is also found in the study that SDGs implementation programme cannot run without sufficient funding arrangements. Particularly the developing and the poor economies are in dire need of funding for SDGs implementation programme. With all other external sources of funding, domestic resource mobilisation i.e. improving domestic taxation capacity has been identified as an important source of funding (SDG target 17.1). One of the vital components of domestic tax bases is the corporate income tax paid by the transnational corporations (MNEs).

Accordingly, the study proposes that the adoption of unitary taxation for taxing global income of MNEs can contribute in raising the funds necessary for implementing the SDGs programmes. Moreover, adoption of unitary taxation can assist in preventing illicit financial flows, another SDG target.

Though this is a novel approach of connecting the issue of SDGs with taxation of MNEs, it is hoped that the present study will open other avenues of

thought and encourage future research exploring this area in more detail.

**APPENDIX 1 (SDGs IN BRIEF)**

SDG No.	Brief overview
Goal 1 (No poverty)	Includes seven targets and thirteen indicators aiming at: ending extreme poverty (living below 1.25 USD per day) in all forms; ensuring all people’ access to economic resources; reducing the poor’s vulnerability to climate disasters and other shocks; and implementing national social protection systems for all.
Goal 2 (Zero hunger)	Includes eight targets and fourteen indicators targeting at: eliminating all forms of malnutrition; achieving sustainable food security; increasing sustainable agricultural productivity; increasing investments in related research-technology; and addressing trade restrictions, distortions in world agricultural and food commodity markets.
Goal 3 (Good health and well-being)	Includes thirteen targets and twenty-eight indicators focusing on: reducing maternal and child mortality; fighting all communicable and non-communicable diseases; reducing road injuries and deaths; granting universal access to sexual and reproductive health-care; supporting research-development and universal access to affordable vaccines and medicines; and increasing health financing in developing countries including Least Developed Countries (LDCs) and small island countries.
Goal 4 (Quality education)	Includes ten targets and eleven indicators aiming at: ensuring free, equitable and quality pre-primary, primary and secondary education for all; ensuring affordable technical, vocational and higher education; eliminating discrimination in education; attaining universal literacy and numeracy; building inclusive learning environment; expanding higher education scholarships; and increasing the supply of qualified teachers for developing countries including LDCs and small island countries.
Goal 5 (Gender equality)	Includes nine targets and fourteen indicators striving for gender equality and empowerment of women by: ending all forms of discrimination against women and girls everywhere; eliminating all forms of violence and harmful practices against women and child; increasing value of unpaid domestic responsibilities; ensuring full participation of women in leadership and decision-making; and fostering equal rights to all economic resources through strengthened policies and enforcing legislation.

Goal 6 (Clean water and sanitation)	Includes eight targets and eleven indicators aspiring for: safeguarding safe and affordable drinking water-sanitation-hygiene for all; improving water quality, waste water treatment and water-use efficiency; protecting and restoring water-related ecosystems; supporting local engagement in water-sanitation management; and expanding support to developing countries in this regard.
Goal 7 (Affordable and clean energy)	Includes five targets and six indicators for: safeguarding access to affordable and reliable energy; increasing the share of renewable energy in the global energy mix; and promoting access to research-technology and investments in clean energy.
Goal 8 (Decent work and economic growth)	Includes twelve targets and seventeen indicators targeting at: ensuring sustainable economic growth through diversity, innovation and up-gradating of economic productivity; guaranteeing full employment and decent work with equal pay; promoting youth employment-education-training; ending modern slavery, trafficking and child labour; protecting labour rights and promoting safe working environments; and increasing aid for trade support.
Goal 9 (Industry, innovation and infrastructure)	Includes eight targets and twelve indicators aiming at: developing sustainable-resilient-inclusive infrastructures and industrialisation; increasing access to financial services and markets; and facilitating sustainable infrastructure development for developing countries by supporting domestic technology development and industrial diversification, universal access to information and communications technology.
Goal 10 (Reduced inequalities)	Includes ten targets and thirteen indicators striving at: reducing income inequalities; promoting universal social-economic-political inclusion; ensuring equal opportunities and ending discrimination; improving regulation of global financial markets and institutions; and enhancing special and differential treatment for developing countries.
Goal 11 (Sustainable cities and communities)	Includes ten targets and fifteen indicators devoted at: ensuring safe and affordable housing-transportation; promoting sustainable urbanisation; providing access to safe and inclusive green and public spaces; and strengthening national and regional development planning, policies in resource efficiency and disaster risk reduction.



Goal 12 (Responsible consumption and production)	Includes eleven targets and thirteen indicators targeting at: achieving sustainable management and efficient use of natural resources; ensuring environmentally sound management of chemicals and all wastes; reducing waste generation through prevention-reduction-recycling-reuse; and supporting countries in strengthening scientific and technological capacity in this regard.
Goal 13 (Climate action)	Includes five targets and eight indicators aiming at: strengthening resilience and adaptive capacity to climate-related disasters; integrating climate change measures into policies and planning; and building capacity and knowledge-base to meet climate change challenges.
Goal 14 (Life below water)	Includes ten targets and ten indicators aspiring at: protecting and preserving marine ecosystem by reducing pollution and ocean acidification; ensuring sustainable fishing; increasing scientific knowledge, research and technology for ocean health; and implementing and enforcing international laws of the sea.
Goal 15 (Life on land)	Includes twelve targets and fourteen indicators aimed at: preserving and protecting terrestrial and freshwater ecosystems, mountain ecosystems, biodiversity and natural habitats; ending deforestation; stopping land loss and desertification; eliminating poaching and trafficking of protected species; integrating ecosystem and biodiversity in governmental planning; and increasing financial resources and co-operation in this behalf.
Goal 16 (Peace, justice and strong institutions)	Includes twelve targets and twenty-three indicators devoted at: promoting the rule of law and equal access to justice; protecting children from abuse, exploitation, trafficking and violence; combating organised crime and illicit financial and arms flows; substantially reducing corruption and bribery; developing effective, accountable and transparent institutions; and ensuring public access to information and protecting fundamental freedoms.
Goal 17 (Partnerships for the goals)	Includes seventeenth targets and twenty-five indicators aiming at: fostering means of implementation of 16 SDGs by strengthening and streamlining global cooperation and global partnership in five areas- finance, technology, capacity-building, trade and systemic issues.