DESTINATION TAXATION OF CORPORATE INCOME AND THE EMERGING IMPLICATIONS

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Abstract

The international tax regime for the taxation of corporate income is undergoing reform and moving further towards destination taxation. This article highlights the new blueprints for the destination-based taxation of corporate profit, namely the Organisation for Economic Co-operation and Development (OECD)'s blueprint, the United Nations' (UN) blueprint and the destination-based cash-flow tax (DBCFT) blueprint. Furthermore, it examines the seemingly overlooked implications of these blueprints for international tax policy and for nation-states. Arguably, the current move towards the destination-based taxation of the corporate income of multinational enterprises (MNEs) will lead to: (a) the expansion of the source principle, diverging unilateral actions, and challenges to the standardisation of the expanded source principle; (b) avertible costs; (c) distributional impact without the resolution of inter-nation equity issues and (d) tax competition by affluent states for sales factors. These implications provide lessons for international tax policymakers and nation-states. International tax policymakers should coordinate the processes of incorporating destination taxation into the international tax system. Low-income states need to evaluate matters further before adopting any blueprint for destination taxation as part of their domestic legislation. Affluent market states may require expanded country-by-country reporting (CBCR) and anti-tax avoidance rules to regulate their tax competition for sales factors.

1. INTRODUCTION

International tax policymakers and scholars have proposed varying blueprints for the destination-based taxation of corporate income. The OECD's pillar one blueprint seeks to change the nexus and profit allocation rules, especially in favour of giving more taxing rights to market or user states (OECD, 2019a, 2020d). This blueprint results from historical efforts by the OECD and the Group of Twenty (G20), in the form of their Inclusive Framework on BEPS, to find a coordinated solution for the taxation of the digital economy (G20, 2021a, 2021b, 2021c; OECD, 1998a, 2015a[2], 2018, 2019a, 2019b, 2019c, 2019d, 2019e, 2020a, 2020b, 2020d, 2020e, 2021a, 2021b, 2022a, 2022b).[3] On the other hand, the UN modified its double taxation convention (DTC) model in 2021 to encompass a new Article 12B, another blueprint for the destination-based taxation of corporate entities exploiting the digital economy (UN, 2021). During its 22nd session, in April 2021, and following prior work and deliberations

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[2] "The digital economy is the result of a transformative process brought by information and communication technology (ICT), which has made technologies cheaper, more powerful, and widely standardised, improving business processes and bolstering innovation across all sectors of the economy" (OECD, 2015a, p. 11).

[3] See, on the definition of the digital economy, Oxford English Dictionary (n.d.): "an economy which functions primarily by means of digital technology, especially electronic transactions made using the internet."; Elliffe (2021), pp. 63-64 and 65-66, on the apparently most significant features of the digital economy; The International Monetary Fund [IMF] (2018) on p. 6.

at subcommittee level,[4] the UN Committee of Tax Experts on International Cooperation in Tax Matters incorporated Article 12B and its commentaries into the UN model DTC between developed and developing countries.[5] These efforts demonstrate that the international tax regime for the taxation of corporate profit is undergoing reform, which has implications for international tax policy and for nation-states. The goal of this article is not to consider which blueprint is optimal for any country. That would be beyond the scope of this article and is empirical, considering the specific needs of a nation-state. A nation-state may deem it appropriate to undertake this type of empirical analysis before exercising its sovereign right to choose any blueprint. The article aims to highlight and clarify these new blueprints for the destination-based taxation of corporate income. Furthermore, the article reveals and analyses the emerging implications of the reform given the publicly available documents on these blueprints and the current situation concerning the destination-based taxation of corporate income. Scholars have also proposed varying blueprints for the destination-based taxation of corporate income, including the permanent establishment (PE) blueprint,[6] the residual profit allocation by income blueprint,[7] the DBCFT blueprint,[8] a withholding tax blueprint,[9] and the data excise tax blueprint.[10] However, this article focusses on the blueprints that are most likely to be adopted in practice because they emanate from the OECD and the UN (policymakers and institutions that influence policymaking in international tax law).[11] The article also considers the scholarly blueprint (DBCFT), which aims to radically change the way in which MNEs are taxed in order to give a broader understanding of the implications of the destination-based taxation of corporate income.

This article argues that the current move towards the destination-based taxation of MNEs' corporate income has seemingly overlooked the implications for international tax policy and for nation-states. It identifies and discusses four implications. First, that the reform expands the source principle and is likely to encourage diverging unilateral actions, challenging the standardisation of the extended source principle. Second, that the current move results in avertible costs for in-scope taxpayers, consumers, and tax administrations. These costs, which arise from the concurrent existence of the OECD and UN blueprints, include (a) the over-taxation or double taxation of in-scope MNEs, (b) higher prices for the consumers of the products of in-scope MNEs, and (c) inefficiently high compliance and administrative costs. Third, that the distributional impact of the move towards destination taxation does not resolve inter-nation equity for the following reasons:

(a) The OECD blueprint adopts an inadequate differentiated approach that does not necessarily help numerous low-income countries.
(b) The UN blueprint does not adopt a differentiated approach and may have features that disadvantage many low-income countries.

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[4] See UN Committee of Experts on International Cooperation in Tax Matters (2020), pp. 1-8; UN Committee of Experts on International Cooperation in Tax Matters (2021a), pp. 1-5. See, generally, the UN's tax committee sessions' reports (UN, n.d.-b).
[5] See UN Committee of Experts on International Cooperation in Tax Matters 2021(b) and (2021c), p. 1.
[6] See Cockfield (2020), pp. 351-352 and 373-390, on the quantitative economic presence permanent establishment (QEPPE) proposal; Hongler and Pistone (2015).
[7] See Devereux et al. (2021) at chapter 6.
[8] See Devereux et al. (2021) at chapter 7.
[9] See Báez Moreno and Brauner (2019), pp. 127-162.
[10] See Avi-Yonah et al. (2022), pp. 335-341.
[11] See Christians (2016), pp. 1614-1615, noting that some 3,000 DTTs follow the OECD, UN, and U.S. models).

(c) The DBCFT does not adopt a differentiated approach, and the fact that it relies purely on domestic consumption will most likely put many low-income countries at a disadvantage.

Fourth, the significant change will likely lead to tax competition by affluent states for sales factors. Sales factors include any element or component employed in order to sell and buy the products of in-scope MNEs. Sales factors change or add to the traditional objects of tax competition. According to the OECD blueprint, destination taxation can change the behaviour of targeted corporate taxpayers, thereby potentially encouraging tax competition by affluent market states. Tax competition by states for sales factors of in-scope MNEs can occur because proxies or reasonable approximations are likely to be used to determine customers'/consumers'/users'/purchasers' locations or source/market states. Customers are also expected to include business customers. The article submits that the international tax reform is likely building ground for a novel type of tax competition, namely tax competition for "sales factors". Implications one and two arise from the divergence of international tax policymakers' blueprints, while implications three and four are not the result of the variations between the OECD and UN blueprints. International tax policymakers and governments of nation-states ought to consider these consequences when adopting any blueprint for destination taxation.

The article proceeds as follows. Section 2 clarifies the meaning of destination taxation and highlights the diverging blueprints: the OECD blueprint, the UN blueprint, and the DBCFT. Section 3 reveals, discusses, and examines the potential consequences of destination taxation based on these blueprints. Section 4 concludes the article with some lessons for international tax policy and nation-states.

2. BLUEPRINTS FOR THE DESTINATION-BASED TAXATION OF CORPORATE INCOME IN THE INTERNATIONAL TAX SYSTEM

This section highlights the existing blueprints for the destination-based taxation of corporate income that have sufficiently built momentum for its adoption as part of the international tax system for the taxation of MNEs. Corporate residence and production location—the location of subsidiaries and PE—are the bases for taxing the profits of MNEs under the current international tax regime.[12] The destination-based taxation of corporate income adds the location of the demand side of the market to the list of places or bases for taxing the profits of MNEs.[13] This article defines destination taxation as the taxation of corporate income at the destination of sales or consumption of the corporate product rather than necessarily at the place of production. It is simply taxation on the demand side of the market, broadly defined to include the location of the purchaser, customer, consumer, or user.[14] This type of taxation can be contrasted with a situation in which corporate profit is taxed at the supply side of the market, i.e. the place of production. The concept anticipates that the sale and the consumption of the products of in-scope MNEs are critical components of the tax base in respect of how the profits of these MNEs will be taxed. The destination-based taxation of corporate income envisages that taxable presence will no longer be restricted to the physical presence of the relevant taxpayer. A non-resident entity may have a taxable presence in a state without having any physical presence therein. The destination-based taxation of MNEs raises a core interaction issue in that it may violate existing international obligations, such as double taxation treaties

[12] See Devereux et al. (2021) at chapter 3; Devereux and Vella (2018), p. 552.
[13] See also Plekhanova (2020), p. 372.
[14] See also Collier et al. (2021), pp. 406, 411-413, and 418.

(DTTs), World Trade Organization (WTO) rules, and European Union (EU) law.[15] Some commentators respond to the issue in the affirmative;[16] there is also a somewhat optimistic view about the compatibility of destination taxation with WTO rules.[17] Whether or not the destination-based taxation of corporate profits will violate existing international obligations will depend on how it is designed.[18] Alternatively, existing international obligations can be modified to accommodate the destination-based taxation of corporate profits.[19] The move towards destination taxation in the international tax system has been identified as one of the significant areas of change proposed in the 2020s compromise.[20] Blueprints for the destination-based taxation of corporate income can consist of either incremental or radical changes to the international tax system. The following subsections highlight these new blueprints and clarify three that diverge from each other: the OECD blueprint, the UN blueprint, and the DBCFT.

2.1. The OECD Destination Taxation Blueprint

The OECD destination taxation blueprint stipulates that a portion of the residual (non-routine) profits of in-scope MNEs is to be separated from the total profits of such MNEs and allocated to market/users' jurisdictions (Amount A).[21] The blueprint also includes Amount B which, arguably, envisages destination taxation.[22] However, this article focusses on Amount A because the crucial goal of Amount B is not necessarily to create a new type of destination taxation for MNEs' income, but to prevent transfer pricing disputes in respect of baseline marketing and distribution activities.[23] Amount A is restricted to apply to a specific scope of MNEs. According to the blueprint released in October 2020, the scope of Amount A would be determined by two tests, namely the activity test and the threshold test.[24] The July 2021 agreement (OECD, 2021a) and the October 2021 update (OECD, 2021b) from the substantial members of the OECD/G20's Inclusive Framework on BEPS override this. These documents change the threshold test by restricting in-scope taxpayers to MNEs "with global turnover above 20 billion euros and profitability above 10% (i.e. profit before tax/revenue)" (OECD, 2021a, p.1; OECD, 2021b, p.1). The October 2021 update adds that this threshold will be "calculated using an averaging mechanism" (OECD, 2021b, p. 1). Thus, the OECD destination taxation blueprint is concerned with very highly profitable MNEs. The July 2021 agreement and October 2021 update note that the "extractives and regulated financial services" sectors are

[15] See also OECD (2019d), p. 33, on compatibility with international obligations; Báez Moreno & Brauner (2019), pp. 148-153, analysing the interaction between their withholding tax (WHT) proposal with obligations under the following: WTO rules, EU law, and DTT law; Devereux et al. (2021), pp. 328-330 (two sets of international obligations that may conflict with the DBCFT are the DTTs and commitments under the WTO); Elliffe (2021), at pp. 121-164, on key restrictions on the imposition of new interim taxes.

[16] Schön (2016), arguing that the DBCFT may violate existing international obligations, including WTO and DTT rules; Avi-Yonah and Clausing (2017), pp. 235-247, arguing that the DBCFT, as proposed by the United States' of Representatives' Ways and Means Committee in 2016, may violate existing international obligations, including WTO and DTT rules; Mason and Parada (2020), pp. 183-203, arguing that, under EU law, taking unilateral and uncoordinated measures, e.g. digital service taxes (DSTs) when taxing the digital economy discriminates against non-resident, large, digital corporations.

[17] See Pirlot (2019), who concludes that the likelihood that the DBCFT would be found incompatible with international trade law is much lower than initially thought.

[18] See also Devereux et al. (2021), p. 330; Grinberg (2017), pp. 803-804 and 808-816, suggesting how the DBCFT can be drafted or designed to comply with WTO obligations.

[19] See also Devereux et al. (2021), p. 330.

[20] See Elliffe (2021), pp. 313-316, 214, and chapter 8.

[21] On Amount A, see OECD (2020d), at pp. 8, 11[7], 12, 13-15, 18, 212-220; Elliffe (2021), pp. 177-193.

[22] See OECD (2020d), pp. 15-16 [11-15], and chapter 8.

[23] See OECD (2020d), pp. 175 [710] and 160 [650-651]. See also Elliffe (2021), pp. 177, arguing that Amount B continues to require a physical taxable presence, the position under the current international tax regime.

[24] See OECD (2020d), p. 19 [21] and chapter 2.

excluded from the scope of Amount A (OECD, 2021a, p.1; OECD, 2021b, p.1). Limiting the scope of Amount A to these very highly profitable MNEs is a type of ring-fencing in respect of MNEs that earn supernormal profits. Devereux and Simmler (2021) find that 78 to 100 of the world's 500 largest companies would be affected. Historical works seem to be efforts to tax MNEs exploiting the digital economy (OECD, n.d., 2015a, 2019a, 2019b, 2019d, 2020d) but Amount A is a plan to tax MNEs that make supernormal profits. Are MNEs that make excess profits the only companies exploiting the digital economy? Empirical investigation beyond the scope of this article may be needed to determine this issue.

The OECD destination taxation blueprint proposes new nexus, sourcing, profit/tax base determination, and allocation rules in the era of digitalisation in order to give or reallocate more taxing rights to the market/user states.[25] The proposed nexus to give states taxing rights goes beyond having a physical presence in such nation-states.[26] The provision of nation-state taxing rights is a new/standalone nexus rule and is determined by the in-scope MNE's sales/market revenue indicating that it has active, significant, and sustained engagement with market states beyond the mere conclusion of sales.[27] According to the July 2021 agreement and the October 2021 update from the substantial members of the Inclusive Framework on BEPS:

> There will be a new special purpose nexus rule permitting allocation of Amount A to a market jurisdiction when the in-scope MNE derives at least 1 million euros in revenue from that jurisdiction. For smaller jurisdictions with GDP lower than 40 billion euros, the nexus will be set at 250 000 euros.
>
> The special purpose nexus rule applies solely to determine whether a jurisdiction qualifies for the Amount A allocation. (OECD, 2021a, p. 1; 2021b, p. 1)

The OECD blueprint generally, and newly, adopts a transaction-by-transaction sourcing rule for in-scope MNEs to determine the source/market state.[28] This sourcing rule is further elaborated in section 3.4 of this article. According to the OECD destination taxation blueprint, the tax base of these MNEs is to be determined by the profits-before-tax (PBT) of a group (rather than on a separate entity basis), e.g. via the consolidated group financial accounts of in-scope MNE groups.[29] This tax base is an adjusted PBT, i.e. the financial accounting profit of the in-scope MNE after making specific adjustments and deducting net losses.[30] The OECD blueprint proposes that the "calculation and allocation of Amount A will be delivered through a formula that is not based on the" arm's length principle (ALP) (OECD, 2020d, p. 123).[31] That is, the profit allocation rules are proposed to now go beyond the current ALP for transfer pricing in order to include some form of formulary apportionment rule.[32] The blueprint envisages the calculation and allocation of Amount A to involve three distinct but connected components, namely: (a) a profitability threshold to isolate the residual profit potentially subject to reallocation; (b) a reallocation percentage to identify an appropriate share of residual profit that can be allocated to market jurisdictions under Amount A; and (c) an allocation key to distribute the allocable tax base amongst the eligible market jurisdictions (i.e. where nexus is established

[25] See OECD (2020d) at pp. 7-8 and chapters 3-6; OECD (2022a), pp. 5-8.
[26] See OECD (2020d) at chapter 3.
[27] See OECD (2020d), pp. 8, 22 [38], 65 [187], and 66 [194].
[28] See OECD (2022a), pp. 5-8.
[29] See OECD (2022a), pp. 100 [406-407] and 213, and, generally, chapter 5; OECD (2021a), p. 2; OECD (2021b), p. 2; OECD (2022b).
[30] See OECD (2022c), pp. 15-16.
[31] See, generally, OECD (2020d), chapter 6.
[32] See OECD (2020d), p. 217.

for Amount A); the allocation key will be "based on locally sourced in scope revenue" (OECD, 2020d, p. 123).[33] The OECD destination taxation blueprint clarifies the quantum of the components as follows: "For in-scope MNEs, between 20-30% of residual profit defined as profit in excess of 10% of revenue will be allocated to market jurisdictions with nexus using a revenue-based allocation key" (OECD, 2021a, p. 2). In the October 2021 update, the 20-30 per cent of the residual profit is fixed at 25 per cent.[34] Where the in-scope MNE meets certain conditions, the amount derived by the formula, based on the three distinct components, is reduced by the marketing and distribution profits safe harbour adjustment.[35]

Policymakers seek to implement this blueprint based on sound policy rationales for the destination-based taxation of the corporate income of entities exploiting the digital economy. This OECD formulary apportionment destination taxation envisages implementing the changes via new domestic laws, multilateral convention, and guidance.[36] The taxation of the income of corporate entities under the international tax regime is built on the notion of equating taxable presence to a physical presence. However, within the digital economy, MNEs do not need a physical presence in the market location in order to engage substantially with potential consumers or customers.[37] This is a unique feature of the digital economy because the MNE does not necessarily need a middleman in order to engage substantially with potential consumers or customers in another foreign state.[38] Therefore, the policy rationales for the OECD destination taxation blueprint include the following: a) to update international tax rules to be in line with current reality, that an entity can "generate profits through participation in a significant/ active and sustained way in the economic life of a jurisdiction, beyond the mere conclusion of sales, with or without the benefit of local physical presence"; and b) to explicitly acknowledge that users/customers/consumers/purchasers in the market states create value for MNEs exploiting the digital economy.[39]

Commentators have articulated their views about the OECD blueprint. Elliffe (2021) argues that the OECD blueprint represents the most extensive reforms in a very long time because it creates more taxing rights for market states, overrides the physical presence test, and challenges the ALP. The African Tax Administration Forum (ATAF) criticises the limitation of Amount A to excess profits and prefers all profits of MNEs be included, stating: "We propose that the reallocation of profits which we refer to as "Amount D", would be calculated as a portion of the MNEs total profits instead of its residual profit" (ATAF, 2021). Relying on World Trade Organization (WTO) data, Cui (2022) challenges the traditional assumption that international income taxation is being undermined because more business transactions now take place remotely.[40] He submits that there is little evidence that the remote provision of services has grown at the expense of services trade via physical structures like branches and foreign

[33] See also, OECD (2020d), pp. 126-129 and 217.
[34] See OECD (2021b), p. 2.
[35] See OECD (2022c), p. 17.
[36] See OECD (2020d), pp. 205-210 (and, generally, chapter 10); OECD (2021a), p. 3; OECD (2021b), pp. 3 and 6-7.
[37] See OECD (2015a), pp. 98 [246], 99 [248], 100 [253], 101 [256], 101-102, and 106 [273]; Mason and Parada (2020), p. 180; Cockfield (2020), pp. 352-353; Báez Moreno and Brauner (2019), pp.158, 159, and 153-162.
[38] See OECD (2015), pp. 98 [246], 99 [248], 100 [253], 101 [256], 101-102, and 106 [273]; Mason and Parada (2020), p. 180; Cockfield (2020), pp. 352-353; Báez Moreno and Brauner (2019), pp. 158, 159, and 153-162.
[39] See OECD (2020d), pp. 8 and 65. See also OECD (2015a), pp. 98-104, 99 [250] and 102 [262]; OECD (2019b), pp. 9-10 [16 21], 12-13 [30-39] and 19 [65]; Christians and Magalhaes (2019), pp. 1160-1163; Elliffe (2021), pp. 169-170, 171-173, 175 and 178-179 (on the policy rationales of the user participation proposal, market intangibles proposal, significant economic presence proposal, and Amount A proposal).
[40] See Cui (2022), pp. 204 and 209-216.

affiliates.[41] However, Cui's (2021) submission does not dispute the fact that the supply of services electronically via the internet is ongoing in a way that the current international tax rules are yet to capture. The OECD destination taxation blueprint has also been criticised for the complexity of its contents and the logistical challenges of implementing a multilateral tax agreement for many nation-states.[42] Whether or not the plan to implement the blueprint via ratification by a critical mass of countries will overcome the logistical challenge is an open question.[43] The next subsection highlights an alternative blueprint for destination taxation emanating from another policymaker in international tax law.

2.2. The UN Destination Taxation Blueprint

The UN destination taxation blueprint is embodied in Article 12B of the UN's model DTC between developed and developing countries (UN, 2021). Article 12B's scope is restricted to automated digital services (ADSs), and the nexus to determine taxation is payment for ADSs.[44] According to the blueprint, the market or source state is the location of the payer for ADSs, or the location of the payer's PE or fixed base connected to the obligation to pay for the ADSs.[45] ADS means "any service provided on the Internet or another electronic network, in either case requiring minimal human involvement from the service provider" (UN Committee of Experts on International Cooperation in Tax Matters, 2021c, p. 4). The blueprint further provides that ADSs include:

- Online advertising services;
- Supply of user data;
- Online search engines;
- Online intermediation platform services;
- Social media platforms;
- Digital content services;
- Online gaming;
- Cloud computing services; and
- Standardized online teaching services (UN Committee of Experts on International Cooperation in Tax Matters, 2021c, p. 4)

However, the commentary notes that if an activity appears on this list, it is merely an indication that it is an ADS and does not necessarily mean that it is one (UN Committee of Experts on International Cooperation in Tax Matters, 2021c). When determining whether or not the operations of a specific beneficial owner or MNE group are classed as ADSs, these operations must meet the requirements of the earlier definition of the term (UN Committee of Experts on International Cooperation in Tax Matters, 2021c). The commentary clarifies that the term ADS:

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[41] See Cui (2022), pp. 204 and 209-216.

[42] See Avi-Yonah et al. (2022), pp. 298-300; UN Committee of Experts on International Cooperation in Tax Matters (2020), p. 67 (Annex 4); ATAF (2021).

[43] See OECD (2022c): the "critical mass of countries" includes:

> the residence jurisdictions of the ultimate parent entities of a substantial majority of the in-scope companies whose profits will be subject to the Amount A taxing right, as well as the key additional jurisdictions that will be allocated the obligation to eliminate double taxation otherwise arising as a result of the Amount A tax. (p. 5)

[44] UN Committee of Experts on International Cooperation in Tax Matters (2021c), pp. 3-4 (Article 12B (1) (2) (9)).

[45] UN Committee of Experts on International Cooperation in Tax Matters (2021c), p. 4 (Article 12B (9)).

> does not include:
>
> *i.* Customized professional services;
> *ii.* Customized online teaching services;
> *iii.* Services providing access to the Internet or to another electronic network;
> *iv.* Online sale of goods and services other than automated digital services; and
> *v.* Revenue from the sale of a physical good, irrespective of network connectivity ("internet of things"). (UN Committee of Experts on International Cooperation in Tax Matters, 2021c, p. 21)

In addition, the blueprint does not apply in two other scenarios: (a) where the payment qualifies "as "royalties" or "fees for technical services"" (UN Committee of Experts on International Cooperation in Tax Matters, 2021c, p. 4) and (b) in PE or fixed base scenarios where the payment is effectively connected to a PE or fixed base of the beneficial owner in the source/market state (UN Committee of Experts on International Cooperation in Tax Matters, 2021c).

The blueprint encompasses the gross taxation of corporate revenue or net taxation in specified instances (UN Committee of Experts on International Cooperation in Tax Matters, 2021c). It provides a general rule that the residence state may tax income from ADSs, i.e. income derived from underlying payments from the source/market state to a resident of the residence state. Article 12B then gives an exception that the source/market state, according to its laws, may also tax income from ADSs, i.e. income derived from underlying payments from the source/market state to a resident of the residence state (UN Committee of Experts on International Cooperation in Tax Matters, 2021c). The source/market state's taxation on the beneficial owner of such income shall not exceed a specific percentage "of the gross amount of the payments underlying the income from" ADSs (UN Committee of Experts on International Cooperation in Tax Matters, 2021c, p. 3). This specific percentage "is to be established by bilateral negotiations" between the residence and source/market states (UN Committee of Experts on International Cooperation in Tax Matters, 2021c, p. 3). Therefore, the UN blueprint for destination taxation encompasses the source/market state's WHT on gross income derived from ADSs. Furthermore, Article 12B provides that the beneficial owner of the income derived from ADSs may elect to avoid the gross basis taxation and choose its qualified profits from ADSs for the relevant fiscal year to be taxed according to the domestic laws of the source/market state (UN Committee of Experts on International Cooperation in Tax Matters, 2021c). Article 12B determines the qualified profit by applying 30% to the resultant amount of the profitability ratio of the ADS business segment to the gross annual revenue from ADSs derived from the source/market state (UN Committee of Experts on International Cooperation in Tax Matters, 2021c). Collier et al. (2021) explain this profitability ratio analysis as follows:

> This works on the basis that the profitability ratio (relevant annual profits divided by annual revenue) of the recipient is applied to the gross revenue arising in the source state, and 30% of the resulting net profit is then treated as the profit that is taxable in that state. This is equivalent to a form of formulary apportionment, in which 30% of the global profit is allocated in proportion to the sales in market countries. (p. 419)

The profitability ratio analysis of Article 12B is intended to be net basis taxation instead of gross basis taxation (UN Committee of Experts on International Cooperation in Tax Matters,

2021c). This net basis taxation is contingent on the availability of information about the profitability of the relevant MNE group. Where such profitability information is not available to the tax authority of the source/market state, gross basis taxation shall prevail over net basis taxation (UN Committee of Experts on International Cooperation in Tax Matters, 2021c).

Article 12B is to be implemented via changes to domestic law and DTTs based on policy rationale that appears arguably similar, but not the same as, the policy rationale(s) for the OECD blueprint for the destination-based taxation of corporate income. This similarity stems from the inadequacy of the current international tax rules. The policy rationale for Article 12B is "to preserve the domestic law taxing rights for States from which payments for automated digital services are made", i.e. the goal of protecting the taxing rights of states (especially developing countries) over digital business models that can engage in cross-border business activities without necessarily having a physical presence in the market jurisdiction (UN Committee of Experts on International Cooperation in Tax Matters, 2021c, p. 5). The source/market state may or may not choose to adopt domestic laws to exert the Article 12B taxing right.

As would be expected, commentators have expressed their opinions about the UN blueprint. It has been praised for its simplicity, contribution to the elimination of double non-taxation, ability to raise stable tax revenues, ease of implementation and compliance in respect of the gross taxation of business-to-business (B2B) scenarios, style of providing option for gross or net basis taxation, preservation of taxing rights, and protection of the tax base in the digital economy, especially from ADSs.[46] The blueprint has also been criticised for being difficult to implement in business-to-customer (B2C) transactions, for raising interpretational challenges, for its potential to result in excessive or double taxation, for creating tax planning opportunities that would make developing countries lose tax revenues, for providing an ineffective approach by which to address the tax challenges created by the digital economy via treaty, and for providing very limited coverage to only ADSs and lax robustness to tax avoidance.[47] Moreno argues that introducing Article 12B of the UN model DTT is unnecessary, undesirable, and counter-productive because, inter alia, the correct and non-restrictive interpretation of Article 12A of the UN model DTC on fees for technical services can encompass ADSs (Báez Moreno, 2021). The following subsection highlights a scholarly blueprint for destination-based taxation of corporate income of MNEs.

2.3. The Scholarly Destination Taxation Blueprint: The Destination-Based Cash-Flow Tax

The DBCFT blueprint is a proposal for a radical or fundamental change in how MNEs are taxed.[48] The DBCFT proposal seeks to replace the corporate income tax (CIT) with the DBCFT in a domestic tax system.[49] In the context of the domestic business taxation of MNEs, the DBCFT seeks to: a) replace the income tax with a cashflow tax, b) substitute depreciation allowances with immediate expensing of investment and c) abolish interest deductions for non-financial companies (Auerbach, 2017). With regard to the international business taxation of

[46] See Mpoha (2022), pp. 235-236; Avi-Yonah et al. (2022), p. 334-335. See also Magwape (2022), p. 451.

[47] See Mpoha (2022), pp. 236-240. See also Magwape (2022), p. 451.

[48] See Auerbach (2017); Devereux and Vella (2018a), pp. 555-557; Devereux et al. (2020), pp. 3 and 20-21, arguing that the DBCFT proposal is a better reform than the OECD GLoBE proposal for the purposes of addressing both profit shifting and tax competition; Devereux et al. (2021) at chapter 7.

[49] See Auerbach (2017) at 410; Avi-Yonah and Clausing (2017), at p. 231, n 1 (the DBCFT was proposed for adoption in the United States).

MNEs, the DBCFT is a territorial tax system on domestic activities alone, plus a border adjustment to deny deductions for imported inputs and relieve export receipts from taxation (Auerbach, 2017). The DBCFT is similar to a consumption tax or value added tax (VAT): a tax on only domestic consumption; a tax on domestic consumption net of returns to labour; or a tax that equates with a VAT and a wage subsidy at an equal rate (Auerbach, 2017).

The DBCFT aims to achieve: the equal tax treatment of debt and equity capital; simplicity by not requiring income measurement; to eliminate the tax on normal return to investment; to curb profit shifting by MNEs; and to curb tax competition by nation-states.[50] Other policy rationales for the DBCFT include the following:

- the ill-suited nature of the corporate income tax, which taxes business income based on mobile factors—corporate residence, location of profits, and location of production—which are easily manipulable by MNEs; and
- taxing a less mobile factor: domestic consumption and/or sales to third parties.[51]

This radical reform has its merits and demerits.[52] The DBCFT may be a more efficient way in which to tax corporate income in the global economy because it adopts a relatively immobile tax base.[53] In other words, the DBCFT will severely minimise the distortion as to the location and scale of investment; and corporations may find it more difficult to benefit from fiscal arbitrage or income shifting regarding income earned on the internet or in the digital economy.[54] The efficiency of the DBCFT model seems to align with the purist philosophy of international tax policy.[55] Notwithstanding, Cui (2017) comprehensively appraises two versions of the DBCFT proposal and concludes that the normative benchmarks (e.g. neutrality) supporting the proposal are insufficient, unsatisfactory, and modest.[56] He also notes that proponents of the two versions of the DBCFT have failed to describe a tax that is simultaneously non-distortionary, feasible, and a tax on corporate profits.[57]

3. WHAT ARE THE EMERGING IMPLICATIONS OF THE MOVE TOWARDS DESTINATION TAXATION?

The move toward destination taxation has potential consequences for nation-states and international tax policy. This section identifies and discusses four implications based on the blueprints highlighted in the previous section:

[50] See Auerbach (2017), pp. 411-419; Devereux and Vella (2018), pp. 551, 552, and 555-557; Devereux et al. (2021), pp. 170-171.
[51] See Auerbach (2017), pp. 411-419; Devereux and Vella (2018), pp. 551, 552, and 555-557; Devereux et al. (2021), pp. 170-171.
[52] See also Elliffe (2021), pp. 268-271.
[53] See Devereux et al. (2021), pp. 279-283, and 333.
[54] See Devereux et al. (2021), pp. 280, 290-294, 297, and 333. See also Gordon and Nielsen (1997), pp. 181-183, and 190 (at p. 190, finding less tax evasion via cross-border shopping under a VAT system than under an income tax system via income shifting); Mintz and Smart (2004), pp. 1150 and 1166, finding that it is more difficult for a corporation to employ certain financing techniques in order to engage in income shifting under a system where its total income is allocated according to a statutory formula based on the distribution of sales.
[55] See Cockfield (2007) on the dichotomy between the purist and contextualist analysis of international tax law.
[56] See Cui (2017), pp. 304-305 and 346 .
[57] See Cui (2017), pp. 304-305, 322-337, and 346-347.

1. The reform will expand the source principle in a diverging way that challenges the standardisation of the extended source principle.
2. The change in momentum will likely lead to avertible costs for in-scope taxpayers, consumers, and tax administrations.
3. The destination taxation blueprints have a distributional impact without resolving inter-nation equity.
4. The reform (the OECD blueprint) will likely lead to tax competition by affluent states for sales factors.

The initial two implications arise from the divergence of international tax policymakers' blueprints. In contrast, the subsequent two implications are not the result of the divergence between the OECD blueprint and the UN blueprint. The following subsections discuss these four implications seriatim.

3.1. Expanding the Source Principle, Encouraging Diverging Unilateral Actions, and Challenging the Standardisation of the Expanded Source Principle

The reform expands the source principle in a way that may encourage diverging unilateral actions because of the divergence of the blueprints of policymakers. This divergence may challenge the standardisation of the expanded source principle. Arguably, assigning taxing rights to the demand side of the market or market states via the destination-based taxation of MNEs' corporate income is an expansion of the source principle in the field of international tax policy and practice in respect of how nation-states tax the income of corporate taxpayers. The UN blueprint expands the source principle to include payments for the sale of ADSs (UN Committee of Experts on International Cooperation in Tax Matters, 2021c; see 2.2 above), while the OECD blueprint expands the source principle generally on a transaction-by-transaction basis determined by the in-scope MNE's "sale/market revenue indicating active, significant and sustained engagement with market states beyond the mere conclusion of sales" (quoted from 2.1 above). Conversely, the scholarly DBCFT restricts this expansion of the source principle to the domestic consumption of the products of companies or MNEs (see 2.3 above). The destination-based taxation of corporate income entails that in-scope corporations have assets in the location of the demand side of the market, even without having a physical presence therein.[58] This destination-based taxation of the digital economy expands the source principle because it connotes that a sale by the relevant taxpayer is now necessarily a basis for the taxation of business profit. This expansion has tax revenue implications. Expanding the source principle via the destination-based taxation of MNEs is likely to increase governments' tax revenues due to the expansion of the tax base caused by such destination taxation.[59] The

[58] See also Devereux et al. (2021), pp. 169-170, and:

> At the time of writing, the members of the OECD/G20 Inclusive Framework are considering allocating some partial taxing rights to the destination country, although some of those advocating this reform argue that this may be justified because the business owns valuable intangible assets there—thereby treating the place of sale as an origin country. (p. 32, n 26)

[59] See also OECD (2020c), p. 61, chapter 2, and:

> Pillar One would involve a significant change to the way taxing rights are allocated among jurisdictions, as taxing rights on about USD 100 billion of profit could be reallocated to market jurisdictions under the Pillar One rules. This would lead to a modest increase in global tax revenues. (p. 10)

OECD impact assessment finds that any global tax revenue increase arising from the implementation of the OECD blueprint is likely to be "modest" (OECD, 2020c, p. 10), i.e. "less than 1% of global" corporate income tax revenue (OECD, 2020c, p. 61). The OECD predicts that "about US $100 billion of profit" could be reallocated to the location of the demand side of the market annually under the OECD blueprint (OECD, 2020c, p. 10). Elliffe (2021) notes that, were this projection to be correct, the description of such revenue as modest might be an understatement.[60] The revenue implication of expanding the source principle via the destination-based taxation of the corporate income of MNEs suggests that nation-states will be eager to have a piece of the tax pie.

International tax policymakers have given nation-states diverging routes by which to have a portion of this tax pie. The issue of how the OECD blueprint and the UN's Article 12B can be coordinated or reconciled remains. The OECD blueprint requires "the removal of all existing digital services taxes" (DSTs) "and relevant similar measures with respect to all companies, as well as a commitment not to enter into such measures in the future (OECD, 2022c, p. 5). This stipulation neither mitigates the concern about diverging unilateral actions by sovereign entities nor reconciles with UN Article 12B. For at least three reasons, UN Article 12B, concurrently existing with the OECD blueprint, may act as a precursor to countries enacting diverging forms of destination taxation, e.g., DSTs, DST-like domestic laws, WHTs, and formulary apportionment-like domestic laws. First, the July 2021 agreement (OECD, 2021a) and October 2021 update (OECD, 2021b) did not arise from a consensus agreement by the Inclusive Framework on BEPS. As of 09 June 2023, (a) 139 members of the Inclusive Framework on BEPS had agreed to the OECD blueprint, and (b) four members—Kenya, Nigeria, Pakistan, and Sri Lanka—had yet to agree to the OECD blueprint (OECD, 2023a; 2023b). As of 15 November 2023, 140 out of the now increased 145 members of the Inclusive Framework on BEPS—including Kenya and Nigeria—had approved a July 2023 outcome statement to proceed with the OECD blueprint, implying that five members—Belarus, Canada, Pakistan, Sri Lanka and Russian Federation—were yet to approve this outcome statement (OECD, 2023a; 2023b; 2023c). This first reason is buttressed by the expectation that the multilateral convention to implement the blueprint "will enter into force only upon ratification by a critical mass" of nation-states (OECD, 2022c, p. 5). This expectation suggests that countries that are not part of the critical mass may not have an obligation to ratify or implement the OECD blueprint or Amount A tax. These countries are free to consider other blueprints for the destination-based taxation of corporate income but could be encouraged to adopt the OECD blueprint due to the ratification by the critical mass. Second, some UN member states are not members of the Inclusive Framework on BEPS. The UN has 193 member states (UN, n.d.-b), suggesting that at least 48 countries are not members of the Inclusive Framework on BEPS. These 48 countries may choose the UN blueprint or OECD blueprint for the destination-based taxation of MNEs.

Third, the UN's destination taxation is a DST in substance because it seeks to tax ADSs via a WHT or net basis taxation[61] and sovereign entities have histories of adopting unilateral measures. Despite having made efforts to reach a consensus on how to tax the digital economy in a coordinated way, sovereign entities have started to take uncoordinated and unilateral actions to tax the digital economy in ways that are similar to the pending blueprints for the

[60] See Elliffe (2021), pp. 212 and 316.

[61] See also Jefferson VanderWolk (2021). Compare with Báez Moreno (2021), p. 532, (concluding that (a) WHT on ADSs is not a unilateral measure where the source state's taxing rights are preserved by a provision in a DTT; and (b) the argument that WHT on ADSs is a measure similar to DST is a difficult argument because such WHT is income tax creditable in principle in the residence state.

destination-based taxation of corporations exploiting the digital economy.[62] These are similar to the pending blueprints because they expand and link the tax base with regard to how the income of non-resident enterprises are taxed in order to encompass the location of the demand side of the market.[63] For example, in 2018, the European Commission proposed a common system of digital services tax within the EU (European Commission, 2018).[64] In May 2021, the European Commission resuscitated its call for a digital levy on digital corporations (European Commission, 2021). In July 2021, the EU decided to postpone the publication of the digital levy on digital corporations (Vela, 2021). It has been reported that the implementation of the digital levy is still on the EU's agenda.[65] DSTs have been introduced in the United Kingdom and France.[66] An equalisation levy on online advertisement services by non-residents now applies in India.[67] In 2020, Nigeria adopted the Significant Economic Presence (SEP) test to tax non-resident companies (Federal Government of Nigeria, 2004, 2019, 2020; PwC Nigeria, 2020). Nigeria has also stated that when a multilateral agreement to which it is a party is reached on a coordinated solution, such agreement will supersede Nigeria's new SEP test to tax non-resident companies in Nigeria.[68] Will Nigeria discard its SEP test because of its approval of the July 2023 outcome statement to proceed with the OECD blueprint? It remains to be seen what steps Nigeria and other countries in a similar situation will take in the coming future. The options include:

(a) eventually signing the multilateral agreement based on the OECD blueprint; or
(b) adopting the UN blueprint in their domestic laws; or
(c) continuing with the SEP test.

Presumably, these diverging, uncoordinated, and unilateral actions have been caused by the desire of these states and the EU to protect and legalise a profitable tax base, and raise tax revenues in the absence of a consensus on a coordinated solution.[69] Given that DSTs are like tariffs on imported services,[70] unilateral DSTs and DST-like laws may impede cross-border trade because of the likelihood of retaliatory measures/tariffs being taken by states (e.g. the United States) that are not satisfied with the DSTs.[71] Cui (2022) observes that such retaliatory tariffs are likely to violate WTO rules, may hurt U.S. consumers and small countries may avoid such tariffs because they do not sufficiently export goods to the United States.[72] Furthermore,

[62] See OECD (2018), pp. 134 [341-343], 159, and, generally, chapter 4.
[63] See OECD (2018), pp. 134 [341-343] and 159, and, generally, chapter 4.
[64] See also Mason and Parada (2020), pp. 177, and 181-182.
[65] See Avi-Yonah et al. (2022), pp. 282, n 12.
[66] See HMRC (2020); Mason and Parada (2020), pp. 182-183.
[67] See OECD (2018), p. 142.
[68] See Federal Government of Nigeria (2020), Section 1(3).
[69] See also OECD (2018), p. 134; Magwape (2022) on the challenges and opportunities of taxing the digital economy in Africa.
[70] See Lockwood (1993): "the tax on the imported good is exactly like a tariff" (p. 144). See also Lockwood (2001), pp. 282, 283, and 311, noting that, due to spillover, tax reforms that lower taxes on imports are generally desirable in respect of destination taxation.
[71] See Mason and Parada (2020), pp. 192-195, arguing that DSTs may be taken as discriminatory taxes against U.S. MNEs because most digital corporations are U.S.-based. See also Martin (2021), stating that the United States Trade Representative has found that "DSTs enacted in Austria, Spain, and the UK discriminate against US companies within the meaning of Section 301 of the US Trade Act of 1974"; Butani and Jain (2021) on the finding by the United States Trade Representative that the Indian 2020 equalisation levy is discriminatory against US companies; BBC News (2021), which reports that the United States has announced the temporary suspension of any retaliatory tariffs.
[72] Cui (2022), pp. 220 and 222 n 91.

Avi-Yonah et al. (2022) submit that the U.S. tariffs have had no impact in deterring French DSTs.[73] In summary, diverging DST-like domestic laws may eventually co-exist with the OECD destination taxation blueprint because of (a) the lack of unanimous consensus on the OECD blueprint, (b) the fact that some UN member-states are not members of the Inclusive Framework on BEPS, (c) the DST nature of the UN blueprint, and (d) the history of sovereign entities in adopting unilateral measures. Cognisance is taken of the political challenges from the legislative arm of government in the United States with regard to the implementation of the OECD blueprint.[74] Even if the United States fails to implement the blueprint and the political/gentleman's agreement about it collapses, the momentum built around the existing, diverging, policymakers' blueprints is likely to propel nation-states to adopt diverging unilateral actions like DSTs, DST-like domestic laws, WHTs, and formulary apportionment-like domestic laws.

This likely diverging outcome questions or challenges the standardisation of the newly expanded source principle in international tax policy. What is the extent or standard of this newly expanded source principle in international tax policy? Given the diverging tax base, nexus, and sourcing rules of the OECD and UN blueprints, is the newly expanded source principle in international tax policy the UN's nexus/sourcing rule, the OECD's nexus/sourcing rule, or both? If only one blueprint existed or the blueprints did not diverge, this standardisation issue would not arise. The correct answer to this standardisation issue will be revealed as nation-states begin to legally adopt blueprints for the destination-based taxation of corporate income. States should consider the implications of adopting new, unstandardised source principles within their international tax legislation. The next subsection discusses the avertible costs of the built-up momentum.

3.2. Avertible Costs

This subsection focusses on the avertible costs arising due to the policymakers' diverging blueprints.[75] These diverging blueprints have cost implications for taxpayers (MNEs), consumers, and tax administrations. The likely costs include: (a) costs as a result of over-taxation or double taxation, (b) higher prices for the consumers of in-scope MNEs' products and (c) inefficiently high compliance and administrative costs. The concurrent existence of the OECD and UN blueprints is likely to lead to the over-taxation or double taxation of the corporate income of non-resident, in-scope MNEs.[76] For example, a state where the relevant MNE has no physical presence may adopt UN Article 12B's gross taxation because it is not satisfied with the OECD's destination taxation.[77] In this instance, there will likely be over-taxation or double taxation, especially where (a) the targeted MNE eventually incurs a loss in deriving such corporate income, (b) the relevant corporate income is also likely to be taxed by another country adopting the OECD's destination taxation, and (c) the targeted MNE gets no relief for gross taxation because its resident state does not recognise UN Article 12B. Plausibly,

[73] See Avi-Yonah et al. (2022), p. 330.
[74] See Avi-Yonah et al. (2022), p. 299, on the political challenges in the United States. See also Davison (2022); Rappeport (2022); Rappeport and Tankersley (2022).
[75] See also UN Committee of Experts on International Cooperation in Tax Matters (2020), p. 67. The DBCFT also raises cost implications, as mentioned below in subsection 3.3.
[76] See also UN Committee of Experts on International Cooperation in Tax Matters (2020), p. 67; VanderWolk (2021), p. 2; Mason and Parada (2020), pp. 201-202, n 126 and n 128, arguing that DSTs may result in unrelieved double taxation; OECD (2018), p. 159 [368], which notes that uncoordinated interim initiatives are likely to generate some economic distortions, double taxation, and associated compliance costs for businesses operating cross-border.
[77] See also OECD (2018), p. 141 [362].

the relevant MNE, faced with the risk of over-taxation, has a choice between continuing sales or stopping sales in this location of the demand side of the market (market state). If it chooses to continue selling in the relevant market state, it may increase the price of the products that it sells there, making consumers/customers in this market state bear the real burden of the tax. In-scope corporations that face the risk of over-taxation may shift the costs of over-taxation to consumers[78] (unless those MNEs are making excess profits and would not mind paying extra taxes).[79] The issue remains as to how much tax burden these MNEs would be willing to bear vis-á-vis any excess profit. In any event, this likely shift of the cost/incidence of the gross taxation to consumers/customers may lead to higher prices for the consumers of the targeted MNEs' products. These consumers/customers can either consume such products together with bearing the real burden of the gross tax or choose not to consume such products. The UN destination taxation blueprint recommends a modest WHT rate of 3% or 4% and refers to factors that should be considered when determining the precise level of the WHT.[80] These factors include:

- the possibility of non-resident service providers passing the cost of a high WHT rate on to customers in the source/market country;
- the likelihood of a high WHT rate deterring investment, especially if such rate is higher than the foreign tax credit limit;
- the likelihood that a high WHT rate may be excessive on net income derived from ADSs, given that some non-resident service providers incur high costs in providing ADSs;
- revenue and foreign exchange consequences for the source/market country from the reduction of the WHT rate; and
- relative flows of payments for ADSs.[81]

Some of these noted factors align with the concerns about over-taxation and the negative consequences therefrom.

Compliance and administrative costs may also arise from the OECD and UN blueprints. Corporations opting for net taxation under the UN Article 12B model may have higher compliance costs as they will need to comply with the two types, rather than one type, of destination taxation if different locations of the demand side of the market or market states adopt Article 12B and the OECD destination taxation blueprint. An example of higher compliance costs can be seen in terms of higher reporting costs. In-scope taxpayers or corporations may be required to file tax returns in source/market states, i.e. states in which they are not currently tax residents and have no physical presence. Do corporations have reporting obligations in the location of the demand side of the market (source/market states) in which they have no physical presence? Usually, such corporations have reporting obligations in states in which they are tax residents because these are states in which they are obligated to file their

[78] See Sweet (2020), reporting that Amazon is seeking to increase fees for U.K. sellers in response to the United Kingdom's DST.

[79] See Fox (2020), who argues, from his empirical study using U.S. corporate tax return data covering 1957 to 2013, but with emphasis on 1995-2013, that (1) the CIT burden fell largely on economic rents (excess profits); (2) given that economic rents are so profitable that investors will not respond to tax increases on them, the CIT burden is less likely to be shifted to labour; and (3) therefore, the real burden of the CIT fell on capital owners during the period studied.

[80] See UN Committee of Experts on International Cooperation in Tax Matters (2021c), p. 11; UN Committee of Experts on International Cooperation in Tax Matters (2020), pp. 13-14.

[81] See UN Committee of Experts on International Cooperation in Tax Matters (2021c), p. 11; UN Committee of Experts on International Cooperation in Tax Matters (2020), pp. 13-14.

tax returns.[82] In order for the destination-based taxation of corporate income to be workable, these companies may have to register in market states where they have no physical presence.[83] Alternatively, the implication of the destination-based taxation of corporate income may be that corporations will be required to file tax returns or have reporting obligations in source/market states in which they have no physical presence. The OECD blueprint provides that the coordinating entity of the in-scope MNE would file a single Amount A self-assessment return with its tax authority.[84] This tax authority then validates the assessment and exchanges information with other affected tax authorities.[85] Article 12B net basis taxation is contingent on the source/market state's tax authority having information about the relevant MNE group's profitability.[86] MNEs are likely to incur additional compliance costs if they have to file Amount A self-assessment returns and Article 12B profitability information because (a) they are operating in different market states imposing the OECD and UN blueprints, and (b) they opt for the net taxation under the UN Article 12B blueprint. Taxpayers (MNEs) facing higher compliance costs are likely to look for ways in which to optimise and mitigate their costs, including shifting the costs to local consumers. Another way by which to mitigate additional compliance costs is to employ one report for Amount A and Article 12B purposes if both require similar information. Tax administrations are also likely to incur higher administrative costs when administering the new destination taxation. Suppose that the cost of administering the new destination-based taxation of corporate income is substantially higher than the tax revenue derived; this will be inefficient, violating the efficiency principle endorsed for the taxation of electronic commerce.[87]

If some source/market states adopt the OECD destination taxation blueprint and others adopt the UN destination taxation blueprint, there are likely and avertible cost implications for taxpayers (MNEs) and consumers. As previously noted, the adoption of any destination taxation blueprint has cost implications for tax administrations.

VanderWolk (2021) observes that:

> Article 12B is unlikely ever to apply to payments to the large, global companies at whom digital services taxes are aimed. Most of those companies are based in the U.S., and the U.S., which opposes digital services taxes and uses its own model tax treaty in any case, would almost certainly never agree to a provision like Article 12B.

This observation seems to suggest that the UN destination taxation blueprint may be an almost toothless bulldog, given that most relevant MNEs are U.S. residents. However, at least two important points ought to be noted, namely: (a) not all relevant MNEs are resident in the United States;[88] (b) the UN destination taxation is a DST in substance and this sends a signal to the source/market countries without DSTs to adopt such or similar measures within their domestic laws (VanderWolk, 2021). There are cost implications if countries that do not agree with, or have changed their minds about, the OECD blueprint heed this signal.

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[82] See Tax Administration Act 1994 (New Zealand), part 2A, s 15B, "Taxpayer's tax obligations".
[83] See Devereux et al. (2021), p. 187.
[84] See OECD (2020d), p. 220. See also OECD (2021a), p. 3; OECD (2021b), p. 3.
[85] See OECD (2020d), p. 220. See also OECD (2021a), p. 3; OECD (2021b), p. 3.
[86] See UN Committee of Experts on International Cooperation in Tax Matters (2021c), p. 14 [42] (Draft commentary on Article 12B (3)(4)).
[87] See OECD (1998a), p. 4 [9].
[88] See Devereux and Simmler (2021), pp. 4-5 and 9-10.

3.3. Distribution Impact Without Resolving Inter-Nation Equity

The destination-based taxation of MNEs has a distributional impact or momentum that does not resolve inter-nation equity for the following reasons:

a) The OECD blueprint adopts an inadequate differentiated approach that does not necessarily help numerous low-income countries;
b) The UN blueprint does not adopt a differentiated approach and may have features that disadvantage many low-income countries; and
c) The DBCFT does not adopt a differentiated approach and its reliance purely on domestic consumption will most likely put many low-income countries at a disadvantage.

Amid an inefficiently and inequitably situated global society of nation-states, the few affluent market states seem comparatively better off via the distributional impact of destination taxation. The current global society is unfairly and inefficiently situated because: (a) investment pattern concentrates excess wealth or financial capital in few affluent states globally;[89] and (b) multidimensional poverty exists in vast areas of the global society, especially within low and lower-middle income states.[90] Locations of the demand side of the market or market states are likely to be the primary beneficiaries of the distributional impact of the existing types of destination taxation, as these provide more taxing rights to these states.[91] Given that affluent states have the largest consumer markets, there will likely be more distribution in favour of these few states with large and financially buoyant populations.[92] In other words, the ongoing changes to the international tax regime seem to make these few affluent states comparatively better off via destination taxation. Those that gain less from the destination-based taxation of MNEs include the following: (a) states with comparatively small populations because a small population may equate with comparatively low consumption; and

[89] See Clausing (2016), pp. 921, 922, and 923 (deducing from the 2012 Forbes Global 2000 list of the world's largest corporations that the headquarters of 72 per cent of the world's most profitable firms are in OECD states); Murphy et al. (2021), who note that the United States dominates as the location for the world's largest public companies; Ogrean and Herciu (2016) p. 95, noting that, as of 2015, most of the top 100 non-financial MNEs were in the United States; UN Conference on Trade and Development (2016), p. 152, with regard to: (a) the ownership of MNE affiliates by share of direct owners—the United States and European Union had 84%, developing Asia had 29%, Latin America and the Caribbean had 19%; and Africa had 18%; and (b) the ownership of MNE affiliates by share of ultimate owners—the United States and European Union had 72%; developing Asia had 24%, Latin America and the Caribbean had 11%, and Africa had 8%.
[90] See van Apeldoorn (2019), p. 561.
[91] See also OECD (2020a): "Preliminary findings suggest that the combined effect of *Pillar One* and Pillar Two would lead to a significant increase in global tax revenues as well as *a redistribution of taxing rights to market jurisdictions* [emphasis added]" (p. 19).
[92] See Christians and Magalhaes (2019), pp. 1154-1157 and 1173-1176. In particular, they state that:

> As a starting point, available OECD and World Bank data from 2017 provide a fairly clear picture of which states are the largest consumer markets. They are the United States, Europe, and China by a wide margin, followed by Japan, India, and Brazil, with Canada and Australia another step removed. (p. 1174)

They also note that: (a) "a focus on the consumer base as the market is a metric that, by definition, tends to favour the biggest consumer markets in relation to small-market, low-income countries" (p. 1175); and (b) "given the disparate levels of consumption across the globe, a market-based system would mostly benefit relatively more affluent countries and, in the best-case scenario, some emerging ones" (p. 1176).

(b) poor/low-income states because poverty may equate with low purchasing power for consumption.[93]

Hence, inter-nation equity is an apt principle by which to fairly safeguard the tax revenue of other nation-states, especially disadvantaged or low-income ones. Inter-nation equity raises two distinct issues, namely (a) what fair principles are to be applied in dividing and taxing gains/losses from cross-border transactions; and (b) the redistribution of tax revenue globally, especially in favour of low-income states.[94] Treating unequal nation-states differentially when allocating taxing rights among states can advance inter-nation equity which can, in turn, promote international distributive justice, and help to resolve global poverty and inequality (Ozai, 2020). For example, the allocation of more income to low-income countries under a formulary apportionment proposal will be a redistributive transfer of the right to tax.[95] The redistribution of income and wealth is recognised as one of the standard objectives of fiscal policy,[96] and adopting this objective in international tax policy is reasonable in an inefficiently and inequitably situated global society.

The OECD destination taxation blueprint reflects an awareness of the distributional impact and these inter-nation equity concerns but does not address these issues. It adopts a lower threshold of taxing nexus or rights for small, developing economies.[97] To fairly tax gains, the OECD blueprint arguably adopts a differentiated nexus principle by suggesting that, for smaller states with GDP below 40 billion euros, the taxing nexus should be the MNE deriving at least 250, 000 euros from such states.[98] In contrast, the taxing nexus for other market-states will be the MNE deriving at least one million euros from these states.[99] On the second inter-nation equity issue, the following question arises: is preventing wealthy states from taxing at the lower threshold redistributive towards low-income states? The answer to this question does not seem to be in the affirmative because this differentiated nexus approach does not necessarily allocate more income or taxing rights to low-income countries but does make it less burdensome for small, developing economies to claim taxing rights under the emerging destination-based taxation of MNEs' corporate income.[100] Furthermore, the published documents on this differentiated approach do not elaborate on how a GDP below 40 billion euros was chosen as the benchmark for small, developing economies. This lack of elaboration raises the question of whether the selected benchmark is appropriate.

In any event, the low-income jurisdiction allocation key provided in the sourcing rule of the OECD blueprint neither allocates more taxing rights to low-income states nor advances global

[93] See also Christians and Magalhaes (2019), pp. 1174-1176.
[94] See Chukwudumogu (2021), pp. 109-110. Musgrave and Musgrave (2002); Avi-Yonah (2020), pp. 1649-1651.
[95] See Benshalom (2014), pp. 355-357, noting that another example of redistributive transfer is the inclusion of a minimum tax rate requirement to reduce tax competition for mobile MNE capital investments. See also Benshalom (2014), pp. 326-327, 328-343, and 351-354.
[96] See Dietsch and Rixen (2019), pp. 503.
[97] See OECD (2020d), pp. 67 [197 & 198] and 69 [213]; OECD (2021a), p. 1; OECD (2021b), p. 1.
[98] See OECD (2021a), p. 1; OECD (2021b), p. 1.
[99] See OECD (2021a), p. 1; OECD (2021b), p. 1.
[100] See also OECD (2020d):

> For the smallest jurisdictions (e.g. jurisdictions with GDP less than USD 5 billion), *the analysis suggests that many MNE groups may not have a nexus in these jurisdictions if a single threshold is set at EUR 5 million or above* [emphasis added]. On that basis, and the considerations further discussed below, a possibility is to have two separate market revenue thresholds. (p. 67)

redistribution.[101] World Bank data is used to define low-income jurisdictions as low-income economies or lower-middle income economies.[102] The sourcing rule does not necessarily prioritise the sourcing of revenue to low-income jurisdictions, as it provides that:

> After the application of paragraph B(3)(a), any remaining Revenues (the "Tail-End Revenues") shall be treated as arising in [a Jurisdiction] using the Low Income Jurisdiction Allocation Key, provided that [a Jurisdiction] is a Low Income Jurisdiction. In the event that the Covered Group demonstrates that Revenues did not arise in any Low Income Jurisdiction, the Tail-End Revenues shall be treated as arising in [a Jurisdiction] using the Global Allocation Key. (OECD, 2022a, p. 13 [B3b])

Sourcing for a low-income state is in "proportion to the percentage of its share of the final consumption expenditure as published by the United Nations Conference on Trade and Development" (OECD, 2022a, p. 14). In other words, sourcing for low-income states is secondary and tied to final consumption expenditure, suggesting that these states may not be better off when compared to the few affluent market states. Low-income states have low purchasing power and allocating taxing rights based on their final consumption expenditure is equivalent to giving them comparatively small taxing rights.

The UN destination taxation blueprint does not adopt a differentiated approach and may be deficient in inter-nation equity. The blueprint submits that it seeks to preserve developing states' domestic taxing rights over digital business models.[103] However, this submission ought to be taken with a caveat. States adopting the UN blueprint may end up taxing local consumers under the guise of taxing MNEs exploiting the digital economy, given the above-mentioned point in subsection 3.2. Furthermore, Chand and Vilaseca (2021) argue that the UN blueprint ranks low from the perspective of the tax policy principles discussed in the Ottawa framework and is not really in the interest of developing countries for reasons including:

> (a) it does not cover consumer facing businesses (CFBs) and developing countries may be deprived of the tax revenues from these;
> (b) it does not provide for revenue thresholds for ADSs and this may result in disproportionate administrative burdens for tax administration;
> (c) gross WHT dissuades cross-border activities, and the real cost of gross-basis taxation may be passed on to the local consumer in the market state;
> (d) the impracticality of collecting the WHT in a B2C context;
> (e) issues with the net basis taxation option e.g. no guidance is provided for calculations and there is no mention of how loss will be treated;
> (f) its sourcing rule (ADS income sourced to payer's residence) would lead to lower tax revenues for developing countries in some instances such as: online advertising, where substantial viewers of the advert are located in a developing country but the payer for the advert is resident in a developed state; and sale of user data where user data is located in a developing country, but the payer for such data is resident in a developed state;
> (g) the enforcement of Article 12B via DTT raises issues with regard to limited DTT networks in developing economies suggesting that they have to negotiate new DTTs or adopt domestic DSTs in the very likely event that OECD member states

[101] See OECD (2022a), pp. 13, 14, and 28.
[102] See OECD (2022a), p. 28.
[103] United Nations Committee of Experts on International Cooperation in Tax Matters (2021c), p. 5 [1 and 2].

> (resident states to most ADSs businesses) refuse to introduce Article 12B in their DTTs because of the issues surrounding it and the time-consuming process of having to renegotiate existing DTTs that may lead to non-uniform practice.[104]

Considering the likely implications of adopting the UN destination taxation blueprint, adopting states should evaluate their tax bases, tax incidence, and potential tax revenues. They ought to determine that the blueprint or potential law is likely to tax the targeted tax base. Alternatively, adopting states may limit it to instances where the targeted MNEs have a physical presence in the state or there is a means to effectively collect the tax from them.[105] States can effectively collect the tax via third-party financial intermediaries that customers employ to pay for the products of the targeted MNEs.[106]

The inter-nation equity deficiency of destination taxation is additionally underscored if the DBCFT is adopted by the entire global society asymmetrically consisting of advantaged and disadvantaged states. Given that affluent states have the largest consumer markets,[107] inter-nation equity is likely to be negatively impacted if all states are coordinated to adopt a DBCFT model as the only means for taxing corporate profits. States that are disadvantaged in terms of having small populations and populations with low purchasing power are likely to gain comparatively less amid an already inefficiently and inequitably situated global society of nation-states.[108] In other words, global adoption of the DBCFT may not fit under the contextualist philosophical view of international tax policy.[109]

Proponents of the DBCFT seem to acknowledge equity challenges to the blueprint[110] but also advance a counter-argument that small states or countries with small markets may not

[104] See also Mpoha (2022), who concludes that UN Article 12B is not a simplified solution for developing countries with regard to the taxation of income derived from the digital economy.
[105] See also Collier et al. (2021), pp. 420-421.
[106] See UN Committee of Experts on International Cooperation in Tax Matters (2021c), pp. 23-24 [63-65]. The note articulates the self-assessment and financial intermediary models of the collection of the WHT on ADSs.
[107] See Christians and Magalhaes (2019), pp. 1154-1157 and 1173-1176.
[108] See also Andersson (2019):

> Attributing one third of the allocation to sales raised concerns that countries with small domestic markets would not be interested in the CCCTB since they might easily lose tax revenues. This led to the conclusion that the importance of sales should be limited so that small countries would not lose revenues". (p. 499)

and:

> When a corporate tax system is designed, eliminating possibilities to manipulate the tax base is of course a major concern, but it should not be the only concern. One policy prescription that some promote as a means to avoid manipulation of the tax base is levying the corporate tax where the goods or services are consumed. Proponents argue that their prescription works because it is very difficult for corporations to manipulate the location of the consumer. *However, this would tend to shift taxation rights unduly to larger economies* (emphasis added) and countries with trade- and current account deficits". (p. 501)

Compare this with IMF (2019), stating that the implications of the DBCFT "for developing countries remain unclear, but, with source taxation retained for natural resources, these are not necessarily adverse" (p. 31) and p. 41, where it is indicated that the DBCFT has a medium low suitability to circumstances of low-income countries.
[109] See Cockfield (2007) on the contextualist analysis of international tax law.
[110] See Devereux et al. (2021):

necessarily be the losers under the DBCFT because: (1) under the current system, small states may have limited real activities that give them taxing rights; (2) there will be less revenue loss via profit shifting under the DBCFT than under the current system; (3) tax competition under the current system will make it increasingly difficult for these small states to raise revenue. DBCFT will reduce or eliminate tax competition.[111] The counter-argument continues as follows:

> Switching from an origin-based tax to a destination-based tax, the effect on the distribution of taxing rights depends (amongst other things) on the balance of trade. Under a DBCFT, for example, moving from an origin to a destination basis would mean that each country would forego tax on its exports, but collect tax on its imports. Where trade was balanced, these effects would net out. In the short and medium term, and ignoring all other factors, a country with a trade deficit would see a rise in its tax base, whilst a country with a trade surplus would see a fall. (Devereux et al., 2021, p. 172)

The DBCFT proponents posit that developing countries that are not resource-rich will be beneficiaries of a switch to DBCFT; maintaining origin taxation for natural resources, countries whose imports exceed their exports would likely increase their tax base and tax revenue by a switch to DBCFT for non-resource trade.[112]

The above counter-argument does not necessarily resolve the inter-nation equity concerns. First, the literature suggests that, under the current system, small, well-organised states gain from tax competition.[113] Profit shifting under the current system has made some small states (e.g. tax havens) economically prosperous.[114] These points seem to suggest that if a small low-income country is well-organised, it may gain from tax competition under the current system.[115] Second, disadvantaged states have fewer owners of economic rent than advantaged states and the incidence of the DBCFT is domestic owners of capital (or economic rent) in the destination state.[116] Given that these domestic owners of economic rent are shareholders of MNEs that are mostly resident in developed rich states, disadvantaged states are likely to gain less by a move towards the global adoption of the DBCFT.[117]

> So, although there may be questions about fairness, these are rather more general than applying only to destination-based taxes. As argued above, the case for a destination basis instead is based on its performance with respect to the criteria of economic efficiency, robustness to avoidance, and incentive compatibility. (p. 173)

See also Devereux et al. (2021), pp. 171, 182, 283-290, and 333.

[111] See Devereux et al. (2021), p. 172.

[112] See Devereux et al. (2021), p. 288.

[113] See Genschel and Seelkopf (2016), arguing that the winners of tax competition include the governments and workers of small, well-governed democracies. See also Dietsch and Rixen, (2014), p. 161, on the success of Ireland; Rixen (2011), pp. 453-454, noting that tax havens profit from tax competition and the world's tax havens are mostly small countries or dependent territories.

[114] See Hines Jr. (2005), pp. 65-67, 75-78, 79-92, and 94-95 on the economic prosperity of tax haven states; Rixen (2011), pp. 453-454.

[115] See Chukwudumogu (2021), arguing for a regulatory approach to tax competition in preference to the prohibitory approach in an asymmetrical global context.

[116] See Devereux et al. (2021):"And a DCBFT would also fall on the owners of capital, albeit in the destination country rather than the country of the owners of the business"(p. 172). See also Devereux et al. (2021), pp. 283-285.

[117] See UN Conference on Trade and Development (2016), p. 152.

Third, the DBCFT seems to redistribute more tax base to states that import more than they export, but the number or quantity of imports and purchasing capacity of the people matter. For example, a state with ten people imports for the needs of ten people, while a state with one hundred people imports for the needs of one hundred people. The purchasing capacity of the people should also be considered in any analysis of the DBCFT favouring states with trade deficits. Import being more than export cannot be enough to assess how the DBCFT will make low-income states comparatively better off; this trade deficit has to be analysed in relation to the number of people in such a state and the purchasing power of the people in such a state. A state with more people willing and capable of buying appears to gain from the DBCFT more than a state with fewer people or people who have low purchasing capacity. In any event, the political feasibility of the universal adoption of a DBCFT is still uncertain because of those more productive states that export more than they import. Devereux et al. (2021) submit two factors showing why the DBCFT may be right for these net exporting states:

> First, net trade positions change over time, albeit extremely slowly in some cases, and net exporting states might find themselves closer to a balance of trade or even net importers in years to come. Second, countries which seek to tax on an origin basis because of the benefit principle might in time find themselves simply unable to do so. Competitive forces will continue driving down corporate tax rates under the current system and businesses will respond by moving their real activity. (p. 286)

Two points ought to be noted: (a) the futuristic conjecture of the first factor is feasible, but countries may remain or subsequently become net-exporting states, and (b) policymakers can regulate tax competition in a way that allows states to tax income effectively.[118]

Fourth, there is uncertainty surrounding how the gains and losses of the DBCFT, as compared to those of the current system, will pan out for low-income countries. The current system may have its problems, but can one submit, with accurate conviction, that the problems arising under the DBCFT will be fewer than those arising under the current system when the DBCFT has not been put into practice as the means for taxing corporate profits? Arguably, the potential costs of introducing the DBCFT in developing states include transition costs,[119] new administrative costs,[120] the loss of potential gains from tax competition, and any unforeseen and unintended costs of moving to a fundamentally new system. The potential gains from the DBCFT include more tax on imports and less BEPS/tax avoidance.[121] The costs of the current international system for taxing corporate profits include BEPS/tax avoidance, too many complex laws (e.g. anti-avoidance rules), and potential losses from tax competition.[122] Who can accurately articulate how these gains and costs will net out for low-income states? Perhaps, there is a real challenge involved in accurately assessing the outcome.[123]

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[118] See Chukwudumogu (2021), pp. 169-174, on the regulation of tax competition via more enhanced transparency; OECD (2020a), on the regulation of tax competition via global minimum tax rules.

[119] See Devereux et al. (2021) at pp. 179-181 and 187. See also Titus (2021), pp. 41-42, arguing that the transitional costs of a switch to the DBCFT would be prohibitive in the context of an African developing country.

[120] See Devereux et al. (2021), pp. 179-181, 294, and 298. See also Morse (2010), pp. 631-636, on the administrative and compliance costs of introducing a global destination sales-based formulary apportionment.

[121] See Devereux et al. (2021), pp. 279-295 and 333, evaluating the DBCFT if universally adopted and concluding that its potential benefits are substantial.

[122] See Devereux et al. (2021), pp. 113-127 and 130, evaluating the existing system for taxing MNEs' international profits and concluding that it is very costly to run.

[123] Compare with Devereux et al. (2021):"it is hard to see the outcome of a DBCFT as being any less fair than the existing system" (p. 333).

For these four reasons, the scholarly DBCFT seems deficient through the lens of inter-nation equity, raising doubts about its suitability for use in an asymmetrical global context. The likely and severe inter-nation equity implication of the global adoption of the DBCFT may suggest that the destination-based taxation of MNEs' corporate income via policymakers' incremental changes to the system may be less disadvantageous to low-income states than the radical DBCFT. Drawing from the discussion in this subsection, the blueprints for destination taxation do not resolve inter-nation equity and the distributional impact of the reform will likely favour affluent market states more. Arguably, these states are likely to engage in new forms of tax competition, especially where the OECD blueprint is adopted on a large scale.

3.4. Tax Competition for Sales Factors

The OECD blueprint for the destination-based taxation of corporate income is likely to encourage the mobility of sales factors, leading to the emergence of tax competition. Although the adoption of the UN and DBCFT blueprints may cause other issues relating to tax competition to arise,[124] this subsection focusses on tax competition for sales factors. A key driving force that causes tax competition to emerge or to be readily perceived is the mobility of the object of tax competition.[125] This mobility argument is further supported by economists who recognise that the mobility of consumers or cross-border shopping can encourage tax competition within destination taxation models.[126] In instances where the destination taxation model is directed at the income of MNEs, the consumers' mobility will likely be replaced by the mobility of sales factors. Sales factors include any element or component employed to sell and buy the products of in-scope MNEs. These sales factors change or add to the traditional objects of tax competition, which is defined as how states employ their tax systems to attract and retain factors of production or potentially taxable events.[127] In other words, sales factors are a category of other potentially taxable events for which states may start to engage in tax competition.

Novel tax competition is likely to emerge from the destination-based taxation of corporate income, as in-scope MNEs are likely to modify their behaviour in response to such taxation. The destination-based taxation of corporate income appears similar to a formulary

[124] The UN blueprint may likely lead to tax competition via the WHT rate if adopted on a large scale. See IMF (2019), pp. 28 and 31, arguing that if a few states of the world adopt the DBCFT, tax competition is still likely to occur because these states will have a competitive advantage in terms of the location of the corporations' production activities; Auerbach (2017), pp. 418-419, noting the competitive advantage of only the United States adopting the DBCFT, i.e. the competitive advantage in terms of the location for the production activities of corporations—in other words, the United States may become a location tax haven if it unilaterally adopts the DBCFT; Devereux et al. (2021):

> In effect, replacing an origin-based tax on profit with a DBCFT could be seen as an aggressive move in the existing tax competition game. Origin-based taxes on business income would continue in other countries, giving businesses an incentive to locate, or relocate, their activities to countries adopting the DBCFT. This would be true irrespective of where the product was destined to be sold. (p. 296)

See also Devereux et al. (2021), pp. 23-28, 50, 72, 75, n 110, 270, 272, 278, 293-291, 296-298, and 324-325, raising issues of tax competition and the DBCFT where the customer/consumer is another business, as tax rates differ and losses/expenditures are treated/relieved differently among states.
[125] See Chukwudumogu (2021), pp. 6-12.
[126] See Agrawal and Mardan (2019); Devereux et al. (2021), pp. 15 and 284-285.
[127] See Chukwudumogu (2021), p. 7.

apportionment proposal that relies solely on the sales factor.[128] Roin (2008) submits that this formulary apportionment proposal is not a remedy for tax competition because taxpayers can, under this regime, reduce their tax liability by relocating the sales factor from high-tax to low-tax jurisdictions.[129] Therefore, based on the OECD destination taxation blueprint, in-scope MNEs are likely to re-engineer or restructure their transactions to show more sales in low or favourably taxed states.[130] In-scope MNEs and other relevant businesses are likely to shift or move sales factors from one location to another.[131] Sales factor shifting is also likely to lead to tax competition, which can cause real economic distortion because it entails shifting real activities (sales activities) from one place to another.[132] It must be noted that economic theory has observed that MNEs tend not to shift tax burden or cost when they earn an excess profit, economic rent, or residual profit (Fox, 2020). The OECD destination taxation blueprint/Amount A is about taxing residual profit. Therefore, one may submit that in-scope MNEs are unlikely to re-engineer their transactions to show more sales in low or favourably taxed states. Notwithstanding, Roin (2008) notes that "tax savings must outweigh the costs of achieving them for real world taxpayers to find tax-minimizing schemes attractive" (p. 233). Devereux et al. (2021) also submit that "if a business must choose amongst mutually exclusive options, then it is likely to choose that option which earns the highest post-tax economic rent" (p. 28). In the events described by Roin (2008) and Devereux et al. (2021), the relevant MNEs can re-engineer their sales in a way that encourages or causes tax competition among states.

Re-engineering by MNEs can arguably occur when the final destination of sales cannot be accurately determined and administrable proxies for the location of the final consumers have to be employed.[133] Such proxies may not work well when attempting to accurately determine the place of final consumption in cases such as services, intellectual property, and business to business sales.[134] With regard to a proposed destination sales formulary apportionment, Morse (2010) observes that MNEs can manipulate the location and structure of their purchasing and selling operations or functions in order to minimise their tax liabilities.[135] She continues as follows:[136]

> Despite its asserted inelasticity, sales has been "viewed as a highly mobile factor," not because the residence of the customer is elastic, but because it is relatively easy to manipulate the proxies, such as the place of delivery, that the tax system must use to determine the destination of sales. (Morse, 2010, p. 634)

Grubert (2015) articulates:

[128] See Roin (2008), pp. 215-217 and 221-235. The formulary apportionment proposal was as proposed by Clausing and Avi-Yonah (2007) .
[129] See Roin (2008), pp. 203-204.
[130] See also Roin (2008), pp. 207-209.
[131] See also Ting (2010), pp. 100 and 134, arguing that the Common Consolidated Corporate Tax Base (CCCTB), which mirrors the multilateral formulary apportionment model, will create new opportunities for tax avoidance by MNEs: "multinational groups may refocus their tax strategies from income-shifting to "factor- shifting", that is, manipulating the location and valuation of factors used in the allocation formula" (p. 100).
[132] See Roin (2008), p. 203.
[133] See Morse (2010), p. 618.
[134] See Morse (2010), pp. 618 and 619. See also Morse (2010), pp. 620-624 and 630, on re-engineering and restructuring in business-to-business sales; Roin (2008), pp. 208-209, on the difficulty of determining the location of the ultimate/final buyer of services.
[135] See Morse (2010), pp. 620-621, 619, and 634.
[136] See Morse (2010), p. 634.

> But where is the consumer located for airplanes sold to a Bermuda leasing company, for microprocessors sold to a low-tax computer company, or for copper sold on the London Metal Exchange? Identifying the final consumer is difficult or impossible in the case of capital goods like airplanes, components like microprocessors or business software, and commodities like petroleum sold on a forward market or through a swap agreement. Capital goods present a particular problem because the destination of the final consumers may change over time. (pp. 53-54)

Benshalom (2009) argues thus: "Tax authorities cannot counter the ability of MNEs to incorporate subsidiaries in low-tax jurisdictions through which they may channel sales and purchasing operations" (p. 638). For example, a semi-conductor or microchip manufacturer that hardly contracts with final users may sell via its subsidiary in a low-tax (favourably taxed) state to subsidiaries of computer manufacturers in such state; such sale would increase the sale factor in such a low-tax state without significantly altering the way in which the relevant MNE conducts business.[137] In-scope MNEs can also sell or ship consumer-facing goods destined for high-tax states via unrelated intermediaries located in low-tax states.[138] These intermediaries may not be in-scope MNEs subject to the existing destination-based taxation. Alternatively, an in-scope MNE may divert income to a non-adopting low-tax jurisdiction.[139] Sales factor shifting is likely to exist because of the destination-based taxation of corporate income, especially in instances where proxies are employed in order to determine the final place of consumption, because of the difficulty involved in determining such a place. It is submitted that this sales factor shifting is likely to encourage tax competition among market states in respect of the selling and purchasing operations/functions of MNEs and other businesses (unrelated intermediaries).

Although the OECD blueprint seems to solve the sales factor shifting problem via its proposed sourcing rules, the adopted approximation standard to determine the source/market state allows some sales factor shifting. As a starting point, the blueprint features a transaction-by-transaction based sourcing rule in order to determine the source/market state.[140] This type of sourcing rule is further supported by specific provisions depending on the particular revenue from the specific product of the in-scope MNE.[141] For example, the source/market state for finished goods sold to final customer is also the goods' place of delivery.[142] Second, in-scope MNEs are expected to use reliable indicators or a range of reasonable factors in order to determine the source/market state from which the revenue for the particular product is derived, based on the available information about the transaction.[143] Reliable indicators by which to determine the place of delivery of such finished goods include the delivery address of the final customer and the place of the retail storefront selling the finished goods to the final customer.[144] Third, an allocation key providing a reasonable approximation of the source/market state is used to source any remaining revenue that cannot, despite reasonable efforts having been made,

[137] See Benshalom (2009), pp. 637-638; Morse (2010), p. 620.
[138] See Morse (2010), p. 634; Roin (2008), pp. 207-208 and 231; Chand et al. (2020), p. 606.
[139] See Roin (2008), p. 226.
[140] See OECD (2022a), pp. 5-6.
[141] See OECD (2022a), pp. 6-7.
[142] See OECD (2022a), pp. 6 [5] and 12.
[143] See OECD (2022a), pp. 3, 10, and 11.
[144] See OECD (2022a), pp. 12-13.

be sourced on a transactional basis.[145] In other words, the OECD blueprint recognises the challenges involved in transactionally determining the source/market state for (a) third-party distribution arrangements, (b) components, (c) certain services, and (d) intangible property.[146] Therefore, the OECD blueprint seems to have solved the challenge raised above by Benshalom (2009) in respect of components by determining the location of the final customer or the place of delivery of the finished goods into which the component is incorporated to be the source/market state.[147] This sourcing rule seems to solve the sales factor shifting problem relating to the sale of components like semi-conductors or microchips used in the manufacture of computers. However, in-scope MNEs are likely to continue to plan strategies by which to mitigate their tax liabilities, especially where indicators or reasonable approximations, such as the location of an intermediary/"independent" distributor/reseller or place of use of a B2B service, are used to determine the market or source state.[148] MNEs seek ways by which to optimise the costs of doing business, including tax costs.[149] In-scope MNEs and other relevant businesses may be incentivised to locate and perform their sales and purchasing functions in favourably taxed or low-tax states. Therefore, states may begin to compete to be the location of sales factors that include business customers using cloud computing services, customers enjoying or using in-scope MNEs' services, and purchasers/intermediaries buying in-scope MNEs' goods or services.

Which states are likely to seek to attract and retain this novel object (sales factor) and how will they do so? Arguably, the tax competition for sales factors may be predominantly amongst symmetrically advantaged or wealthy/affluent states because: (a) the major consumer markets are in these states, (b) the in-scope MNEs are the few highly profitable ones, and (c) shifting the sales factors of an MNE to a disadvantaged state or market with low purchasing power would obviously result in questions being asked about the intention of such a move. The second issue mentioned in this paragraph borders on the elements or means of tax competition. The means of tax competition under the OECD blueprint are likely to include tax rates, tax base,

[145] See OECD (2022a), pp. 3, 26 [2], 28 [22], and 30 [35]. The report also states that: "despite best efforts, a Covered Group may not be able to isolate the source for every transaction (e.g. tail-end revenue, components, B2B services), and in such case an allocation key is provided" (p. 6, n 3); and:

> "Allocation Key" means the Regional Allocation Key, the Low Income Jurisdiction Allocation Key, the Global Allocation Key, the Aggregate Headcount Allocation Key, the Cargo Air Transport Allocation Key, the Cargo Non-air Transport Allocation Key, the Headcount Allocation Key, the Passenger Air Transport Allocation Key, and the Passenger Non-air Transport Allocation Key. (p. 26 [7])

The global allocation key employs a country's percentage share of final consumption expenditure as published by the UN Conference on Trade and Development or an approximation of such final consumption expenditure using the country's population.

[146] See OECD (2022a), p. 3.

[147] See OECD (2022a), pp. 6 [7] and 15 [A].

[148] See OECD (2022a), pp. 7 [h], 13 [B], 15 [A], 21 [H], and 23 [iii]. Compare this with OECD (2022c), p. 67. The OECD (2022c) demonstrates an awareness of the likelihood of sales factor shifting via intermediaries. The report also provides that, to the extent to which the covered group knows, or reasonably concludes, that its finished goods that are sold through an independent distributor are primarily delivered to final customers located outside of the location of the independent distributor, the covered group's revenue will not be treated as arising from the location of the independent distributor. This article submits that this provision is subjective and may be prone to exploitative interpretation by covered groups that intend to optimise their tax costs.

[149] See Cui (2017), p. 308, arguing that one of the margins in investment decisions taken by MNEs is the choice of where to book profits once profits on investments are realised. This choice is affected by countries' statutory tax rates. See also Christians (2018), pp. 17 and 19, on the costs of imposing tax.

tax incentives, and administrative practice.[150] Tax competition via low or favourable tax rates can occur in the event of the destination-based taxation of corporate income. Market states can engage in tax competition via the CIT rate that is to be applied to their portion of Amount A, i.e. by reducing their CIT rates in order to attract the sales factors of in-scope MNEs and other relevant businesses.[151] For example, states may use the tax rate to compete for unrelated intermediaries through which in-scope MNEs sell their products to high-tax states. States can also generate and respond to tax competition by narrowing the tax base of the destination-based taxation of corporate income.[152] Tax competition via the narrowing of the tax base may occur as a result of some types of in-scope MNEs being taxed more favourably than others. For example, in-scope MNEs at the top of the excess wealth pyramid may be given preferential tax treatment not available to in-scope MNEs at the bottom of the excess wealth pyramid. Market states may also develop novel tax incentives and administrative practices to compete for sales factors.

This subsection has submitted that the move towards the destination-based taxation of corporate income will likely lead to novel tax competition for sales factors. In other words, implementation of the OECD's destination taxation blueprint may lead to behavioural changes amongst in-scope MNEs and other relevant businesses. This, in turn, is likely to result in tax competition that can cause real economic distortion because sales factor shifting entails shifting real activities (sales activities) from one place to another. The concluding section includes suggestions as to how international tax policymakers and affluent market states should react to this likely shifting of sales activities and the resultant tax competition. It also highlights additional lessons that can be learned from the other implications discussed.

4. CONCLUSION: LESSONS FOR INTERNATIONAL TAX POLICYMAKERS AND NATION-STATES

This article highlights policymakers' blueprints and a scholarly blueprint for the destination-based taxation of MNEs' corporate profits. As nation-states consider which blueprint to adopt and legalise, they should take the emerging implications of these blueprints into account. Therefore, this article also reveals and examines these implications, namely: (1) expanding the source principle, diverging unilateral actions, and the challenge to the standardisation of the newly expanded source principle in international tax; (2) avertible costs; (3) distributional impact that does not resolve inter-nation equity; and (4) symmetrical tax competition for sales factors. Section 3 elucidates and discusses these overlooked consequences of destination taxation based on the blueprints highlighted in the article. What lessons do these implications have for stakeholders, namely international tax policymakers and nation-states?

Implications one and two suggest that international tax law policymakers need to coordinate in order to ensure that the international tax system is coherent with regard to its approach to the destination-based taxation of MNEs' corporate income and to prevent avertible costs. The reform imposes avertible costs on taxpayers, consumers/customers/users/purchasers, and tax administrations. International tax policymakers need to coordinate the process of incorporating destination taxation into the international tax system in order to prevent both diverging unilateral actions by sovereign entities and unstandardised source principles. Why do states send representatives to two different institutions—the UN and the Inclusive Framework on BEPS—to concurrently negotiate the resolution of the same critical policy issue of how the

[150] See Chukwudumogu (2021), pp. 8-11.
[151] See also Eden (2021) on differences in CIT rates triggering new tax avoidance games by MNEs.
[152] See also Belan and Gauthier (2009), p. 654.

exploitation of the digital economy by MNEs can be taxed when the respective representatives can reach different solutions or outcomes?[153] Understandably, negotiating via different institutions has the advantage of resulting in the creation of a fallback plan perchance negotiation in one institution fails to yield favourable outcomes. However, it must be noted that this concurrent negotiation strategy could cause avertible costs to arise as a result of inconsistent, uncoordinated, or diverging outcomes. A better and more refined approach to negotiating the resolution of a critical global policy issue would be to choose a genuinely representative, multilateral, and competent institution for the negotiation of, and deliberation about, such an issue so as to avoid inconsistent, uncoordinated, or diverging outcomes with attendant costs. Alternatively, international tax policymakers need to coordinate the processes of incorporating destination taxation into the international tax system.

Implication three suggests that low-income countries need to evaluate any destination taxation blueprint that they plan to adopt into their domestic legislation more than other nations. The non-resolution of inter-nation equity by built-up momentum indicates that low-income countries need to evaluate more before legally adopting any blueprint. A low-income country opting for either the OECD or UN blueprint should evaluate its tax base, tax incidence, and potential tax revenue. For example, it should determine whether or not the UN blueprint or potential domestic law will likely tax the targeted tax base. The UN blueprint may be adopted or limited to instances where the targeted MNEs have physical presences in the state or there is a means of effectively collecting the tax from them. States can effectively collect the tax via third-party financial intermediaries that customers employ to pay for the targeted MNEs' products. If the adoption of the UN destination taxation blueprint is not likely to raise tax revenue efficiently, it may be desirable to adopt the OECD destination taxation blueprint. This implication also suggests that, when international tax policymakers are significantly reforming the international tax system, inter-nation equity should be considered so that numerous low-income states are not excluded and enticed to deviate from the reformed system.

Implication four suggests that an expanded CBCR and anti-tax avoidance rules may be apt or needed by affluent market states in order to respond to the likely symmetrical tax competition. The CBCR requires (a) relevant MNE groups to report on their sales activities and (b) details about each MNE, including a "description of the main geographic markets for the group's products and services" (OECD, 2015b, p. 25); and purchasing or procurement, sales, marketing and distribution business activities.[154] This comprehensive reporting mechanism of the CBCR is a tool with which to address the sales factor shifting and symmetrical tax competition. Hence, it is advisable that policymakers consider employing the CBCR reporting mechanism for Amount A purposes. Policymakers may expand the CBCR to include "all markets (sales and purchases) of the group's products and services" rather than merely "the main geographic markets". This expanded CBCR should be incorporated into the multilateral agreement and model domestic legislation being finalised in order to implement the OECD's destination taxation blueprint. This expanded CBCR may also address the reporting challenge created by the non-comprehensive "single Amount A self-assessment return", which does not show all the sales and purchasing functions/activities of the in-scope MNE. Chand et al. (2020) have also called for the amendment/expansion of the CBCR and automatic exchange of information among tax administrations so as to implement a simplified, modified, residual profit split

[153] See UN Economic and Social Council (2021), noting that the 25 members of the Committee of Experts on International Cooperation in Tax Matters act "in their personal capacity" and are "nominated by governments"/member states of the UN (p. 1). Nomination by their governments suggests that the governments have the influence or power to direct the works of these 25 members.
[154] See OECD (2015b), pp. 15, 16, 25, 27, and 30.

method.[155] These commentators suggest the modification of the current version of the CBCR documentation to include the collection of business line-level aggregated data on profits, losses, and the locations of sales, i.e. a change that requires MNEs to report information at the business line level based on global consolidated income.[156]

The expanded CBCR is a readily available regulatory instrument for the regulation of tax competition for sales factors. The CBCR may deter states from being used excessively for sales factor shifting because of the reputational crisis that such use could cause. However, if these states are not deterred, how will a high-tax state respond, given the use of the CBCR as a tool for the regulation of tax competition? The expanded CBCR is expected to report comprehensively on the sales activities of MNEs. Hence, a high-tax state can employ this instrument in order to discover whether or not an MNE group is engaging in excessive sales factor shifting and identify the recipient states of the sales factor. With such information, the high-tax states can deter MNEs from sales factor shifting via the denial of deductions for costs arising from such sales activities, especially if the source/market state is also the resident state of an in-scope MNE engaging in sales factor shifting. The high-tax state may also reduce its taxes so that sales functions can be located therein (i.e. generate and respond to tax competition).

The expanded CBCR has a limitation and, therefore, needs to be supported by anti-tax avoidance rules because of symmetrical tax competition. For example, a high-tax state may be a source state and not a residence state. This high-tax state may choose not to generate and respond to tax competition. In this instance, it may be difficult for such a high-tax state to react in order to counteract tax competition from low-tax states, even if it is equipped with CBCR information. Some may argue that these source/market states "find themselves in 'a prisoners' dilemma' where they would be better off collectively by not offering incentives but each feels compelled to offer the incentive to maintain a competitive business environment" (OECD, 1998b, p. 34). This assertion may be valid if the states involved are symmetrically situated.[157] This article projects that tax competition for sales factors is likely to occur symmetrically among affluent market states.[158] This indicates that there may be no need to employ tax competition in order to rectify inefficiency and inequity.[159] Such symmetrical tax competition would likely cause real economic distortion because the shifting of sales factors entails the movement of real (sales) activities from one location to another.[160] In these circumstances, a narrow regulatory response may be apt.[161] It may be appropriate to penalise the shifting of sales factors in order to curb such symmetrical tax competition and mitigate real economic distortion. How can sales factor shifting be penalised in the multilateral instrument and how can the model domestic legislation be finalised? The incorporation of anti-tax avoidance rules within the forthcoming multilateral instrument and accompanying domestic legislation may be a mechanism by which to penalise sales factor shifting.[162] The use of such rules may also address

[155] See Chand et al. (2020), pp. 608-610.
[156] See Chand et al. (2020), pp. 608-610.
[157] However, where states involved are not symmetrically situated, the validity of the assertion becomes doubtful. See Chukwudumogu (2021), arguing that, in an asymmetrical global context, the approach to tax competition ought to be regulatory rather than merely curbing or prohibitory.
[158] See above at subsection 3.4.
[159] Compare with Chukwudumogu (2021), arguing that, in an asymmetrical global context, tax competition can correct market failure globally. Hence, a wide regulatory response is apt in this circumstance.
[160] See above at subsection 3.4.
[161] This contrasts with a wide regulatory response if the scenario were asymmetrically involving advantaged and disadvantaged states.
[162] See also Chand et al. (2020), p. 606.

the situation in which an in-scope MNE splits (Ralston, 2021), thereby making the resultant MNEs not liable for Amount A tax. Therefore, an expanded CBCR accompanied by anti-tax avoidance rules is an apt response to sales factor shifting and the resultant symmetrical tax competition by affluent market states. International tax policymakers and affluent market states should consider employing these tools when finalising the multilateral instrument and adopting domestic legislation for the OECD's destination taxation blueprint.

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