Manchester Journal of International Economic Law
Volume 18, Issue 3: 298-326, 2021

The UN Model Tax Convention Article 6: The Selective Territoriality – The Specter of Privileged Player in a Rigged Game

Muhammad Ashfaq Ahmed*

ABSTRACT: *The paper lays out the chessboard on which taxes on international incomes from immovables are contested, bargained, and harvested as per pre-determined rules that are starkly tilted in favor of developed countries. This embedded and pronounced bias in the international tax regime in favor of developed countries makes them a privileged player. The developed countries then also make maneuvers to optimize on their economic gains at the expense of developing nations rendering it a rigged game setting. The paper derives its rationale from an exceptionally selective choice of territoriality on incomes from immovables, which was astonishingly not aligned with the expected reverse capital movement, that is, from developing to developed countries. The genesis and evolution of selective territoriality are traced through its various institutional development phases – League of Nations, Organization of European Economic Cooperation, Organization for Economic Cooperation and Development, and United Nations (UN). An overwhelming international consensus on selective territoriality on incomes from immovables notwithstanding, the UN's role is brought into spotlight to argue that the developing countries may have suffered massively over the past one hundred years by instinctively believing in UN Model Tax Convention's efficacy and blindly pursuing Article 6 in their bilateral double taxation conventions. The implications of herd-mentality on part of developing countries got galvanized in the wake of developed countries employing innovative optimization tools – citizenship/residence by investment programs, tax havenry, manipulable ownership structures, beneficial ownership legislations, and porous exchange of information regime – to maximize on the economic gains. The paper undertakes both normative and structuralist evaluation of selective territoriality to sum up that this is an unjust principle of distribution of fiscal rights particularly in asymmetric inter-state economic relationships, and can hold its ground only until developing countries attain full cognition of the reality and start raising their vocal chords in unison to dismantle it.*

> *Every year billions of dollars are siphoned off by corrupt developing world politicians to tax havens and invested in expensive properties in western metropolises. The delta between rich and poor countries is expanding due to the fact that money laundering is not treated at par with drug money or terror financing.*
>
> – – Imran Khan†

* The author is a Pakistan IRS officer, and is currently posted as Chairman, Federal Board of Revenue, Islamabad. He holds PhD in political economy. The usual disclaimer applies.

† Imran Khan, Pakistan Prime Minister Imran Khan's Speech at the United Nations General Assembly on September 30, 2019, New York, United States.

1. INTRODUCTION

The United Nations Model Tax Convention (UN MTC) vide Article 6 allocates taxing rights on income from immovable property to the State in which the property generating such income is situated.[1] In international taxes lexicon this is dubbed as the territoriality, the source rule or the situs principle. Territoriality, theoretically speaking, is the default position of all international taxation whereunder all states enjoy unfettered authority to tax all incomes arising within their geographical borders. This principle has ruled the roost throughout history with only a few exceptions. The UN MTC's position on immovable property, from this angle, ought to be taken as normal, logical, and equitable – a fair framework of inter-nation distribution of fiscal rights. However, when seen at slightly deeper level, the equitability assumption turns out to be sham and shallow on a couple of significant counts.

One, while UN MTC preserves territoriality on immovable property, it rigs the same on other categories of international incomes – practically rendering it a scenario of selective territoriality. Taxation of industrial or business profits as well as professional services, for instance, is assigned to the residence state unless derived through a permanent establishment (PE) or a fixed base situated in the source state. The taxing rights on profits of shipping and air transport business are allocated to the state in which the place of effective management of the enterprise is located. Likewise, dividends, royalties, interest incomes and directors' fees are, per se, taxable in the residence state. Taxation of income from employment, and the performance of artistes and sportsmen have been vested in the state in which the employment or performance takes place.[2] Governmental remunerations are assigned to the payer's state for taxation purposes. The residual incomes are vested to be taxed by residence state of the recipient. This contrast parsimoniously helps illuminate bluntness in the pattern of allocation of taxing rights under UN MTC warranting a deeper appraisal.[3]

Two, the way the territoriality in asymmetric bilateral arrangements between developed and developing countries operationalized itself over the past century, its fiscal fallouts have turned out to be unilaterally favorable to the stronger partners in the economic relationship. It is premised that the principle underlying UN MTC Article 6 has instrumentally contributed towards siphoning off of inestimable amounts of capital from the developing to the developed countries, and its investment in the latter's immovables market. It is contended that UN MTC's meekly acquiescence to the source rule in isolation and exception to the allocative principles on other types of international incomes is not sans purpose and design. The coercive implication of the premise gets galvanized by UN MTC's avowed and aggressive posturing that since it is

---

[1] Article 6(1) of UN, *United Nations Model Double Taxation Convention between Developed and Developing Countries 2017* (New York: Department of Economic & Social Affairs 2017).

[2] R. Rohatgi, *Basic International Taxation*, vol. I (Richmond, U.K.: Richmond Law & Tax, 2005).

[3] In some situations, incomes derived sans a PE may also be taxed in the source state including: (i) income from a direct use of immovable property in hoteling or mining business; (ii) income of entertainers, sportsmen, and atheletes; (iii) income in the form of dividends, royalties, interest, and fees for technical serices per rates mutually agreed upon in DTCs; (iv) income attribuatable to insurance and reinsurance premia; & (v) income from services rendered should the providers' presence exceed 183 days. On the contrary, incomes from international traffic and capital gains (excluding gains from immovables and business property of a PE), despite there being a PE are not taxed in the source state.

a model for negotiations 'between developed and developing countries,' it must necessarily be favorable to developing countries. Thus, it is not astonishing that the entire tally of double taxation agreements (DTCs) that developing countries have signed over past one hundred years purportedly modeled on UN MTC are based on the principle of territoriality on immovable property.

This situation gives rise to a paradox. The paradox emanates from the fact that UN MTC is not only meant to serve as a model for negotiations between developed and developing countries, but also to promote, champion, and protect fiscal rights of developing countries vis-à-vis developed ones. This position is in sharp contrast to the Organization for Economic Cooperation and Development (OECD) MTC, which admittedly looks to promote fiscal interests of developed countries.[4] The paradox between UN MTC's stated position of a protector of developing country rights, and a simultaneous meek acceptance of the source state's unbridled taxing rights on immovable property, may potentially have resulted in substantial fiscal fallouts for the developing countries – not so far conceptualized and analyzed with clarity and in a systematic fashion. It is posited that by accepting source taxation on immovable property in isolation, in the wake of massive capital flight from developing to developed countries, UN MTC has not done any good to the cause of the former – an extant international consensus on the matter notwithstanding. The UN MTC, in fact, blundered by accepting source taxation rights on immovable property on behalf of developing nations as it cost them dearly not only on account of large sums of investible capital siphoned off from their economies and parked in real estates of developed nations, but also on account of liquidation of their hard-earned scant foreign exchange. Moreover, the selective territoriality deprived the developing countries of potential revenues on the rental streams and capital gains.

Taking the developing country as the unit of analysis, the paper inevitably inducts international political economy into the appraisal toolkit.[5] In the international system states interact amongst themselves at bilateral and multilateral levels – apparently on an equal footing – to legitimately promote their political and economic interests. In reality, however, states behave much more surreptitiously, selfishly and exploit total diplomatic power to promote their economic interests without having regard to moral compunctions; states also form alliances. The analysis is undertaken by dividing all countries into two groups – developed and developing. The groups of states interact not only at state-to-state level but also at multiple other levels – MNCs, NGOs, INGOs, ICC and multilateral institutional frameworks such as UN, IMF, and World Bank.

The international taxes system created under the auspices of the League of Nations (LN) and then adopted by the UN could be interpreted differently by different academic and intellectual schools of thought. Liberals would promote it as a shot in the arm of international cooperation leading to and resulting in all what globalization stands for and implies. A

---

[4] Muhammad Ashfaq Ahmed, 'U.N M.T.C Article 8: Was the Source Rule Surrender a Blunder? The Case Study of Pakistan,' *Intertax* 48, no. 1 (2020).

[5] This will not be impertinent to mention that Easson has already used the developed-developing country framework to appraise the international taxes regime in a more general and broader sense. See, for further analysis A. Easson, 'Do We Still Need Tax Treaties?,' *Bulletin for Interantional Taxation* 54 (2010).

constructivist would equate it with a system of capitalist interaction in which concepts are developed, meanings are created and norms are generated to facilitate real world transactions. Marxists would bring in the economic argument suggesting that the system only advances the international economic status quo resulting in ever-growing economic inequality at whatever and whosoever's cost. [6] Neo-Marxists would prop the instrumentalist perspective to point out the state capture of developed western economies by the capitalists resulting in a muffled internationalization of capitalism under the garb of international taxes.[7] The realist, on the other hand, would argue that the system reflects naked power politics in the international fiscal domain in its brute and raw form. This paper is geared to lay bare various dimensions of UN MTC, selective territoriality on immovable property, its implications for developing countries and alternatives for the future essentially from an underlying realist perspective.

The paper consists of five sections. After section 1 has framed the issue and triggered the debate, section 2 unravels the international consensus on vesting of taxing rights on immovables to source state under various MTCs, and traces its roots in history since LN's early years to its latest manifestation reflecting in UN MTC 2017, OECD MTC 2017, and the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI). Section 3 takes stock of fallouts of adoption of Article 6 by developing countries in their double taxation conventions (DTCs) from various angles. Section 4 appraises selective territoriality by undertaking its normative evaluation from various angles. The paper concludes in section 5 with a glum comment on the efficacy of UN MTC to serve its avowed objectives, and its ramifications for developing countries, particularly, if the extant international compact on taxation of immovable property is left unaltered for any further length of time.

2. Selective Territoriality – Historical Context

2.1. International Consensus

The selective territoriality on UN MTC Article 6, in fact, does not come in isolation; it resonates a wider international consensus on the matter cutting across temporal and spatial divides. The OECD MTC Article 6 falls on all fours of the UN MTC Article 6 with practically few variations. The US MTC Article 6 may be slightly divergent in formulation but essentially it is in *pari materia* with the UN MTC's allocative principle. The Andean Community (AC) MTC, despite being at variance with UN MTC on a few fundamental counts, converges with its principle of taxation on immovable property by stipulating that 'Income of any kind from immovable property shall be taxable only by the Member Country in which such property is situated.'[8] The international consensus on source rule on immovable property does not confine itself to the incomes covered under Article 6; it does extend to capital gains on disposal of real

---

[6] Muhammad Ashfaq Ahmed, 'U.N M.T.C Article 5: The Predatory Ploy: A Neo-Marxist Mapping of the Permanent Establishment,' *Manchester Journal of International Economic Law*, 2020, 17(2).

[7] Umut Özsu, 'Grabbing Land Legally: A Marxist Analysis,' *Leiden Journal of International Law*, 2019, 32(2) https://dx.doi.org/DOI:10.1017/S0922156519000025 (accessed 28 December 2021).

[8] Article 4 ('Income from Immovable Property') of AC, *Model Convention for the Avoidance of Double Taxation between Member Countries and Other Countries Outside the Andean Sub-Region* (Lima, Peru: Commission of Andean Community, 2004).

property, too. In fact, the UN MTC asserts source rule not only to capital gains derived from direct disposal of immovable property,[9] but also to gains derived from indirect disposal, e.g., through share capital of a company.[10] This widens the scope of situs rule to practically any income or gains deriving directly or indirectly from immovable property. The OECD's Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (MLI) only reinforces this dispensation.[11] While OECD MTC and US MTC are coterminous with UN MTC on this count, the AC MTC lends convergence only to the extent of direct disposal of capital assets.[12] In fact, 'neither the OECD Model nor the U.N. Model indicates whether tax should be imposed on gross or net income.'[13] However, the UN's stated position on the matter is that 'taxation of income…should have as its appropriate objective the taxation of profits rather than gross income.'[14] Strangely, to Whittaker, it 'appears to be a concession to developed countries which believe that expenses should be offset in taxing such income.'[15] This is the fullest and widest possible convergence that could be achieved on a principle of international taxation, and its practical manifestation into the DTAs actually signed is not only wide-spread geographically, it is also deep-rooted historically – virtually throwing up no exceptions to the rule. The fact of the matter is that 'Article 6 of the…UN Model remains the most unchanged and stable part of the Models and bilateral tax treaties.'[16]

The consensus on selective territoriality on immovables amongst the OECD member states, and the US is quite explainable. The OECD MTC is admittedly geared to promote financial and fiscal interests of advanced economies. Likewise, the sole objective of the US MTC is to protect and promote economic interests of the US fisc by jealously guarding taxation rights on its real property. The AC MTC looks to forge and promote bilateral economic relationship between neighborly par economies at an almost equal level of development.[17] However, it was UN MTC's professed position and responsibility to promote fiscal interests of the developing countries (as probably they could not do on their own), and its brazen capitulation into surrendering residence taxation on immovable property was nothing less than a grand failure with far-reaching implications for the developing countries. A brief survey of the evolution of the situs rule on immovable property through various phases of history would illuminate the ensuing debate as to its efficacy, implications, and legitimacy.

9 Article 13(1) of UN.
10 Article 13(4) and (5) of UN.
11 OECD, *Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 - 2015 Final Report Oecd/G20 Base Erosion and Profit Shifting Project* (Paris: OECD Publishing, 2015).
12 Article 4 ('Income from Immovable Property') of AC.
13 Donald R. Whittaker, 'An Examination of the O.E.C.D. And U.N. Model Tax Treaties: History, Provisions and Application to U.S. Foreign Policy,' *North Carolina Journal of International Law and Commercial Regulation*, 1982, 8(1).
14 UN.
15 Whittaker, *supra* note 13.
16 Danil V. Vinnitskiy, 'History of Taxation of Incomes Derived from Immovable Property in Cross-Border Situations,' Russian Law: Theory and Practice 2 (2016).
17 See, for further expansion of the idea, Ahmed, 'U.N M.T.C Article 8: Was the Source Rule Surrender a Blunder? The Case Study of Pakistan.'

2.2. Pre-LN Period

There is little evidence to suggest that prior to LN's systematic work on international taxes any principle of taxation of immovable property other than the unfettered territoriality was in practice in any manner. In 1914, Neumeyer drawing upon one of Jacobus Perizonious's manuscript dating back to 12th century Bologna, which inter alia, dealt with the issue of taxation of immovable property located in Bologna and Ferrara owned by foreigners, confidently promoted the proposition that the situs rule was the accepted principle of international taxation during the Middle Ages.[18] Reimer believes that the allocation of taxing rights to the situs state may be as primitive as bilateral or multilateral tax agreements.[19] Vinnitskiy avers that everybody 'seems to agree that income from immovable property in a state is taxable there.'[20] Thus, it is reasonable to believe that during the pre-LN period situs rule applied across the board to the taxation of income from immovable property owned by non-residents.

2.3. LN's Role

The LN was established as a result of the Paris Peace Conference, on January 10, 1920.[21]/[22] The LN's purpose, as per its Covenant, was 'to promote international co-operation and to achieve international peace and security.'[23] Although, the Covenant primarily consecrated itself to the restoration of peace, and the prevention of war yet it also catered for an 'equitable treatment for the commerce of all Members of the League.'[24] In February 1918, the LN's Council resolved to 'convene an international conference to analyze the financial crisis and suggest means of remedying and mitigating the dangerous consequences arising from it.'[25] The International Financial Conference that convened at Brussels in late 1920, espoused unto itself, inter alia, international taxation, and professed to make progress on 'an international understanding, which, while ensuring the due payment by everyone of his full share of taxation, would be facilitating placing of investments abroad.'[26] This is how the LN got involved in international tax matters.

---

18 K. Neumeyer, 'Internationales Finanzrecht,' *Zeitschrift für Internationales Recht* XXIV, no. Band (1914).

19 E. Reimer, 'Income from Immovable Property (Article 6 Oecd Model Convention),' in *Source Versus Residence: Problems Arising from the Allocation of Taxing Rights in Tax Treaty Law and Possible Alternatives*, ed. M. Lang et al. (New Delhi: Taxmann Publications, 2010), 3.

20 Vinnitskiy, *supra* note 16.

21 The Covenant establishing the League of Nations was included in the Treaty of Versailles, which was signed on 28 June 1919.

22 The League's highest ever membership at 58 was from September 28, 1934 till February 23, 1935, which included Argentina, Australia, Belgium, Bolivia, Great Britain, Canada, Chile, China, Columbia, Cuba, Czechoslovakia, Denmark, El Salvador, France, Greece, Guatemala, Haiti, Hondouras, India, Italy, Liberia, the Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Iran, Peru, Poland, Portugal, Romania, Siam, South Africa, Spain, Sweden, Switzerland, Uruguay, Venezuela, Yoguslavia, Austria, Bulgaria, Finland, Luxembourg, Albania, Estonia, Latvia, Lithuania, Hungary, Ireland, Ethiopia, Dominican Republic, Mexico, Turkey, Iraq, Soviet Union, Afghanistan, and Ecuador. At this time, Costa Rica, Brazil, Japan and Germany had already left, whereas Egypt was yet to join the League. The League was eventually dissolved in 1946.

23 Martin Hill, *The Economic and Financial Organization of the League of Nations: A Survey of Twenty-Five Years' Experience*, *International Law* (Carnegie Endowment for International Peace, 1946), https://books.google.com.pk/books?id=3CtBAAAAIAAJ (accessed 28 December 2021).

24 Article 23(e) of the Covenant of the League of Nations.

25 League of Nations, *International Financial Conference Brussels, 1920*, *Volume 1* (1920), 3.

26 Nations, 26.

2.3.1. LN Report 1923

The Financial Committee having been assigned the work on international taxes[27] made the observation that it 'should be studied from the widest possible standpoint, and that expressions of opinion upon it should be obtained from recognized experts' and further that any 'possibility of an international convention regulating the matter should be considered.'[28] Thus, a Committee of four well-known fiscal economists was constituted to come up with a comprehensive report on the issue.[29] The Committee, in regard to the 'immovables', after dilating upon four plausible factors of decision-making, that is, 'acquisition or origin,'[30] 'situs',[31] 'enforceability or legal status',[32] and 'domicile',[33] re-emphasized the source rule but not quite. It was held that 'inasmuch as the second and third elements in economic allegiance strongly re-enforce the first (origin), domicile ought to play only a slight role as compared with origin.'[34] The LN Report 1923, which essentially incorporated the Economists' work, went on to hold:

> Most countries, as a matter of fact, allow it to play no role at all. We should be disposed, however, to maintain that, as a matter of pure theory, the claim of domicile to at least a small share ought not to be overlooked. This conclusion, however, obviously applies more completely to a tax on the property itself, whether in the form of a real tax, a land tax, an inheritance tax or a capital levy. But it is true even to some extent of a pure income tax. If an absentee landowner plays, because of his large rent roll, a considerable part in his place of habitual residence or domicile, it does seem that the place of domicile should not be entirely denied a right to ask him for at least a slight support. But, at the very best, the proportion allotted to domicile would be exceedingly small.[35]

[27] Yann Decorzant, 'Internationalism in the Economic and Financial Organisation of the League of Nations,' in *Internationalism Reconfigured: Transnational Ideas and Movements between the World Wars*, ed. Daniel Laqua, vol. 34 (I.B.Tauris, 2011).

[28] Provisional Economic and Financial Committee - Report to the Council upon the Session held at Geneva, August-September, 1921 Communicated to the Assembly in Accordance with the Council's Resolution of September 19, 1921 (A.95.1921.II) P.6. See, for further details, Sunita Jogaranjan, 'Stamp, Seligman and the Drafting of the 1923 Experts' Report on Double Taxation', 2013, *World Tax Journal*, 5(3).

[29] The economists which comprised the committee were Prof. Bruins, Commercial University, Rotterdam; Prof. Senator Einaudi, Turin University; Prof. Sligman, Columbia University, New York; & Sir Josiah Stamp, London University.

[30] The term 'Acquision or Origin' in regard to 'Immovables: Land and Houses' has been implied in the sense that since 'earnings from land and houses -- that is 'from real estate or immovable property -- may be said to be so intimately bound up with the real estate itself as to render the place where the yield arises the overwhelming factor in the element of origin,' and that the 'individual landowner forms, in most cases, an economic part of the society where the land is situated; his economic interests are so closely interwoven with the land that it is there that his chief economic allegiance is due.' See, for elaboration, League of Nations, *Report on Double Taxation* (Geneva: Economic & Financial Commission, 1923), 31.

[31] The term 'Situs' in regard to 'Immovables: Land and Houses' has been defined as the 'land is physically located where its yield arises.' See, for an extended debate on the concept, Nations, 'Report on Double Taxation,' 32.

[32] The term 'Enforceability or legal status' in regard to 'Immovables: Land and Houses' has been defined as 'The chief element in the legal status is the protection afforded by the title to the physical property,' and that it 'is obviously bound up directly with the property itself.' See, for detailed deliberations, Nations, 'Report on Double Taxation,' 32.

[33] Contextually, the term 'Domicile' has been equated with 'permanent residence,' implying individuals 'who are permanently or habitually resident in a place'. See, for in-depth analysis, Nations, 'Report on Double Taxation,' 20.

[34] Nations, 'Report on Double Taxation', 32.

[35] Nations, 'Report on Double Taxation'.

A year prior to the publication of LN Report 1923, Italy had already 'proposed a conference of government officials to reach practical solutions on the more pressing double taxation issues.'[36] The Financial Committee went ahead with consulting three states that already had an experience of negotiating and finalizing double taxation treaties, and three more states,[37] which were likely to be interested in the matter.[38] The initiative ostensibly stemmed from a desire to appraise the issue at a more practical level.

2.3.2. LN Report 1925

The LN Report 1925 differed with the LN Report 1923 on the principle of sharing of taxing rights on immovables asserting that 'the country of domicile alone is entitled to collect the general income-tax.' However, 'as an exception to this principle,' it was laid down that 'the country of origin may tax income accruing from immovable property, agricultural undertakings and industrial and commercial establishments, exclusive of dividends.'[39] It is, therefore, clear that the territoriality on immovables was incorporated into the modern international taxes framework good a hundred years ago through the LN Report 1925. It may be added that while the experts retained the territoriality on immovables, they made brave departures on other types of incomes. In an intra-developed world scenario, the exception would have probably faired neutrally. It was only in a developed-developing country scenario that its real impact would feel, and the fact that all the experts hailed from and represented developed industrialized countries (in their personal capacity though) only galvanized that grievance. Although, empirically intractable, yet the exception, in its unidirectional outcomes, may have induced lopsidedness into the forward march of world economic history over the past hundred years, and helped the developed world on account of reverse capital flows. The seeds of yet another concerted effort under the League's framework had been sown in LN Report 1925. It was prompted that 'the League convene an expanded conference of government officials to develop draft international treaties.'[40] The Financial Committee accepting the proposal, moved to institute a Committee on Double Taxation and Tax Evasion[41] by enjoining upon it 'to take into consideration the disadvantage of placing any obstacles in the way of the international circulation of capital, which is one of the conditions of public prosperity and world economic reconstruction.'[42] The work on international taxes under the auspices of the Committee continued over the next couple of years.

---

[36] Minutes of the First Meeting of the Sixth Session of the Financial Committee of the Provisional Economic and Financial Committee held at 11am on 23 February 1922, in Geneva - League of Nations Archieves; Box R 333:E.F/FinanceVI/P.V.I: United Nations, Geneva - as cited by Sunita Jogaranjan, *Double Taxation and the League of Nations*, *Cambridge Tax Law Series* (Cambridge University Press, 2018).

[37] The states, in first category, were the Great Britain, France, and Belgium, and in the second, the Netherlands, Italy, and Switzerland.

[38] Sunita Jogaranjan, 'The Drafting of the 1925 League of Nations Resolutions on Tax Evasion',' in *Studies in the History of Tax Law*, ed. Peter Harris and Dominic de Cogan, vol. 7 (Hart Publishing, 2015).

[39] League of Nations, *Double Taxation and Tax Evasion: Report and Resolutions Submitted by the Technical Experts to the Financial Committee of the League of Nations*, vol. 45. (Geneva: Publications of the League of Nations, 1925).

[40] Jogaranjan, *Double Taxation and the League of Nations*.

[41] The Committee consisted of Salvador Oria, Argentina; M. Clavier, Belgium; Valdimir Valnicek, Czechoslovakia; M. Borduge, France; Herbert Dorn, Germany; Pasquale D'Aroma, Italy; Kengo Mori, Japan; J. Sinninghe Damsete, Netherlands; Stefan Salseri, Poland; Haus Blau, Switzerland; Thomas Adams, USA; and Frederico Feo, Venezuela.

[42] The Financial Committee Report to the Council on the Work of the Eighteenth Session, Geneva, June 4-8, 1925 - League of Nations Archives, C.335.1925.II - United Nations, Geneva.

2.3.3. LN MTC 1927

The Committee of Technical Experts presented its report in April 1927, proposing four draft conventions with explanatory notes. It was the Draft Convention for the Prevention of Double Taxation that contained an allocation rule for income from immovable property. Article 2(1) of the Convention reads: 'The income from immovable property, i.e. which corresponds to the actual or presumed rental value of such property, as well as any other income from such property which is not covered by Article 5, shall be taxable in the State in which the property in question is situated.'[43] This particular principle was likewise to 'apply to income from mortgage or other similar obligations.'[44] Vinnitskiy argued that the provision 'did not limit the scope of its application to cases where the taxpayer is a resident of a contracting state and immovable property is situated in the other contracting state,' and wherefore it 'could be applied to the situations where the income was derived from the immovable property situated in a third state.[45] He further contends that the particular provision gave the taxing right to the state in which the immovable property was situated 'only if the income was not derived from industrial, commercial or agricultural undertaking through a permanent establishment.'[46] However, if the income was derived from a PE the taxing rights were vested in the state in which the PE was located. It is evident that in LN MTC 1927, the situs rule was placed in a subaltern position to the PE principle, which was quite contrary to the modern dispensation on the issue.[47] The term 'immovable property' was not defined, which 'approach was based on the idea of the border (in the logical and economic sense) between income from immovable property and business income that was 'derived from industrial, commercial or agricultural undertakings,' whereby the former was to 'correspond to the actual or presumed rental value.'[48] The Committee of Technical Experts was replaced by the Fiscal Committee in 1928 as the LN's loose limb.

2.3.4. LN Report 1935

The Fiscal Committee deliberated upon the LN MTC at its various sessions held between 1928 and 1935. The Fiscal Committee's Plurilateral MTC, 1931 mirror-imaged LN MTC 1927 except that the 'business income shall not include…income from immovable property…income from mortgage, from public funds, bonds (including mortgage bonds)…'[49] Vinnitskiy posits that this brought 'the distributive rule on income from immovable property closer to the current approach of the…UN Model.[50] The LN Report 1935 did not substantially impact the lateral developments in the arena of international taxes.

[43] Article 2(1) of League of Nations, *Report and Resolutions Submitted by the Technical Experts on Double Taxation and Tax Evasion* (Geneva 1927), https://catalog.hathitrust.org/Record/001138077 (accessed 28 December 2021).
[44] Article 2(2) of Nations, *Report and Resolutions Submitted by the Technical Experts on Double Taxation and Tax Evasion*.
[45] Vinnitskiy, *supra* note 16.
[46] *Ibid.*
[47] *Ibid.*
[48] *Ibid.*
[49] League of Nations, *Convention for the Allocation of Business Income between States for the Purposes of Taxation* (Geneva: League of Nations, 1935).
[50] Vinnitskiy, *supra* note 16.

2.3.5. LN MTC 1943

In spite of its overly pronounced pro-developing country leanings, the LN MTC 1943 did not choose to tinker with the situs rule enshrined in LN MTC 1927 by stating that 'income from real property shall be taxable only in the State in which the property is situated.'[51] A few additional sub-categories of income from immovable property such as 'income from mortgages,' 'royalties from immovable property or in respect of the operation of a mine, quarry, or other natural resource,' and gains derived from the disposal of immovable property were closely identified and left to be regulated by Article 3, 10, and 12, respectively. But the principle underlying these incomes was essentially the situs rule. 'In these circumstances, such a classification of incomes from immovable property had quite a limited meaning.'[52] On the issue of interaction between income from business and income from immovable property, the scope of the former was excluded from the purview of Article 2 where income was 'derived from exploration of lands, buildings, and sub-soil as a part of a business, including mining, forestry and agriculture.[53] Thus, the principle reflected in LN MTC 1927 was replicated and the proposal of LN MTC 1935 was discarded.

2.3.6. LN MTC 1946

Immediately after WWII, European capitalist powers scrambled to stock-take the developments that had taken place during the war period. The Fiscal Committee convened in London for its 10th session to come up with MTC 1946.[54] When it comes to immovables, both the LN MTC 1943 and LN MTC 1946 converge. Article II of the LN MTC 1946 reads: 'Income from real property shall be taxable only in the State in which the property is situated.'[55] Whittaker argues that the 'uniformity of position is probably the result of a consistent view of in rem taxing jurisdiction by the developed countries, and a preference for source jurisdiction by the developing countries.'[56] It is contended that Whittaker's attribution of the wide-going consensus on the source rule to 'a preference…by the developing countries,' is without any empirical basis. It may even be that developing countries are yet to attain true cognition of the inimical nature of the source rule and its complex interaction with the reverse capital flows.

2.4. Post-War Period

No sooner the WWII was over, the Organization of European Economic Cooperation (OEEC), was created in 1948. The OEEC established a Fiscal Committee in March 1956, and tasked it to prepare a MTC alongwith proposals for its implementation.[57] Thus, while UN baulked on its role in fiscal domain, OEEC rushed into grab the opportunity. The OEEC work, which was fundamentally based on LN MTC 1946, attempted to introduce the modern approach under

---

[51] League of Nations, *Model Bilateral Convention for the Prevention of the Double Taxation of Income* (Mexico: League of Nations, 1943).
[52] Vinnitskiy, *supra* note 16.
[53] *Ibid.*
[54] League of Nations, *Fiscal Committee: Report on the Work of the Tenth Session of the Committee* (London: League of Nations, 1946).
[55] League of Nations, *Model Bilateral Convention for the Prevention of the Double Taxation of Income and Property* (London: League of Nations, 1946).
[56] Whittaker, *supra* note 13.
[57] Ahmed, 'U.N M.T.C Article 8: Was the Source Rule Surrender a Blunder? The Case Study of Pakistan.'

which situs principle prevailed on business income (taxation of immovable property rule should apply to immovable property of commercial, industrial or handicraft enterprises, etc.).[58] Likewise, it was unequivocally held that ships and aircraft would not constitute immovable property under DTCs. The OEEC also rather inconsequentially tinkered with the definition of elements of immovable property by drawing distinction between 'income derived from the direct use,' 'income from letting,' and 'alienation of immovable property,' without, in fact, changing the underlying principle of taxation. The OEEC's transmuted into OECD on September 30, 1961 alongwith the work on international taxation. It has been argued that the true heir of LN's extensive work on international taxation was OECD, and not UN as is generally mistakenly believed.[59] Given the stakes involved, the capitalist world substantially invested in the OECD, and capacitated it enough to churn out dominant ideas which could capture almost the entire epistemological space in the international fiscal domain.

2.5. OECD MTC 1963

The OECD MTC 1963 reconfigured the provision on immovable property as Article 6 with a single important alteration, that is, a clear-cut demarcation between income derived from immovable property itself and the gains derived from its disposal. It has been stipulated that since OECD MTC Article 6 did not contain reference to the residence state, it potentially created a possibility of the worldwide taxation by the source state of the income derived from immovable property. This unintended aberration was corrected in UN MTC 1981 by stipulating that the 'property in question must be located in the state which is not the taxpayer's state of residence.'[60] Resultantly, income derived by a resident of contracting state from this state or a third state would fall under Article 21, but not Article 6 and anyway subject to taxation under the domestic laws.

2.6. UN MTC

In 1967, the UN ended up creating an Ad-Hoc Group of Experts on Tax Treaties, too.[61] The very nomenclature of the Group expressly containing a direct reference to 'Tax Treaties between Developed and Developing Countries' betrays an underlying urge to rectify fiscal inequities in the international taxes regime extant between the UN member nations. The UN MTC 1981 – the 1st of its kind – was rolled out with fanfare. Intriguingly, while the principle of territoriality was effectively rigged on business incomes (linking it to the PE), it was observed and reinforced on incomes from immovables. The UN MTC Article 6, in fact, resonated the international consensus that had evolved through the preceding half century and culminated in OECD Model 1963 Article 6. The acquiescence appears to have been quite mechanical and sans deliberations – at least, any meaningful ones. The term 'immovable property' was left to don the meaning that 'it has under the law of the Contracting State in which the property in question is situated.'[62] Nonetheless, the property that is accessory to the

---

[58] Vinnitskiy, *supra* note 16.
[59] Ahmed, 'U.N M.T.C Article 8: Was the Source Rule Surrender a Blunder? The Case Study of Pakistan'.
[60] Vinnitskiy, *supra* note 16.
[61] The 'Ad-Hoc Group of Experts on Tax Treaties between Developed and Developing Countries' was established under ECOSOC Resolution 1273 (XVIII) adopted on 4 August 1967.
[62] Article 6(2) of UN.

immovable property, 'livestock and equipment used in agriculture and forestry, rights to which the provisions of general law respecting landed property apply, usufruct of immovable property and rights to variable or fixed payments as consideration for the working of, or the right to work, mineral deposits, sources and other natural resources,' have, in any case, been included within the scope of the immovable property for the purposes of taxation in the source state. The UN MTC Article 6 reinforces the source state's right to tax incomes derived from immovable property's 'direct use, letting or use in any other form.'[63] The source state's right to tax also extends to the incomes from immovable property of an enterprise and to the incomes from immovable property used for the performance of independent personal services.[64] Likewise, ships and aircrafts have been specifically excluded from the tax nexus on immovable property in the source state – in fact, in either of the states.[65] Moreover, like a plain reading of the provision leads one to conclude, it 'does not deal with income arising from immovable property situated in the taxpayer's state of residence, or in a third state.'[66]

The UN MTC's naiveté does not end at routine incomes from immovable properties; it does extend to capital gains, too. Similarly, incomes from immovable property that are attributable to a PE are treated as business profits, and liable to tax under the relevant rules. It has been averred that the 'purpose of this provision is to ensure that the state of source has the right to tax any income from immovable property even if it is not attributable to a PE.'[67] The UN MTC Article 13 'expands the right to tax of the state of source, in that it may tax gains from the alienation of interests in partnerships, trusts and estates which principally own immovable property situated therein,' which essentially implies that 'gains, in whatever form, from the immovable property situated in a Contracting State may be taxed in that State.'[68] In the same vein, the 'gains from the alienation of shares, other than those shares of principally immovable property owning companies, representing a participation' beyond a mutually agreed threshold 'in a company which is a resident of a Contracting State may be taxed in that State.'[69] At this particular point, the OECD MTC is at variance with the UN MTC as it does not contain a formal provision in this connection and leaves the contracting states to settle the matter through bilateral negotiations.[70] Lennard cites it as a rare instance where essentially an UN MTC provision travelled to the OECD MTC – a rarity in its own right.[71] The UN MTC went through some modifications in 1999, 2001, 2007, 2011, and 2017, but without ever touching

63 Article 6(3) of UN.
64 Article 6(4) of UN.
65 Article 6(2) of UN.
66 Dhruv Sanghavi, 'The Interaction of Articles 6, 7 and 21 of the 2014 Oecd Model Tax Convention: A Historical Analysis,' *Intertax* 44, no. 8/9 (2016).
67 Bin Yang, and Chun Ping Song, 'A Comparative Study of the Oecd Model, Un Model and China's Treaties with Respect to Rights to Tax Income and Capital', *eJournal of Tax Research*, 2011, 9(3).
68 *Ibid*.
69 *Ibid*.
70 See, for further details, F.S. Scandone, and B.E. Pappalardo, 'The Interaction between Business Profits and Income from Immovable Property under Tax Treaties: Is It All About Definitions?', *Intertax*, 2009, 37(4), Irene Burgers, and Irma Mosquera, 'Corporate Taxation and Beps: A Fair Slice for Developing Countries?', *Erasus Law Review*, 2017, 1, August, Stefano Simontacchi, *Taxation of Capital Gains under the Oecd Model Convention: With Special Regard to Immovable Property* (Amsterdam: Kluwer Law International, 2007). https://books.google.com.pk /books?id=wlkX4uXRtZkC (accessed 28 December 2021).
71 Michael Lennard, 'The U.N Model Convention as Compared with the O.E.C.D Model Tax Convention - Current Points of Difference and Recent Developments,' *Asia-Pacific Tax Bulletin*, no. January (2009).

the selective territoriality on incomes from immovable property. The UN MTC's consecration to source rule without aligning it with the movement of capital and associated fiscal implications were set to have fallouts for the developing countries, and they did as explicated in the next section.

3. SELECTIVE TERRITORIALITY – OPTIMIZATION

In order for the allocation of taxing rights on international incomes from immovables to best reflect the interests of the developed countries a two-tiered approach was adopted to lay out the requisite legal infrastructure. At the multilateral level, various MTCs – particularly the UN MTC were rolled out by way of a conceptual framework, which was voluntary in nature but compulsive in incidence. At the bilateral level, the *Model* tax convention was raised to the mantle of a *Convention* – forging across developing countries a condescending allegiance thereby obliquely steering them into signing UN MTC Article 6 in their bilateral DTCs rather involuntarily. It is posited that taxing rights on UN MTC Article 6 were not aligned with the likely direction of capital flows as on other categories of incomes – business, interest, dividends, royalty, and even international traffic. This is simply because capital movement on real estate was anyway going to take a reverse direction, that is, from the developing to the developed countries. This is where the UN MTC failed in its avowed mission of protecting and promoting fiscal rights of developing countries. Thus, once the stage was set in terms of laying down of legal wherewithal, it was only logical that developed countries quickly moved to align their domestic policy frameworks to give traction to the reverse capital flows and optimize on the selective territoriality. A number of mechanisms were contrived and put in place with multiple objectives in view – incentivization of foreign investment into real property being one of them. The actual boon of luring investment in immovable property is that a country can acquire liquid capital from all over the world while retaining the real control over its real assets, that is, land and superstructures built over it being stationary within their territorial borders. It can also spur investment in the construction industry, related sub-industries, and support service sectors creating employment for the domestic workforce, raise saving and investment rates, augment aggregate demand and lift peoples' incomes. The way selective territoriality was optimized by developed countries, and the way it impacted the developing ones can be gauged from the select succeeding aspects.

3.1. Citizenship/Residence by Investment Programs

The foremost mode of optimization on the selective territoriality on immovables is the citizenship by investment (CBI) and residence by investment (RBI) programs that are offered by nation states, dependencies, and protectorates allowing foreign individuals to obtain citizenship or (temporary or permanent) residence rights in return for certain investment in their economies, in general, and to their real estates, in particular. The CBI and RBI programs with overlapping features in many a respect are identical to eachother in motives, design, operation, outcomes, and implications. However, there is also a marked difference in that while CBI programs bestow citizenship rights exhibiting in a passport or a national identity card, RBI programs accrue residential status manifesting in a residence card, permit, or a certificate. Thus, while a CBI program may carry all features of an RBI program, the latter may be loaded with more direct, pronounced, and far-reaching implications for the target state tax systems; in fact, for the entire international taxes system and its integrity.[72]

Shorn of all additives, CBI/RBI programs are indicative of a fierce competition between nation states to lure high net worth individuals into their jurisdictions and reap fiscal fruits of their worldwide businesses, incomes, and wealth. Christians avers that the most enterprising and the wealthiest individuals could choose to live in a jurisdiction depending not only upon personal preferences, arithmetic of 'multiple personal and social factors, but also a calculation of the costs and benefits of competing residence programs that offer tax incentives to immigrants.'[73] This may also be the most perverse and predatory form of internationalization of capitalism. Rixen equates the propensity of jurisdictions towards 'adopting their fiscal policies strategically, among which companies and individuals can choose, in order to attract new investment and poach other countries' tax base,'[74] with perverse tax competition. The CBI/RBI programs are believed to produce 'stockholder citizens'[75] in the sense that 'investors have an instrumental interest in obtaining the citizenship,'[76] of smaller states and havens as entry-pass to bigger economies contrary to 'stakeholder citizens'[77] who are the product of proper naturalization of ordinary migrants, over time, becoming part and parcel of host community.

Although since the Westphalian Treaty, 1648, the award or withdrawal of citizenship has been deemed to be an inalienable sovereign function of the state, yet the modern international legal infrastructure recognizes this position more explicitly. The Hague Convention Article 1 emphasizes that it is within each state's jurisdiction 'to determine under its own law who are its nationals.'[78] Beretta defines jurisdiction 'as a series of rules that define a qualifying connection between a subject matter and a state, and…set of boundaries of a country's sovereignty.'[79] He goes on to explicate that the 'connection must…possess a certain degree of

---

[72] See, for further analysis Xin Xu, Ahmed El-Ashram, and Judith Gold, *Too Much of a Good Thing? Prudent Management of Inflows under Economic Citizenship Programs* (Washington DC: IMF Working Paper, 2015); David Röthler, and Karsten Wenzlaff, *Crowdfunding Schemes in Europe* (Barcelona: European Expert Network on Culture, 2011); Ayelet Shachar, and Rainer Bauböck, *Should Citizenship Be for Sale?* (Feisole: European University Institute - Robert Schuman Centre for Advanced Studies European Union Democracy Observatory on Citizenship, 2014); Madeleine Sumption, and Kate Hooper, *Selling Visas and Citizenship: Policy Questions from the Global Boom in Investor Immigration* (Washington DC: Migration Policy Institute, 2014); OISCO, *Anti-Money Laundering Guidance for Collective Investment Schemes* (Madrid: TC-IOSCO, 2005); Jelena Džankić, *Investment-Based Citizenship and Residence Programmes in the Eu*, vol. EUI Working Papers (Feisole, Italy: European University Institute - Robert Schuman Centre for Advanced Studies, 2015); Giorgio Beretta, 'Citizenship and Tax,' *World Tax Journal*, 2019, 11(2).

[73] Allison Christians, 'Buying In: Residence and Citizenship by Investment,' *Saint Louis University Law Journal*, 2017, 62(51).

[74] Thomas Rixen, 'Tax Competiton and Inequality: The Case of Global Tax Governance,' *Global Governance*, 2011, 17.

[75] Raul Magni-Berton, 'Citizenship for Those Who Invest into the Future of the State Is Not Wrong, the Price Is the Problem,' in *Should Citizenship Be for Sale?*, ed. A. Shachar and R. Bauock (Florence: European University Institute, 2014).

[76] Džankić, *supra* note 72.

[77] Rainer Baubock, 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evalution of External Voting,' *Frodham Law Review*, 2007, 75(5).

[78] Article 1 of the Hague Convention entitled 'Certain Questions relating to the Conflict of Nationality Laws'.

[79] Beretta, *supra* note 72.

intensity, in the sense of entailing a 'genuine' or 'sufficient' link.[80] The tax law, like every field of law, has its own jurisdictional rules. It has been averred that 'in relation to income tax, for a state to impose its taxing rights, a qualifying connection needs to exist either with the tax subject i.e. the person upon whom the obligation falls to pay, or with the tax object i.e. the cluster of facts from which an item of income derives.'[81] The aggressive CBI/RBI programs are viruses that contravene and bug internationally accepted rules of jurisdiction of the target states by first sucking capital therefrom and then stripping them of the associated fruits.

The CBI/RBI programs could be classified into three broad categories. Firstly, the tax-loaded investment programs are, in fact, the most harmful. This implies that nation states sponsoring such programs 'use their taxing power in some manner to attract immigration.'[82] In this respect, the programs that are potentially high-risk…are those that give a taxpayer access to a low personal income tax rate of less than 10% on offshore financial assets and do not require significant physical presence of at least 90 days in the jurisdiction.'[83] Christians believes that 'Tax incentives for favored immigrants are but one aspect of this brave new world of tax competition.'[84] It has been contended that in a world of increasing wealth inequality coupled with an equally fierce competition, a regulatory deficit, 'and a limited number of elite to target for immigration, it is a buyer's market for geographically mobile consumer of fiscally convenient tax residency.'[85] He goes on to explicate that tax planning may be accomplished 'where one's nationality is relevant to the assignment of tax residency under a treaty.'[86] Beretta avers that 'citizenship if purposively acquired through an investment scheme, may represent the springboard for new nationals to obtain, directly or indirectly, a number of tax benefits (if not, 'tax privileges').[87] He further stipulates that 'for a person wishing to acquire…citizenship, the possibility of attaining a special tax regime constitutes an alluring incentive.'[88] There is no doubt that 'by levying no income tax or having no comprehensive personal income tax regime,' a country's CBI/RBI programs become riskier,'[89] particularly for the target state, which first bears its brunt of capital flight and then that of selective territoriality on immovables.

Secondly, the so-called tax-neutral CBI/RBI programs are geared to extend or avail advantage other than those relating to taxes.[90] The host-state motives behind such programs

---

[80] Beretta, *supra* note 72.
[81] Džankić, *supra* note 72.
[82] Christians, *supra* note 73.
[83] OECD-https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/residence-citizenship-by-investment/ (accessed 28 December 2021).
[84] Christians, *supra* note 73.
[85] Christians, *supra* note 73.
[86] UN MTC Article 4 stipulates that when an individual is treated as tax resident under the domestic laws of each state, residence is to be determined on the basis of the tie-breaker rule - beginning with the individual's home and his economic connections - eventaully ending with nationality.
[87] Beretta, *supra* note 72.
[88] Beretta, *supra* note 72.
[89] Andres Knobel, and Frederik Heitmüller, *Citizenship and Residency by Investment Schemes: Potential to Avoid the Common Reporting Standard for Automatic Exchange of Information* (London: Tax Justice Network, 2018).
[90] The OECD has identified and appraised about 100 CBI/RBI schemes by CRS-committed jurisdictions, as a result of which the schemes that potentially pose a high-risk to the integrity of CRS are (i) **Antigua and Barbuda**: (a) Antigua and Barbuda Citizenship by Investment, and (b) Permanent Residence Certificate; (ii) **Bahamas:** Bahamas Economic Permanent Residency; (iii) **Bahrain:** Bahrain Residence by Investment; (iv) **Barbados:** Special Entry and Residence Permit; (v) **Cyprus:** (a) Citizenship by Investment, (b) Scheme for Naturalization of Investors in Cyprus by Exception; (vi) **Dominica**: Citizenship by Investment; (vii) **Grenada:** Grenada Citizenship by

could be the avenues to set up a new business in the host jurisdiction, greater mobility due to visa-free travel, better education and job opportunities for the family or even the right to live in a country with political stability.[91] Arguably, tax-neutral programs are 'explicitly designed to attract the wealth to become permanent residents and taxpayers,'[92] and not for any immediate or short-term tax benefits.[93] Some of CBI/RBI programs could be 'nothing more than a fast lane to visa status for those who can pay the premium.'[94] It has been averred that for many countries 'launching visa programs that favor citizenship acquisition by foreigners is a straightforward way of sustaining their budget needs and stimulating the economy, job creation and capital investment from abroad.'[95] Such programs incentivize wealthy individuals 'to migrate to, or at least work or study for some time in a different country,' which can guarantee to them or their progeny an additional option to relocate in the future.[96] It is contended that even the most tax-neutral CBI/RBI programs would have implications for target states under selective territoriality.

Thirdly, secrecy-driven CBI/RBI programs merely extend secrecy cover in return for all the dubious capital transmittals through surreptitious means. It is feared that CBI/RBI programs can potentially be exploited to misrepresent an individual's jurisdiction of tax residence and to endanger the proper operation and integrity of OECD's Common Reporting Standard (CRS) due diligence procedures.[97] Like already pointed out CBI/RBI programs could interest various persons for multiple genuine reasons, but then there are CBI/RBI programs that are high-risk for certain identifiable reasons. These risks include relieving new residents of 'certain reporting requirements concerning foreign income for the entire duration of the special tax regime.'[98] The CBI/RBI programs, it has been argued, 'can also be used for the wrong reasons,' for instance 'to escape a legitimate prosecution in one country by fleeing to another one, to engage in money laundering or violate international sanctions, or…to avoid CRS reporting,…to hide from authorities money related to tax evasion, corruption or money laundering.'[99]

The selective territoriality operates as a thick shelter to the host state because once funds get invested there, rental incomes, capital gains arising to individuals and trusts, and capital

---

Investment; (viii) **Malaysia:** Malaysia My Second Home Program; (ix) **Malta:** (a) Malta Residence and Visa Program, and (b) Malta Residence and Visa Programme; (x) **Qatar:** Residence Visa for Real Estate Owner; (xi) **Saint Kitts and Nevis:** Citizenship by Investment; (xii) **Saint Lucia**: Citizenship by Investment Saint Lucia; (xiii) **Seychelles:** Type 1 Investor Visa; (xiv) **Turks and Caicos Islands**: (a) Permanent Residence Certificate via Undertaking and Investment in a Home, (b) Permanent Residence Certificate via Investment in a Designated Public Sector Project; (c) Permanent Residence Certificate via Investment in a Home or Business; (xv) **United Arab Emirates:** UAE Residence by Investment; (xvi) **Vanuatu:** (a) Development Support Program, (b) Self-Funded Visa, (c) Land-Owner Visa, and (d) Investor Visa.

91 OECD, https://www.oecd.org/tax/automatic-exchange/crs-implement-and-assistance/citizen-by-investment (accessed 28 December 2021).

92 Christians, *supra* note 73.

93 The best example of such tax-neutral CBI program is the 'Dutch Investor Visa for High Net Worth Individuals,' which offers permanent residence in return for investment of $ 1,250,000, but sans any tax relief as the Dutch individual top marginal tax rates runs above 50 percent.

94 Christians, *supra* note 73.

95 Beretta, *supra* note 72.

96 Knobel, and Heitmüller, *supra* note 89.

97 OECD, https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/residence-citizenship-by-investment/ (accessed 28 December 2021).

98 Beretta, *supra* note 72.

99 Knobel, and Heitmüller, *supra* note 89.

gains arising to land-rich corporations get taxed there completely stripping target state of its due tax share. Moreover, since immovables are currently not covered by the CRS framework, the investments made do not get reported in case of new nationals. This may not be out of place to mention that the inadequacy of citizenship as a test of an individual's fiscal obligations was underscored as early as the LN Report 1923, which reckoned citizenship as 'fast breaking down in practice' and 'clearly insufficient in theory.'[100] Since there is an ever 'growing number of countries that grant citizenship or long-term/permanent-resident status to people who only undertake a passive investment, such as…in real estate,'[101] it may be about time that the comity of nations sat down to decide upon adequate level and role of CBI/RBI programs in international fiscal system.

3.2. Tax Havenry

Another mechanism which was contrived, promoted, and protected by developed countries to optimize on selective territoriality under UN MTC Article 6 and to harvest reverse capital flight proceeds was tax havenry. The 'tax haven' denotes a jurisdiction with low or no taxes, scant effective EOI, lack of transparency, and non-existent substantial activity requirements.[102] There is little doubt that once the international taxes regime which was not based on any solid uniform principle, that is, source rule or residence rule, but on cherry-pickings, that is, selectively adopting the rule that suited the developed powers had been rolled out, it was only a matter of time before such sophisticated mechanisms were contrived to optimize on the rules adopted. The regulatory blind spots – euphemistically dubbed as tax havens, which brazenly sucked precious capital out of developed countries' real estate markets is one such super-sophisticated ploy. It is noteworthy that in the wake of live UN MTC Article 6, sans being monocausal, tax havenry has consistently diffused and expanded over the past one hundred years as in 1974, there were only 15 recognized tax havens, which stood 73 in 2018.[103] While the total value of the capital stashed in tax havens is over US$ 21 trillion, good part of it is parked in offshore immovables.

In fact, adverse implications of tax havenry manifest far and beyond UN MTC Article 6 – beyond even the realm of taxation.[104] It was stipulated that the very term 'tax haven' is 'a misnomer, because tax havens offer escape routes not just from taxes but potentially from any of the rules, laws, and responsibilities of other jurisdictions – whether those be taxes, criminal laws, disclosure rules, or financial regulations.'[105] Thus, tax havens contribute towards a global regulatory deficit, in general, and fiscal and current account deficits in developing countries, in particular. It has been contended that tax havens help steal not only 'stamp duty, inheritance

[100] Nations, 'Report on Double Taxation.'
[101] Knobel, and Heitmüller, *supra* note 89.
[102] OECD, *Harmful Tax Competition: An Emerging Global Issue* (Paris: OECD Publishing, 1998), 23.
[103] James S. Henry, *The Bizarre Economics of Tax Havens and Pirate Banking* (TED Talk: www.youtube.com/watch?v=znYA0yIQMq0, 2013).
[104] Jane G. Gravelle, 'Tax Havens: International Tax Avoidance and Evasion', *Congressional Research Service* 7-5700 (2015).
[105] Nicholas Shaxson, 'A Tale of Two Londons,' *Vanity Fair*, 13 March 2013.

tax and capital gains tax,' but also 'income tax if the properties are being let and are artificially loaded with debt to avoid payment.'[106]

The selective territoriality on immovables may have a direct nexus – more in an operational than a causal sense – with the growth and perverse working of tax havens. A large number of companies and trusts based in tax havens are leveraged to purchase expensive properties in developed western countries. It was reported that properties worth £122 billion located in England and Wales were held through offshore companies based in tax havens under anonymized ownerships. This figure was more than all housing stock in Westminster and the City of London put together.[107] In connection with London's inflated and ballooned up real estate market it was pertinently remarked that there 'billionaires are pushed out by billionaires.'[108] In the same vein, it has been averred:

> London belongs to investors who do not live in the city… On paper a mansion is owned by a shell company. At the moment there are in excess of 40,000 properties that are owned by anonymous offshore corporations meaning that we do not know who the owners are. It could be decent people; it could be mafias. A lot of money that came here and exploded the prices is of dirty origin… Trillion of Euros from Russians, Germans, Chinese, and Indians have poured into London. From socio-economic perspective it is not sustainable. You cannot have a city where residents and workers cannot live.[109]

The question arises as to why not the developing countries which signed UN MTC Article 6 in their bilateral DTCs could align their domestic land ownership frameworks to attract foreign investment *a la* the developed countries. Thus, while most powerful developed countries quickly and confidently moved to allow ownership rights to non-nationals and harvest massive chunks of capital into their real estates, developing countries failed in the pursuit. A few developing countries that jumped on to the bandwagon also recorded only a marginal success before being called and cautioned. In fact, developing nations' failure to capitalize on the opportunity is ascribable to a xenophobic worldview stemming directly from their colonial past. It was not until the turn of the century that tax havenry came under spotlight of major European and North American powers. But paradoxically those very major powers happened to actually own, control, manage, and regulate tax havens, and are their overlords.[110] It was posited that while recent initiatives may have, to a certain degree, compelled tax havens to water down their secrecy regimes and engage in voluntary and request-based tax-information exchange, these changes were likely to have only a limited impact because tax authorities had to first fulfill a number of pre-conditions before being able to seek/receive and utilize the

---

106 Richard Murphy, *Tax Haven Ownership of Uk Property Might Cost £2 Billion in Tax Avoidance* (London: Tax Research UK, 2014).

107 Tax Justice Network, www.taxjustice.net/2014/08/01/tax-haven-buyers-set-property-alarm-london/ (accessed 28 December 2021).

108 DW Documentary, *How the Richer Get Richer – Money in the World Economy* (Youtube: www.youtube.com/watch?v=t6m49vNjEGs (accessed 25 March 2020).

109 *Ibid*.

110 Most famours of UK's tax havens styled as Crown Dependencies are (i) Guernsey; (ii) Jersey; (iii) Ise of Man; and those styled as Overseas Territoreis include (i) Bermuda; (ii) Cayman Islands; (iii) Turks & Caicos Islands; (iv) British Virgin Islands; (v) Anguilla; (vi) Montserrat; (vii) Falkland Islands; (viii) South Georgia & South Sandwich Islands; (ix) British Indian Ocean Territory; and (x) Peticairn, Henderson, & Oeno Islands.

information.[111] The UN MTC, it has been argued, monopolized entire epistemological space for developing nations by eliminating alternatives and mental freedom to look for alternatives.[112] At some level, tax havenry represents the ugly face of capitalism, too.

3.3. Manipulable Ownership Structures

While investing in real estate located in an offshore jurisdiction the ownership structure may be the single most important variable in the investor's decision-making equation particularly when it is with capital of dubious credentials remitted through irregular channels.[113] This is where complexity, layering, anonymization and ownership structure attain key importance. Over the past few decades a number of complex ownership structures have been contrived in the developed world each having potential to achieve unspecified objectives and ambiguous outputs – including optimization on selective territoriality on immovables. A non-resident individual investor or group of investors could choose to invest in real property in an offshore jurisdiction under one or more of the following modes:

- Directly – as individual owner, co-owner, or partner;
- Indirectly – via a purpose-built resident company or pre-existing resident company that may or may not have other investments;
- Indirectly – via a non-resident company whose shares are owned either directly by the individual or through an interposed non-resident company;
- Indirectly – via a company incorporated in a 3rd jurisdiction whose shares are owned directly by the non-resident or via yet another non-resident company; or
- Indirectly – via a testamentary or *inter vivos* trust.[114]

It has been argued that in case of *indirect* scenarios 'the entity selected to make and own the investment may be a sole proprietor or member of a co-investment group, as a co-owner or a partner in a partnership.'[115] The indirectization of real property ownership through interposed corporations and trusts – often in multiple layers – has been the single most facilitative factor in bulk transfer of capital from developing to the developed world. The capacity of developing country tax systems and other enforcement arms gets challenged while dealing with labyrinthine and complex ownership structures put in place with expensive and sophisticated legal and technical advice. This way developing countries not only lose precious capital, tax on capital, but also tax on incomes from immovables acquired with stolen capital.

3.4. Beneficial Ownership Mechanisms

Similarly, acquisition of immovable property under beneficial ownership structures is yet another mode through which territoriality under UN MTC Article 6 is optimized and reverse

---

111 Gravelle, *supra* note 104.
112 Ahmed, 'U.N M.T.C Article 5: The Predatory Ploy: A Neo-Marxist Mapping of the Permanent Establishment.'
113 With the advantage of hindsight, it is nomore a hypothetical scenario, this is how actually capital travelled from the developing to the developed countries.
114 Ahmad Khan, *Corss Border Transactions and Tax Treaties Theory and Practice* (Singapore: Petrosin, 2000), 142.
115 *Ibid.*, 143.

capital movement given traction. Ownership of assets by both natural and juridical persons can be either legal or real. In case the asset is registered in name of the person who actually owns it, the matter ends there. However, if the asset is registered in the name of a person other than its actual owner, the scenario is dubbed as beneficial ownership. In legal parlance, the term 'beneficial owner' implies a natural person who eventually owns an asset or controls a legal entity that, in turn, legally holds the asset. The concept also covers the person(s) who enjoys decisive and effective control over a legal person or its arrangement. The obvious purpose of creating beneficial ownership arrangements is to delink the actual owner from the source of funds (which could be proceeds of crime or tax evasion) and its tax implications.[116] This is how the 'global elite', which 'is basically looking for a safe-deposit box,'[117] finds one in offshore anonymized real estates.

It is an established fact that bulk of the transactions that take place in offshore estate markets are held under beneficial ownership, which have tax implications. Brown rightly posits that it is 'critical to establish the identity of beneficial owner of an asset in order to determine the tax result.'[118] This can have tax impact vis-à-vis originally invested funds, the incomes generated post acquisition, and the gain produced at disposal. It was reported that approximately 'two out of three of the 91,248 foreign-company owned properties in England and Wales are held via the British Virgin Islands and Channel Islands structures.'[119] This is a staggering ratio. It is obvious that once real owner is dissociated from an asset, taxation cannot be executed, at least, in residence jurisdiction, by implication, developing countries. Why developing nations, particularly? This is simply because major European and North American powers whose tax base is poached through beneficial ownership structures can effectively coerce tax havens into providing all critically important information required to see through the beneficial ownership veil. It is developing nations that are treated with disdain and dismissiveness by tax havens – and, of course, at the behest of their ultimate overlords – the developed powers.

Astonishingly, though the use of beneficial ownership tool with regard to immovables under Article 6 and the types of properties it covers is rampant, yet it has hardly ever made way into the debate on the matter. This is particularly because the maximum misuse of beneficial ownership is through trusts and interposed companies established in a third jurisdiction vis-à-vis properties purchased in developed countries with the funds siphoned off from developing countries. These kinds of complex ownership arrangements have fleeced developing countries for long – first through siphoning off of capital and then by avoiding paying taxes on the rentals

116 See, for an in depth analysis Alessandro Fiocco, 'The Beneficial Ownership in Oecd's Tax Treaties,' *Focus* 5, no. X (2018); Andres Knobel, 'Drilling Down to the Real Owners – Part 1: 'More Than 25% of Ownership' & 'Unidentified' Beneficial Ownership: Amendments Needed in Fatf's Recommendations and in Eu's Aml Directive,' Tax Justice Network, 2016, www.taxjustice.net (accessed 28 March 2020); Craig Elliffee, 'The Interpretation and Meaning of 'Beneficial Owner' in New Zealand,' *British Tax Review*, 2009, 49(3); Alexander V. Demin, and Alexey V. Nikolaev, 'The Beneficial Owner Concept in the Context of Beps: Problems and Prospects,' *Financial Law Review*, 2019, 13(1); Catherine Anne Brown, 'Tax, Trusts and Beneficial Ownership: Perils for the Unwary Practitioner', *Estates, Trusts & Pensions Journal*, 2004, 23(9).

117 Andrew Rice, 'Stash Pad,' *New York*, 27 June 2014.

118 Brown, *supra* note 116.

119 Murphy, *supra* note 106.

and gains generated. Lately, international community's shift of focus to beneficial ownership issue has started to make a difference though only marginally. Pressure is mounting on various jurisdictions to place information on beneficial ownership in public domain and also allow it to be part of the request-based EOI framework with relative ease. However, due to relative recentness 'of the novelties regulating the beneficial owner concept in the domestic legal order,' its essential aspects in the international legal system are yet to be explored, and 'tested in practice.'[120]

3.5. Porous EOI Regime

The extant international EOI regime exhibits strains and structurally-oriented undercurrents between developing and developed countries. The realist pro-developed country bias in the international taxes cooperation framework is historically embedded. Jogaranjan with reference to EOI under LN MTCs has pertinently remarked that 'it was thought to be completely unacceptable that residence-countries would provide information regarding their residents to enable them to be taxed in another (the source) country.'[121] At some level, these tensions continue to simmer in regard to immovable properties under all three EOI mechanisms – request-based, spontaneous, and automatic – exhibiting a built-in anti-developing country bias with particular reference to flight of capital and its parking in real assets located in developed countries – directly or indirectly through offshore tax havens. When it comes to request-based EOI, issues like foreseeable relevance, retroactivity, availability of information, and 'taxpayers' notice' are brought in to slow down and, at times, scuttle the exchange process. Likewise, when the information exchanged is sought to be used to have a crackdown on money laundering and other illegal funnels of flight of capital, the principle of 'the purpose for which it was exchanged' is brought to the fore to frustrate the efforts to have a crackdown on the money launderers owning borderless and nation-less capital. Spontaneous EOI has had a limited scope – particularly eversince it has been rendered to operate on reciprocal basis. Its efficacy is being tested in connection with RBI/CBI programs despite OECD's advice to all states harboring such initiatives to share the particulars of their buyers enabling parent states to enforce laws. While OECD may be working on it, the countries sponsoring such programs are resisting EOI under the framework on various excuses.

Likewise, automatic EOI under OECD's CRS framework does not cover immovables yet. In fact, CRS is further exacerbating outcomes of territoriality under UN MTC Article 6 in that it may be encouraging conversion of liquidity into real estate to avoid reporting. Noked argues that possibly 'some tax evaders emptied their offshore financial accounts before the start of AEOI by buying real estate or other non-financial assets.'[122] He further apprehends that since 'the direct ownership of non-financial assets, such as real property, precious metals, artwork, and collectibles, is not reported to foreign tax authorities under…CRS,' some 'tax evaders may invest in offshore non-financial assets.'[123] It has been feared that many tax evaders

---

[120] Demin, and Nikolaev, *supra* note 116.
[121] Jogaranjan, *Double Taxation and the League of Nations*.
[122] Noam Noked, 'Tax Evasion and Incomplete Tax Transparency,' *Laws*, 2018, 7(31), https://dx.doi.org/doi:10.3390/laws7030031 (accessed 28 December 2021).
[123] *Ibid*.

may 'have not been deterred or caught by AEOI because they shifted their undeclared offshore financial assets to other tax evasion channels that are not subject to AEOI.'[124] Thus, while selective territoriality under UN MTC Article 6 has implications of its own, it is optimized by developed countries through aforementioned mechanisms. Once in vogue with impunity, various not-so-advanced jurisdictions also got into competition to induce more and more investment in their real sectors by resorting to the aforementioned optimization ploys practically turning a blind eye to the appropriateness of origin of funds and channels through which those were remitted. The oppressive implications of fiscal plunder of developing nations on account of optimization of selective territoriality though empirically intractable yet have been massive.

4. Selective Territoriality – Appraisal

A wide-going skepticism in the scholarly circles as regards legitimacy, fairness or even the very requirement of an MTC-based and DTC-sustained international tax system has been consistently growing over the past few decades.[125] This cynicism has, in fact, mostly been general in nature – not really channelizing itself into unbundling and critically analyzing the system, that is, its allocative principles being dissected in essential detail, genesis, evolution, operation and outcomes, and appraised on some normative principles. In order to grasp in essence, it will be appropriate to contextualize *territoriality* with all its loaded post-colonial connotations. It is argued that the international distribution of *territory* is arbitrary. It is so because the value added to the pieces of land in developed countries is in part a consequence of the asymmetries in international economic order stemming directly from the exploitative colonial past. More accurately, the price-value appreciation in developed territories was due to economic surplus siphoned off from the developing one, which, in fact, amounted to further enriching of the rich at the expense of the poor. Roemer argues 'If the initial distribution is highly unequal because some agents robbed and plundered, then clearly there are grounds for viewing the ensuing exploitation as bad.'[126]

It has further been argued that 'both exploitation within a country and unequal exchange between countries are caused by differential ownership of productive assets.'[127] A systematic

[124] Lisa De Simone, Rebecca Lester, and Kevin Markle, 'Transparency and Tax Evasion: Evidence from the Foreign Account Tax Compliance Act (Fatca),' *Journal of Accounting Research*, 2020, 58(1).
[125] See, for instance, Sergio Andre Rocha, 'Should Developing Countries Include Article 7 in Their Tax Treaties?,' *Bulletin for Interantional Taxation*, no. IBFD (July 2017); Ahmed, 'U.N M.T.C Article 8: Was the Source Rule Surrender a Blunder? The Case Study of Pakistan.'; Katrin McGauran, *Should the Netherlands Sign Tax Treaties with Developing Countries?* (Amsertdam: Centre for Research on Multinational Corporations, 2013); TJN, *Double Taxation Agreements: Gain or Loss to Tanzania?* (Chasham: Tax Justice Network, 2016); Veronika Daurer and Richard Krever, 'Choosing between the Un and Oecd Tax Policy Models: An African Case Study,' *African Journal of International and Comparative Law*, 2014, 22(1): 1-21, https://dx.doi.org/10.3366/ajicl.2014.0077 (accessed 28 December 2021); I.J. Mosquera Valderrama, 'Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism,' *World Tax Journal*, 2015, 7(3); Peter D. Byrne, 'Developing Countries, Tax Treaties and the United Nations Model Tax Convention,' *I.L.S.A. Journal of International and Comparative Law*, 1996, 2: 695; Martin Hearson, *Measuring Tax Treaty Negotiations Outcomes: The Actionaid Tax Treaties Dataset*, vol. 47, *Working Paper* (Brighton: Institute for Development Studies, ICTD, 2016).
[126] J. Roemer, *Free to Lose* (Cambridge, MA: Harvard University Press, 1988).
[127] Benjamin Ferguson, and Roberto Veneziani, 'Territorial Rights and Colonial Wrongs,' *European Journal of Philosophy*, 2020, 29, https://dx.doi.org/DOI: 10.1111/ejop.12583 (accessed 28 December 2021).

perception building of a superiority of urban life of developed countries in the minds of developing world denizens comes on top of an asymmetric baseline. The psychological conditioning of inferiority complex coupled with other factors such as forced under-development, political instability, governance deficit, lack of educational and economic opportunities, trigger and give traction to capital flight from developing to developed territories. This fiscal injustice embedded in the international economic order due to colonial-time plunder gets galvanized when taxing rights over current flows of stolen capital were not assigned to the residence state. It follows that the legitimacy or validity of a principle of law can be analyzed in terms of its underlying canons of justice, equity, and fairness. Similarly, the efficacy of a principle of law can be gauged from its outcomes for its potential affectees – individuals, groups, organizations, and states. The selective territoriality on immovables under UN MTC Article 6 particularly from the point of view of developing nations can, inter alia, be appraised from these very perspectives.

4.1. Selective Territoriality – Defense

The UN MTC does not necessarily and explicitly commit itself as to why territoriality was exercised in the midst of its getting rigged on most other income types. In fact, never a debate has been undertaken to align the principle of taxation on immovables with the likely direction of capital flows – as on other international incomes. The OECD MTC, however, does explain that taxation of income on immovables has been vested to the source state 'due to the fact that there is always a very close economic connection between the source of this income and the State of source.'[128] Khan also believes that the 'international consensus in this matter stems from the fact that there is always a very close economic connection between the source of this income and the state of source i.e. where the property is situated.'[129] Reimer emphasizes that amongst all the distributive principles, the situs state has the 'best right' to acquire the taxing rights because of its control over the real property.[130/131] Vinnitskiy asserts that 'the territorial link between income and respective property was and remains highly important.'[132] It is posited that the raison d'être advanced to support selective territoriality, that is, a close 'economic connection' or 'territorial link' would have been defendable if the property were purchased from the capital generated within the situs state's own economic boundaries, and not with capital poached from the residence state – contextually, the developing nations. It has been contended that 'Real estate is a wonderful way to cleanse money,' as once one 'buys real estate, the derivation of the cash is forgotten,'[133] and that 'Real estate is a great alternative.'[134] Surprisingly, while developing countries continued to lose precious capital siphoned off from

---

[128] OECD, *Commentary on the Model Tax Convention on Income & on Capital* (Paris: OECD Publishing, 2017), 170.
[129] Khan, *supra* note 114, at 140.
[130] Reimer, in *Source Versus Residence: Problems Arising from the Allocation of Taxing Rights in Tax Treaty Law and Possible Alternatives*, 3.
[131] For further evidence that the situs rule was rooted in antiquity, see Il Garelli, *Diritto Internazionale Tributario* (Torino: Roux Frassati Co., 1899); Campos M. Torres, 'Elementos De Derecho Internacional Privado,' *Librería de Fernando Fe* I, no. (La tercera edición) (1906).
[132] Vinnitskiy, *supra* note 16.
[133] Rice, *supra* note 117.
[134] Simone, Lester, and Markle, *supra* note 124.

their economies liquidating in the process heard-earned and in many cases, borrowed foreign exchange, as well as fiscal rights on the revenues being generated from the real assets created with the stolen capital, the entire debate at the international intellectual theater remained focused on 'determining where the property was located,'[135] 'what constituted property,' or even 'what constituted income from immovable property.'[136] This is an astounding trivialization of a superior principle of distribution of fiscal rights between nations in asymmetrical economic relations having far-reaching implications for the denizens of developing countries; it can't have been sans a design or purpose.

4.2. Selective Territoriality – Evaluation

To evaluate fairness of the selective territoriality on immovables, Rawlsian theory of justice can be inducted into the analysis. Rawls believes that all inequalities stem from an inequality anchored in the pre-existing 'legal regime' or the 'birth status.' Contextually, any system that breeds inequality due to one or both reasons, is essentially an unfair system and cannot, under any circumstances, be justified. To Rawls, the only justifiable reason of inequality is the difference in 'talent and effort.' He focuses government as a moderator to minimize all inequality through redistributive justice, i.e., by undertaking welfare-orient spending sustained by progressive taxes. He opines that governmental action should differentiate between those who need most and those less, and its maximum resources should go to those who possess the minimum. Rawls' notion of global justice irresistibly plugs with his concept of redistributive justice. D'Amato, finding faults with international treaties when weighed at the touchstone of Rawlsian principles,[137] pertinently questions: 'Are all treaties to be kept? What about 'unequal' treaties—those imposed by the larger power upon the smaller? Does this deprive the citizens of the smaller power of their just share or equal liberties, all in the name of a concept that sanctifies treaties?'[138] All these questions elicit a negative response from the perspective of selective territoriality.

Amartya Sen's critique of Rawls merits a definite mention. To Sen Rawlsian notion of institutional fairness is elusive in that people in adverse situations may not be in a position to convert legal principles into delivery of justice on the ground. He equates legal or institutional justice with 'niti' and actual delivery of justice on ground with 'naya.'[139] Sen's critique when raised to an international level and applied to selective territoriality on immovables, it appears to capture only half of the problem. What it implies is that not only that the rules have been manipulated at the formulation stage by developing countries, but also that those are continually maneuvered, twisted, and optimized to their own advantage as explicated in the preceding section.

Frank Garcia, appraising fairness of the world economic order undergrid by the prevailing international economic law from a Rawlsian prism, argues that 'justification of

[135] UN.
[136] Khan, *supra* note 114.
[137] Anthony D'Amato, 'International Law and Rawls' Theory of Justice,' *Denver Journal of International Law and Policy*, 1975, 5(2).
[138] *Ibid*.
[139] 'In Sanskirit 'Niti' means 'intent' and 'naya' means 'justice'.

international trade law is to see the disparities in market power and expertise between states as manifestations of the problem of inequality.'[140] He goes on to stipulate that cross-border 'Investment touches so many core social issues and host country responsibilities that it simply cannot be managed from the perspective of capital alone.'[141] However, since the 'key elements of the international economic law system favor the intensification of inequality at national and global levels,'[142] the same 'must therefore be structured so as to put the power of the developed country markets and knowledge at the service of the least developed countries.'[143] To put it simply, Rawlsian justice and Garcia's prescription are visibly the missing components from the prevailing fiscal regime on international incomes arising from immovables. The defense of selective territoriality as gleaned in the preceding part can be further appraised from the structuralist, legalist, and normative perspectives.

4.2.1. Structuralist evaluation

Contextually, the structuralist perspective implies that selective territoriality is the product of structural composition and configuration of the prevailing international tax system in a realist sense. Vann is quite skeptical of the efficacy of MTC-based system when he reckons it as 'the solution to international tax problems…whose time has come – and gone.'[144] He reaffirms his position by stating that MTC-based international tax system had almost become inefficient, irrelevant, and inflexible.[145] Avi-Yonah lends support to Vann's aggressive proposition by stating that the 'current international tax regime is a flawed miracle.'[146] Although, Easson did not go to the extent of proposing its elimination, yet he did suggest that developing countries to reduce their statutory rates on passive incomes unilaterally, that is, lower than the prevailing DTC rates 'in order to attract investment, not to secure reciprocal treaty benefits.'[147] He had the option to suggest to the developed world to allow unilateral tax credit sans any DTCs, in which scenario, the capital would have headed to the jurisdictions offering maximum rate of return. However, Easson later did not dither away from suggesting that it might be the 'time for a new approach,' on the matter.[148] Wheeler averred that 'there is a fundamental flaw in the way that the route to treaty protection is currently defined.'[149] Wilkie exploring into the relevance of DTC-sustained international tax system in the context of taxation of income from business baulked from heralding its doom as 'it would be presumptuous.'[150] The wide-going skepticism

---

[140] Frank Garcia, 'Trade and Inequality: Economic Justice and the Developing World,' *Michigan Journal of International Law*, 2000, 21(4): 975, at 1048.
[141] Frank Garcia, 'Investment Treaties Are About Justice,' *Columbia FDI Perspectives* , 2016, 185: 1-3.
[142] Frank Garcia, 'Globalization, Inequality & International Economic Law', *Religions*, 2017, 8(5): 1-12.
[143] Garcia, 'Trade and Inequality: Economic Justice and the Developing World', 1048.
[144] R.J. Vann, 'A Model Tax Treaty for the Asian-Pacific Region? (Part I),' *Bulletin for Interantional Fiscal Documentation* 45, no. 3 (1991); R.J. Vann, 'A Model Tax Treaty for the Asian-Pacific Region? (Part Ii),' *Bulletin for Interantional Fiscal Documentation*, 1991, 45(4).
[145] Vann, 'A Model Tax Treaty for the Asian-Pacific Region? (Part I).'; Vann, 'A Model Tax Treaty for the Asian-Pacific Region? (Part Ii).'
[146] Reuven S Avi-Yonah, 'Structure of International Taxation: A Proposal for Simplification,' *Texas Law Review*, 1995, 74.
[147] Easson, *supra* note 5.
[148] I*bid*., 625.
[149] Joanna Wheeler, *The Missing Keystone of Income Tax Treaties*, vol. 23, *Doctoral Series* (Amsterdam: IBFD, 2012).
[150] S. Wilkie, 'Are (These) Tax Treaties Necessary?,' in *Essays on Tax Treaties: A Tribute to David A. Ward*, ed. Guglielmo Maisto (Amsterdam: IBFD & CTF, 2012).

notwithstanding, there is no consensus as to that new system should look like and operate. Now, if the entire international tax structure is being questioned for validity, how can its one particular part – selective territoriality on immovables – be considered wholesome.

4.2.2. Legalist evaluation

There is an ever-greater number of developing nations that are attaining cognition as to the actual working and impact of MTC-based world tax system and its various sub-systems. The Kenyan High Court, in a strongly-worded judgement delivered in March 2019, stuck down the Kenya-Mauritius DTC treating it, inter alia, inequitable. The petitioner, Alvin Mosioma, interpreting the court order, emphasized that the 'judgement validates the call for African countries to review all their tax treaties particularly those signed with tax havens.'[151] In the same vein, it was suggested 'to rethink the costs, benefits and motivations around signing DTCs in the first place,' and there might be a need to 'set up a DTC policy framework – which sets out the basic minimums the country should consider while signing bilateral tax agreements.'[152] There is also a growing number of studies questioning specific DTCs, a set of DTCs, or the DTC policy by a given country. In 2012, Pakistan unilaterally terminated its DTC with Greece as it offered excessive benefits to international shiplines.

4.2.3. Normative evaluation

The selective territoriality and its potential fallouts for the developing countries can also be evaluated under the normative evaluative knowledge stream – axiology – the branch of philosophy, which deals with adequacy and propriety of human action. Axiology has two competing strands. Firstly, deontology – that adjudicates upon moral validity of an action on the basis of its adherence to a principle, rule or duty. Secondly, consequentialism – that implies that the morality of an action ought to be judged with reference to its consequences and outcomes. In this connection, Kamm's *Principle of Permissible Harm* can be inducted into the analysis, which stipulates that one may harm in order to save more if and only if the harm is an effect or an aspect of the greater good itself. Similarly, her *Doctrine of Productive Purity,* which provides a deontological prescription for delimiting the boundaries in which people could be allowed to act in a way that could harm others can be helpful.[153] Now under none of the doctrines the shift of capital from the developing to the developed countries, its stashing in the developed immovables markets, and then its taxation in respect of incomes and gains generating therefrom can be justified – in that neither the territoriality is deontological in nature as it is brazenly selective and deviates from the principle of fair play; and likewise, on the standard of consequentialism, it has both intrinsically and instrumentally caused economic injustice and disparity – great affluence for a few in the developed, and great poverty for a far larger number of people in the developing world.

---

[151] Will Fitzgibbon, 'Treaty to 'Dodge Kenyan Tax' Deemed Unconstitutional,' *ICIJ*, 18 March 2019.

[152] Victor Amadala, 'Kenya-Mauritius Double Tax Avoidance Void, High Court Rules,' *Tax Justice*, 19 March 2019.

[153] F.M. Kamm, *Intricate Ethics: Rights, Responsibilities, and Permissible Harm* (Boston: Oxford University Press, 2007).

4.3. UN's Role – Appraisal

It is quite clear now that the UN MTC has not achieved its avowed objectives. It, however, did achieve quite the opposite. Firstly, it helps strip developing countries of the revenues on the assets that are created with capital siphoned off from their economies and parked in the developed countries' immovables markets. Secondly, it encourages flight of capital from the developing countries undermining their governance structures and economic stability. Thirdly, it incentivizes the retention of stolen capital abroad perpetuating the economic harm. Fourthly, it creates balance of payment (BOP) problems for developing countries destabilizing their external sectors transforming them into eternal credit-client states.[154] Fifthly, it triggers brain-drain over the medium and short term in the target countries under the umbrella of CBI/RBI programs whereby the most enterprising of the individuals are sucked out of developing and into developed countries. Sixthly, it undermines the efficacy of the international EOI regime by compromising its integrity by inducing visible blind spots. Seventhly, it leads to and results in inequities in international economic order with much of wealth accumulating in the developed and poverty concentrating in the developing countries.

The impact of these downsides of UN MTC's selective territoriality on Article 6 gets galvanized by the fact that all developing countries without exception signed in their DTCs the UN-prescribed provision. This is primarily due to the developing countries' blind belief in the UN MTC's fundamentally being beneficial and supportive to their cause. Since the developing countries are generally operating under serious capacity constraints, such an assumption becomes a convenient and complacent policy choice – sans due diligence and a rigorous cost-benefit analysis. It has been empirically established that while redefining the international taxes system during 2010s 'the OECD did only consult with developing countries after the major decisions were made, and failed to ask about preferences of developing countries beyond capacity building.'[155] It was further observed that the 'preferences of the surveyed developing countries consistently deviated from the OECD model in the preference of a truly, binding multilateral agreement, the waiving of reciprocity requirements for developing countries, sanctions for non-compliant financial institutions…, and for the inclusion of other types of assets, such as real estate.'[156] Thus, how come the UN MTC which essentially toes the line of the OECD could be expected to protect and promote the developing countries' taxing rights and fiscal interests?

It has been posited that the 'UN's role has been thoroughly dubious as while unfunded mandates to ensure good governance, reduce poverty, improve health, increase literacy rates and ensure sustainable development of their peoples were assigned to developing countries, it practically turned a blind eye rather lent support to a sustained erosion of their own legitimate

---

[154] Muhammad Ashfaq Ahmed, 'Pakistan's B.O.P Blues: Demons in the Debit Side - an Elitistic Analysis of the Outward Remittance Regime - Bringing the Tax Pincer Back In,' *Journal of Taxation and Regulatory Framework*, 2020, 3(1): 1-34.

[155] Markus Meinzer, 'Automatic Exchange of Information as the New Global Standard: The End of (Offshore Tax Evasion) History?,' in Leyla Ates and Joachim English (eds.) *Autmatic Exchange of Information and Prospects of Turkish-German Cooperation*, (Isltanbul: Onikilehva, 2018).

[156] *Ibid*.

tax base.'[157] It is in this context that a 'close link between taxing powers and the ability of the state to fulfill its obligations to its citizens,' is asserted, and therefore, states vociferously 'articulate sovereignty as a defense to certain international tax overtures.'[158] This is, however, not the case with the developing countries when it comes to UN MTC and allocative principles subscribed to under it. In the developing countries the UN MTC was raised to the mantle of a hallowed object to be religiously pursued. Although in reality a model should only be a model – a template, and not a quasi-convention in its own rights setting out hard principles of allocation of taxing rights between states – and never perhaps the tax rates.[159] Although, Jones believes that states 'sign up to variations on the Model Treaty,'[160] yet in reality, there are only a few deviations – and hardly ever on allocative principles. Over time, the territoriality got ingrained into the psyche of developing nations as the gold standard on sharing of taxing rights on immovables, allowing the matter of allocation of fiscal rights off the negotiating table and into the oblivion. This facilitated elimination of almost all the alternatives from the debate surrounding international taxation, and redirecting the entire focus to peripheral implementation matters. With costs of this legalized shift of resources from where those were most needed to where those constituted only surplus capital already risen beyond affordable limits, it was just about the time that the matter was resolved equitably.

4.4. Summation

Now, if all states on all types of incomes pursued territoriality in right earnest there would not be any tax disputes arising amongst them. In fact, if the fiscal outputs were distributed among all states on the uniform principle of territoriality much of the poverty in the developing countries and affluence in the developed ones, would not probably have been visible anywhere in the world. Majorly all this could have occurred due to cherry-picking of allocative principles on fiscal rights triggering and whipping up reverse capital movement. All international economic disparity, in a crude sense, represents ill-gotten international fiscal surplus. Rawls unequivocally proclaimed that 'A theory however elegant economically must be rejected or revised if its is untrue; likewise, laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.'[161]

5. CONCLUSION

The paper seminally brings into the spotlight the problem of reverse capital flows from the developing economies into developed immovables markets and distinguishes it from varied income types that are well-aligned with expected international capital flows, and dissects it against the selective territoriality in a historical context. There are five inter-related summations that can be garnered from the preceding debate. Firstly, the currently applicable international taxes regime is not founded on any one uniform principle of sharing of taxing rights between

[157] Ahmed, 'U.N M.T.C Article 5: The Predatory Ploy: A Neo-Marxist Mapping of the Permanent Establishment.'
[158] Diane Ring, *What's at Stake in the Sovereignty Debate?: International Tax and the Nation-State Legal Studies Research Paper Series* (Boston: Boston College Law Review, 2008).
[159] Rohatgi, *supra* note 2.
[160] J.F. Avery Jones, 'The David R. Tillinghast Lecture: Are Tax Treaties Necessary?,' *Tax Law Review*, 1999, 53.
[161] John Rawls, *A Theory of Justice* (Boston: Harvard University Press, 2009).

nation states. It is rather based on cherry-picking on behalf of those who had the requisite economic power levers to actually exercise the choices, and this is grounded in history. Secondly, once the cherry-picking choices were made, those possessed of the requisite power sinews took to obliquely modifying the norms of international business, movement of capital across borders, and the way it was to be regulated so as to optimize on the principle of territoriality – as delineated in section 3 at length. Thirdly, as also explained in section 2 and 3, howsoever, liberalist it might ostensibly seem, in fact, the international tax system warrants a dissection from a realist perspective to interpret it in its true essentials. Fourthly, the selective territoriality on immovables, under no circumstances, justifies itself – in the particular wake of its having become a protective gear for money launderers and tax evaders of developing countries. Fifthly, if the UN were to be developing nations' main forte to protect their economic and fiscal rights, then they sooner came out of the delusion the better, and learned to operate on a self-help basis to protect themselves in this anarchic world. It has been rightly argued that 'the developed world by pitching up UN MTC as 'counter' to the OECD MTC practically monopolized the entire epistemological space for any independent alternative thinking by the developing countries.'[162] In fact, the BOP problem for most developing countries is not a debt problem; it is primarily a tax problem.

It is obvious that once the requisite cognition has been attained, most developing nations would prefer to renegotiate their DTCs – particularly those with developed countries – thereby reversing selective territoriality underlying UN MTC Article 6 and its attended provisions. To make it palatable, tax on immovables could be aligned with the origin, source and earning of funds invested in acquisition of offshore immovables. Alternatively, the residence taxation rights could be associated with a more structured and transparent mechanism of bestowing 'stakeholder citizenship.' Another possibility could be to share taxing rights under Article 6 between developed and developing countries. At the international level, nation states could consider debarring corporations and trusts from acquiring properties in jurisdictions other than those of their own registration and residence; establishing a global assets registry at the earliest; including immovables in the CRS transmission schema, and operationalizing spontaneous EOI to cover CBI/RBI programs, as all these measures could do a lot of good to the developing countries fiscal systems and economic stability as well as the integrity of the international economic system. Currently, in many a situation, some of the developing nations could, in reality, be net lenders to some of their creditor developed nations, and UN MTC would have to garner substantial amount of superior wisdom to correct that meta-historical wrong. It goes without saying that in order for the international cooperation frameworks to be sustainable over a longer period of time, those have to be fair and equitable.

[162] Ahmed, 'U.N M.T.C Article 5: The Predatory Ploy: A Neo-Marxist Mapping of the Permanent Establishment'.