# Taking More than They Give: MNE Tax Privateering and Apple's "Ocean" Income

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**Abstract**

Following a three-year investigation, on August 30, 2016, the European Commission (EC) released its decision in the Ireland-Apple State aid case. The EC found that Ireland had breached the Treaty on the Functioning of the European Union because the manner in which Ireland had determined the tax payable by two Apple subsidiaries was not consistent with the arm's length principle and/or it was not based on objective criteria. This meant that Ireland had selectively favored Apple and provided the firm with State aid. The EC decision provides an example of how aggressive multinational enterprise (MNE) tax minimization is anti-competitive. The Ireland-Apple case also provides an illustration of how a lack of transparency and incoherency in MNE definition contribute to aggressive MNE tax minimization. States' reactions to the EC decision are further telling because they show how MNE tax minimization engages the self-interest of States. This suggests that efforts to combat aggressive MNE tax minimization, such as the OECD's Base Erosion and Profit-Shifting Action Plan, face complex State motivations in effecting change on the international level. Profit haven States have the most to lose if MNE tax minimization is effectively addressed. In addition, MNE home States may be at times loath to support changes to the system which favors "their" MNEs at the expense of other States' tax revenues. It is as if some home States view MNEs as their privateers, with such MNEs operating internationally under the tacit approval of their home States to aggressively avoid paying taxes to other countries. Home State leadership may be mistaken in thinking that MNE tax minimization is in their favor because MNEs are largely free agents and aggressive MNE tax minimization is dearly costing nearly all states.

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**A. Introduction**

In free market economies, State governments provide the environment for private organizations to function. In return, organizations pay taxes on profits they make that go towards the functioning of the host State. This symbiotic relation breaks down when large multinational organizations become more powerful—wealthy—than host States and are able to influence decision-making at the State level in their favor.

This Article discusses how Ireland allowed much of Apple's income from its operations to be tax free. In doing so, this State allowed a situation where profits earned by multinational enterprises (MNEs) become exempt from taxation through various loop-holes or "special" deals. This practice undermines a government's role in providing for its citizens. Furthermore, it is anti-competitive and anti-democratic. Democracy is based on the equality of citizens, and those with the same income should pay the same amount of tax. It sets a dangerous precedent when MNEs feel that taxation no longer applies to them and that they can operate without contributing to the host State. Such MNEs seek representation without taxation, or perhaps they believe they are beyond the need for representation.

The antidote to this human opportunism is sunshine. Exposing and denouncing rule-bending and rule-breaking will deter others. People have to believe that others are following the rules in order to believe that the rules are in effect and apply to them. It is possible to change current practices and to make MNEs pay fair taxes to the countries where they do business. Value shifts are possible and public scrutiny can provide a catalyst for such shifts.

Those at the helm of the world's great companies, such as Apple, appear to believe that they are bound and entitled by international competition to shun national tax liabilities, and to use incredible legal finesse to shore up the maximum amount of untaxed capital possible. They do not feel that they are citizens with attendant tax obligations of the States that they operate in. Apple, and other large MNEs, make their national profits disappear on paper through transfer-pricing, deductions in high-tax countries, conduit companies with thin capitalization, and engaging in inversion, among many techniques.[1]

At the behest of G20 leaders, the OECD is spearheading the "Base Erosion and Profit-Shifting (BEPS) Action Plan," which responds to current "opportunities for MNEs to greatly minimize their tax burden."[2] Base erosion and profit-shifting (BEPS) refers to MNEs'

[1] INTERNATIONAL MONETARY FUND, *Spillovers on International Corporate Taxation,* IMF STAFF REPORT 11 (May 9, 2014), https://www.imf.org/external/np/pp/eng/2014/050914.pdf; *See also* Markus Henn, *Tax Havens and the Taxation of Transnational Corporations*, FRIEDRICK EBERT STIFTUNG (June 2013), http://library.fes.de/pdf-files/iez/global/10082.pdf.

[2] OECD, ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING 8 (2013), https://www.oecd.org/ctp/BEPSActionPlan.pdf [hereinafter BEPS Action Plan].

"tax planning strategies that exploit gaps and mismatches in tax rules to make profits 'disappear' for tax purposes or to shift profits to *locations where there is little or no real activity but the taxes are low* resulting in little or no overall corporate tax being paid."[3] MNEs thus have State accomplices in their tax minimization—the "locations" to which they shift their profits.

*I. Apple*

Base erosion and profit-shifting creates an environment of unfair competition[4] because those who are bound to follow national system rules have a disproportionately higher tax burden than MNEs have.[5] MNEs thus aggressively minimize their tax burden.[6] Market distortion was the subject of the Ireland-Apple State aid case released by the European Commission (EC) on August 30, 2016.[7] The EC determined that the way in which Ireland had taxed two Irish-incorporated subsidiaries of Apple at a much lower rate than the corporate tax rate of 12.5% constituted a breach of Article 107(1) of the Treaty on the Functioning of the European Union (TFEU).[8] Ireland had permitted these corporate entities to attribute most of their earnings to their respective "head office" branches—branches which actually had no offices or employees.[9] Ireland and Apple are both now appealing the decision, and

[3] OECD, BEPS FREQUENTLY ASKED QUESTIONS, http://www.oecd.org/ctp/BEPS-FAQsEnglish.pdf (last visited May 8, 2017) (emphasis added).

[4] *See* BEPS Action Plan, *supra* note 2, at 8.

[5] *See, e.g.*, Scott Klinter, Chuck Scott & Holly Sklar, *Unfair Advantage: The Business Case Against Overseas Tax Havens*, AMERICAN SUSTAINABLE BUSINESS COUNCIL, BUSINESS FOR SHARED PROSPERITY AND WEALTH FOR THE COMMON GOOD (2010), http://www.financialtransparency.org/wp-content/uploads/2015/04/Unfair-Advantage-The-Business-Case-Against-Overseas-Tax-Havens.pdf; Shane Darcy, *The Elephant in the Room: Corporate Tax Avoidance & Business and Human Rights,* 2 BUS. & HUM. RTS. J. 1, 7 (2017) (citing House of Commons Committee of Public Accounts, *HM Revenue & Customs, 2010–2011 Accounts: Tax Disputes* 4 (2011)) (reporting how the UK Committee of Public Accounts, in reviewing Google's tax treatment by UK Revenue and Customs, decried the "preferential treatment" evident toward larger companies granted as compared with smaller companies).

[6] Klinter, *supra* note 5.

[7] Commission Decision C/2017/5605, 2017 O.J. (L 187) 1 (EU) [hereinafter EC Decision].

[8] Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

[9] *See* EC Decision, *supra* note 7, para. 281.

Luxembourg is joining the litigation as well.[10] The EC has effectively handed Apple a bill for 13 billion Euro.[11]

Ireland let Apple claim that the large profits earned by its two Irish-incorporated companies were beyond the scope of Irish tax jurisdiction. In so doing, Ireland permitted Apple to record these profits as being beyond the purview of *any* country's tax jurisdiction. As Apple CEO Tim Cook acknowledged before the US Senate Permanent Subcommittee on Investigations in 2013, these corporations were not tax residents anywhere.[12] Income without residence is called "ocean income," according to Harvard tax law professor Steven Shay, who testified before the Subcommittee regarding Apple in 2013.[13] In some years, Apple channeled two-thirds of its pre-tax worldwide income through these two Irish entities.[14]

As of March 31, 2016, Apple was the world's most valuable MNE according to market capitalization.[15] By the second quarter of 2017, Apple had amassed almost a quarter of a trillion dollars (246.1 billion) US in cash and equivalents.[16] This amount is larger than the

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[10] Jon Brennan, *Luxembourg to Support Irish Appeal Over Apple Tax Ruling,* IRISH TIMES (Mar. 28, 2017), http://www.irishtimes.com/business/economy/luxembourg-to-support-irish-appeal-over-apple-tax-ruling-1.3026878.

[11] European Commission Press Release IP/16/2929, State Aid: Ireland Gave Illegal Tax Benefits to Apple Worth Up to €13 Billion (Aug. 30, 2016) [hereinafter EC Press Release August 30, 2016]; *Ireland is Expected to Get "Large Majority" of Apple's €13 Billion Unpaid Tax Bill*, THEJOURNAL.IE, http://www.thejournal.ie/competition-apple-ruling-3214284-Jan2017/ (last visited May 12, 2018).

[12] *See Offshore Profit Sharing, Panel 2*, C-SPAN (May 21, 2013), https://www.c-span.org/video/?312884-2/offshore-profit-sharing-panel-2&start=2026 (reporting Mr. Cook's response to Senator McCain's question at the 34:00 minute as "My understanding is that there is not a tax residence for either—for any of the three subsidiaries you just named."); *See also* UNITED STATES S. PERMANENT SUBCOMM. ON INVESTIGATIONS, *Hearing On Offshore Profit Shifting and the U.S. Tax Code Part 2 (Apple Inc.)* Exhibits 5 (May 21, 2013), https://info.publicintelligence.net/HSGAC-AppleOffshore.pdf.

[13] Jim Newell, *Tim Cook Defends Apple Tax Policy in Senate Hearings—As It Happened,* THE GUARDIAN (May 21, 2013), https://www.theguardian.com/technology/2013/may/21/apple-ceo-tax-avoidance-senate-live.

[14] Howard Gleckman, *The Real Story on Apple's Tax Avoidance: How Ordinary It Is,* FORBES (May 21, 2013), https://www.forbes.com/sites/beltway/2013/05/21/the-real-story-about-apples-tax-avoidance-how-ordinary-it-is/#4684bcb16523 ("Of its $34 billion in total 2011 pre-tax income, $22 billion was allocated to these two [Irish] firms.").

[15] PWC, GLOBAL TOP 100 COMPANIES BY MARKET CAPITALISATION: 31 MARCH 2016 UPDATE (2016), http://www.pwc.com/gx/en/audit-services/publications/assets/global-top-100-companies-2016.pdf [hereinafter PWC GLOBAL TOP 100 COMPANIES].

[16] *Id. See also* Neil Hughes, *Tim Cook: Repatriation of $231B in Overseas Cash Would Be "Very Good For the Country and Good For Apple*," APPLE INSIDER (Jan. 31, 2017), http://appleinsider.com/articles/17/01/31/tim-cook-repatriation-of-231b-in-overseas-cash-would-be-very-good-for-the-country-and-good-for-apple; Tripp Mickle, *Apple's Cash Hoard Set to Top $250 Billion,* WALL STREET J. (Apr. 30, 2017), https://www.wsj.com/articles/apples-250-billion-cash-pile-enlivens-hopes-fuels-expectations-1493566748:

individual 2016 GDPs of all but 41 of the world's States,[17] the 2016 public budgets in all but 14 States,[18] and the foreign reserve holdings of all but 11 States.[19] Apple controls a massive amount of wealth, and the EC decision shows the high stakes relationship which now exists between public authorities and large MNEs.[20]

This Article examines Apple's tax treatment by Ireland as an example of aggressive MNE tax minimization. The Apple case shows an example of MNE tax conduct which is: (1) anti-competitive, (2) based on an incoherent definition of the MNE, (3) based on non-transparency, and (4) based on individualized State self-interest operating at the expense of collective State self-interest.

After this introduction, Part B of this Article presents the EC's reasoning on how Ireland distorted competition within the European Union. Part C discusses the Apple-Ireland tax arrangement as an illustration of an incoherent principle regarding whether MNEs are enterprises or collections of distinct entities.[21] Part D discusses how a lack of public transparency by Apple and Ireland characterized this case. Part E concludes by assessing the position of State vis-à-vis the Apple decision, arguing that in order to address MNE base erosion and profit-shifting, public authorities must cooperate to act with principled

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> Apple Inc. is expected to report Tuesday that its stockpile of cash has topped a quarter of a trillion dollars, an unrivaled hoard that is greater than the market value of either Wal-Mart Stores Inc. or Procter & Gamble Co. and exceeds the foreign-currency reserves held by the U.K. and Canada combined.

*Id.*

[17] *See* WORLD BANK, WORLD DEVELOPMENT INDICATORS DATABASE (Apr. 17, 2018), http://databank.worldbank.org/data/download/GDP.pdf. If Apple's cash was ranked on the World Bank's GDP listing for 2016, it would be between numbers 41 (Pakistan) and 42 (Chile); incidentally, Ireland is at number 36.

[18] *The World Factbook: Field Listing: Budget*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/fields/2056.html (reporting list of government budgets by country) (last visited May. 12, 2018).

[19] *The World Factbook: Country Comparison: Reserves of Foreign Exchange and Gold*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2188rank.html (last visited May 12, 2018).

[20] In a meeting held on January 1, 2016, between CEO Tim Cook and European Competition Commissioner Margerate Vestager, Mr. Cook reportedly raised his voice and interrupted Ms. Vestager in an attempt to lecture her on international tax rules. *See* Rowland Manthorpe, *Europe vs Silicon Valley: Behind Enemy Lines with the Woman Deciding Google's Fate,* WIRED (June 27, 2017), http://www.wired.co.uk/article/margrethe-vestager-apple-facebook-google-antitrust-case.

[21] Ronen Palan, *Tax Havens and the Commercialization of State Sovereignty,* 56:1 INT'L ORG. 151 (2002) (discussing the failure to acknowledge the unity of the MNE).

transparency in their collective self-interest, rather than continue to act in what they perceive as their individualized self-interest.[22] Part F provides a conclusion.

**B. The Distortion of Competition Within the EU**

The EC reportedly became aware of the individualized tax arrangement that Apple had with Ireland as a result of the aforementioned US Senate Subcommittee on Investigations hearings held in 2013.[23] As summarized in a press release which accompanied the 2016 EC decision:

> In 2011, for example (according to figures released at US Senate public hearings), Apple Sales International recorded profits of US$ 22 billion (c.a. €16 billion) but under the terms of the [Irish] tax ruling only around €50 million were considered taxable in Ireland, leaving €15.95 billion of profits untaxed. As a result, Apple Sales International paid less than €10 million of corporate tax in Ireland in 2011—an effective tax rate of about 0.05% on its overall annual profits. In subsequent years, Apple Sales International's recorded profits continued to increase but the profits considered taxable in Ireland under the terms of the tax ruling did not. Thus this effective tax rate decreased further to only 0.005% in 2014.[24]

In June of 2013, the EC began its investigation.[25] The tax measures examined by the EC are two rulings of the Irish tax authority, dating from 1991 and 2007, respectively. The relevant

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[22] *Id.* at 173. Palan writes:

> Tax havens cannot simply be legislated away, because they are not perversions of the principle of sovereignty as much as they are a direct outcome of the conflicting principles of national sovereignty in the age of mobile capital. Consequently, any serious attempt to combat the tax havens phenomenon would have to be conducted at a multilateral level, and would have great implications for the modern doctrine of sovereignty. The abolition of tax havens would require a degree of cooperation among the major industrialized countries and a limit on the sovereign rights of states, which effectively would spell the end of the so-called Westphalian system.

*Id.*

[23] *See* EC Decision, *supra* note 7, at para. 440.

[24] *See* EC Press Release August 30, 2016, *supra* note 11 (footnotes excluded).

[25] *See* EC Decision, *supra* note 7, at para. 440.

tax rulings—which Ireland does not describe as such[26]—pertained to the Irish-incorporated Apple subsidiaries Apple Sales International (ASI) and Apple Operations Europe (AOE). As summarized in the EC decision:

> ASI handles the procurement, sales and distribution activities associated with the sale of Apple products to related parties and third-party customers across the EMEIA and APAC regions. AOE manufacture a speciali[z]ed range of computer products for the EMEIA market and supplies all its finished products to related parties.[27]

Although these subsidiaries were incorporated in Ireland, they were not tax residents of Ireland because they met the "trading exception" existing under Section 23 of the Taxes Consolidation Act 1997 (TCA 97).[28] They had trading activity in Ireland and were ultimately controlled by a person that was resident in a EU Member State or tax treaty country—namely, they were controlled by Apple Inc. in the United States.[29]

Being incorporated in Ireland without being a tax resident of Ireland—an option that was removed in 2013 and effective for new companies in 2015 and for existing companies in 2020[30]—was not itself the conduct at issue for the EC. Rather, the offending actions were the specific tax arrangements Ireland made with Apple in 1991 and in the later revisions made in 2007. It is notable that Ireland strenuously objected to the EC's characterization of such arrangements as being the result of bargaining.[31] Nonetheless, a review of the notes from the meetings between 1990 and 1991 suggest that there was clearly a back and forth exchange regarding the parties' goals and expectations. Notes from one meeting in 1990 read, "the company would be prepared to accept a profit of $30–40m assuming the Apple Computer Ltd. will make such a profit . . . the proposal essentially is that all profits subject to a ceiling of $30–40m will be attributable to the manufacturing activity."[32] Such notes suggest that this was a specialized arrangement arrived at by both parties—in other words, a deal which was arranged.

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[26] *Id*. para. 1 n. 2 (describing Ireland's use of the terminology of "advance opinion").

[27] *Id*. at para. 222.

[28] *Id*. at para. 49.

[29] *Id*.

[30] *Id*.

[31] *Id*. at para. 158.

[32] *Id.* at paras. 65, 158. Local employment provided by Apple was also discussed at this meeting.

Furthermore, it was more than just the fact that there was a specialized tax arrangement between Apple and Ireland which was the problem. In the EC's view, it was the terms of the arrangements themselves which conferred a benefit to Apple that distorted competition. They contravened the TFEU, which holds that "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."[33] The EC took issue with how Ireland allocated taxable profit for the "Irish branches" of these companies, as compared to the profit of the Irish incorporated companies that was not taxable by Ireland because it was attributable to a "head office" of those companies. This was thus not a case dealing with transfer-pricing between distinct corporations within a group of companies; this was a case primarily dealing with allocation of profits within individual corporations, between "branches" of operation within such corporations.

The 1991 arrangement was as follows. For the company that eventually became ASI, the Irish branch's taxable profits were calculated as 12.5% of all branch operating costs, excluding material for resale.[34] For the company that became AOE, the Irish branch profits were calculated as 65% of the branch's operating expenses up to an annual total between 60 and 70 USD, and 20% of branch costs after this amount.[35] Operating costs excluded materials for resale and "cost-share for intangibles charged from apple-affiliated companies."[36]

In 2007, the formula for calculating ASI's Irish branch profits was changed to be equal to 10 to 15% of branch operating costs, excluding "charges from Apple affiliates and material costs."[37] The formula for calculating AOE's Irish branch profit was changed to 10 to 15% of the branch's operating costs, excluding "charges from Apple affiliates and material costs,"[38] plus an Intellectual Property return of 1 to 5 % of the branch's "turnover in respect of the

[33] *See* TFEU, *supra* note 8, art. 107.

[34] *See* EC Decision, *supra* note 7, at para. 59.

[35] *Id*. at para. 61.

[36] *Id.* There was also a capital allowance permitted to be claimed, but not exceeding "by USD [1-10] million the depreciation charged in the accounts." *Id*.

[37] *Id*. at para. 60.

[38] *Id*. at para. 62.

accumulated manufacturing process technology of the Irish branch. . . ."[39] There were also deductions permitted for capital allowances for plants and buildings.[40]

These arrangements must be understood in light of existing Irish tax law. Irish tax law sets the general rate of corporate tax at 12.5%.[41] Non-resident companies are charged corporate tax in Ireland according to Section 25 of the Taxes Consolidation Act 1997, which outlines that they are charged corporate tax on "any trading income arising directly or indirectly through or from the branch or agency; any income from property or rights used by, or held by or for, the branch or agency; and chargeable gains attributable to the branch or agency."[42] Earlier legislation, dating from 1967, similarly held non-residents to be taxable on "any trading income arising directly or indirectly through or from the branch or agency. . . ."[43]

*I. Reasoning on State Aid*

Some commentators have calculated that "Apple's Irish tax arrangements have allowed it to pay tax at a rate of 3.8 percent on $200 billion of overseas profits over the past 10 years."[44] The EC found that Irish tax treatment of Apple met the four-part test for State aid under the TFEU. First, the measure related to State resources because Ireland lost tax revenue it would have otherwise received.[45] Second, the measure was liable to affect trade within EU Members because the relevant corporations were part of the Apple multinational group which was active in all EU States.[46] Regarding the fourth criterion, the EC, relying on European Court of Justice jurisprudence, found that operating aid distorted competition.[47] The third requirement for State aid, that a measure "confer a selective advantage on an

[39] *Id*.

[40] *Id*.

[41] *Id*. at para. 71.

[42] *Id*. at para. 74.

[43] *Id*. at para. 75.

[44] *See* Julia Fioretti, *Apple Appeals Against EU Tax Ruling,* REUTERS (Dec. 19, 2016), http://www.reuters.com/article/us-eu-apple-taxavoidance-idUSKBN148007. *See also* Don Reisinger, *Apple Says EU Breached its Rights in Tax Case*, FORTUNE (Feb. 21, 2017), http://fortune.com/2017/02/21/apple-eu-tax-case/; Vanessa Houlder, Alex Barker & Arthur Beesley, *Apple's EU Tax Dispute Explained*, FIN. TIMES (Aug. 30, 2016), https://www.ft.com/content/3e0172a0-6e1b-11e6-9ac1-1055824ca907.

[45] *See* EC Decision, *supra* note 7, at para. 221.

[46] *Id*. at para. 222.

[47] *Id*.

undertaking,"[48] was also met according to the three-step test for selectivity of fiscal State aid schemes.[49]

The three-part test for selectivity requires: (1) that a "reference system" be identified, (2) determination of whether the measure is a derogation from that system, and (3) if there is a derogation, whether it is nonetheless justified by the overall scheme of the system.[50] Regarding the first step, in its primary and secondary lines of reasoning, the EC identified the reference system as the "ordinary rules of taxation of corporate profit in Ireland . . . which have as their intrinsic objective the taxation of profit of all companies subject to tax in Ireland."[51] Regarding the third part of this test, the EC ultimately found that there was no justification for this derogation within the tax system.[52]

The second step focused on whether Ireland's tax treatment was a "derogation from [the] reference system, leading to unequal treatment between companies that are factually and legally in a similar situation."[53] To complete this analysis, the EC noted that Irish law necessitates some type of profit-allocation method, one which in not expressly outlined in the law, in order to determine how much tax to charge local branches of non-resident corporations.[54] This is because the Irish TCA 97 obliges taxing of non-residents on their "chargeable profits."[55] A profit-allocation method is needed to determine the actual amount of these "chargeable profits," which the aforementioned Section 25 defines as "any trading income arising directly or indirectly through or from the branch or agency, and any income property or rights used by, or held by or for the branch or agency, but this paragraph shall not include distributions received from companies resident in the State."[56]

The EC assessed how Ireland's profit-allocation method applied to ASI and AOE. The EC's foremost consideration was how Article 107 of the TFEU, as interpreted by the European Court of Justice on various occasions as binding on Member States,[57] required Ireland to

[48] *Id*. at para. 220.

[49] *Id*. at para. 226 (citing Joined Cases C-78/08 to C-80/08, Paint Graphos and Others, EU:C:2011:550).

[50] *Id*.

[51] *Id*. at para. 242.

[52] *Id*. at para. 411.

[53] *Id*. at para. 245.

[54] *Id*. at para. 248

[55] *Id*. at para. 246.

[56] *Id*. at para. 247.

[57] *Id*. at para. 257.

employ the arm's length principle in its profit-allocation method, because doing otherwise would confer a selective advantage as between integrated—e.g., corporate groups—and non-integrated companies.[58] The EC reasoned that:

> [T]o ensure that a profit allocation method endorsed by a tax ruling does not selectively advantage a non-resident company operating through a branch in Ireland, that method must ensure that that branch's taxable profit, on which corporation tax is levied . . . is determined in a manner *that reliably approximates a market-based outcome* in line with the arm's length principle.[59]

The EC decided that the tax rulings of 1991 and 2007 constituted derogations from the reference system of Irish tax law because they allocated profit to the Irish branches of the subsidiaries in a way that departed "from a reliable approximation of a market-based outcome in line with the arm's length principle."[60] The EC's primary argument was that Ireland accepting that ASI and AOE's IP licenses were to be allocated outside of Ireland, and basing its profit-allocation on this assumption, amounted to a deviation from a reliable approximation of a market-based outcome, and a departure from the arm's length principle.[61] The EC's secondary argument was that, IP licenses aside, Ireland's profit allocation method was inconsistent with the arm's length principle.[62] Before delving into the nuance of each argument, the EC stressed that, at the time of the 1991 and 2007 tax rulings, Apple did not provide Ireland a profit allocation report or a transfer-pricing report.[63]

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[58] *Id*. paras. 249–53. The EC cited Joined Cases C-182/03 and C-217/03 Belgium and Forum 187 ASBL v. Commission, EU:C:2006:416 as authority that:

> [A] reduction in the taxable base that results from a tax measure that enables a taxpayer to employ transfer prices in intra-group transactions that do not resemble prices which would be charged in conditions of free competition between independent undertakings negotiating under comparable circumstances at arm's length confers a selective advantage on that taxpayer for the purposes of Article 107(1) of the Treaty.

*Id.* at para. 249.

[59] *Id*. at para. 253 (emphasis added).

[60] *Id*. at para. 260.

[61] *Id*. at para. 264.

[62] *Id*. at para. 261.

[63] *Id*. at para. 262.

*II. Assumption that ASI's and AOE's IP Licenses were Outside of Ireland*

The EC decision described the agreements within the Apple group regarding shared entitlements to intellectual property. In 1980, the company that became AOE was granted an exclusive, royalty-free license to use and sublicense various forms of intellectual property, including patents, trademarks, and trade secrets.[64] In addition, a Cost Sharing Agreement was entered into in 1980 with various subsequent amendments which obliged parties including ASI and AOE to share costs with Apple Inc., including those related to development of new intangible property.[65] Moreover, the EC described how under the Cost Sharing Agreement "the right to use Apple's intangible property to manufacture and sell Apple products is shared among parties to the agreement."[66] The distribution of these rights has taken several forms over time. Since 2007, "Apple grants ASI and AOE an exclusive license to the Apple IP, whereby ASI and AOE grant the same license back to Apple in the form of a non-exclusive rights."[67] Under the Cost Sharing Agreement, parties contribute to development costs based on their percentage of product sales.[68] To elaborate, the EC noted that under the terms of the Cost Sharing Agreement, in 2012 Apple Inc. paid 45% of R&D costs, while ASI and AOE paid 55% of R&D costs.[69]

Because branches within a company are not distinct legal persons,[70] on the face of it, each whole corporate subsidiary has rights to IP, rather than just particular branches. Solely attributing IP rights to particular branches within a company for tax purposes requires a methodology for doing so. The EC pointed to the need for a method that is consistent with the arm's length principle that involves a reasonable approximation of contracting between non-affiliated parties. The EC opined that:

> [F]aced with the request to validate methods proposed by Apple to allocate profit to ASI's and AOE's Irish branches, it was incumbent on Irish Revenue to first properly examine the assets used, the functions performed and the risks assumed by those companies

[64] *Id*. at para. 117.

[65] *Id*. at para. 118.

[66] *Id*. at para. 120.

[67] *Id.*

[68] *Id*. at para. 121.

[69] *Id.*

[70] *Id*. at para. 271.

> through their Irish branches and through the other parts of those companies.[71]

The EC found that if Ireland had completed such an examination it would have found that the IP licenses should have been allocated to the Irish branches of the companies.[72] The EC underscored the fact that ASI and AOE had no employees or physical presence outside of Ireland during the relevant period.[73] Even if the respective Board of Directors for each company had constituted these companies' "head offices," review of the minutes of ASI's and AEO's board meetings did not support the view that these boards "performed active and critical roles with regard to the management and effective control of the Apple IP licenses."[74] Nor did the minutes show Board involvement in the Cost Sharing Agreement.[75] The EC reviewed the minutes of meetings held by both Boards and found that intellectual property was not discussed until August 2013, during a meeting of the ASI board. This was the EC's conclusion following a review of minutes dating from 1980.[76]

The EC further regarded the respective Board of Directors as lacking the actual capacity to manage Apple IP licenses because the Boards' activities consisted largely of occasional meetings and each lacked the ability to make active management decisions or to relate directly to employees.[77] The Cost Sharing Agreement outlined functions and risks which involved IP and which could only have been completed by the Irish branches—and not the Boards—like product quality control and R&D facility management.[78] The EC also focused heavily on the fact that the boards lacked the capacity to control business risk because they did not have employees—only the Irish branches had this capacity.[79] It also raised the question of why the 2007 tax ruling for AOE included a return for IP as a percentage of turnover if the assumption was that the Irish branch had no interest in the IP licensing.[80]

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[71] *Id*. at para. 273.

[72] *Id*. at para. 280.

[73] *Id*. at para. 281.

[74] *Id*. at para. 282.

[75] *Id*. at para. 283.

[76] *Id*. at para. 127.

[77] *Id*. at para. 288.

[78] *Id*. at para. 289.

[79] *Id*. at para. 290.

[80] *Id*. at para. 303.

Even if the Irish authorities failed to investigate the actual capacity of the head office branches to manage the IP licenses and associated risks, they ought to have queried the extent to which the Irish branches would have employed IP licensing in their operations. Regarding ASI, the EC noted:

> Since that branch was authori[z]ed to distribute Apple branded products, its activities necessitated access to the Apple brand, which was granted to ASI as a whole in the form of the Apple IP licenses. Consequently, even if Irish Revenue did not consider that the Apple IP licenses should be allocated to ASI's Irish branch for tax purposes, it should have at the very least analy[z]ed how that branch's access to the Apple IP, which it needed to perform its functions, was ensured and set up within the company. There is no evidence that such an analysis was ever conducted.[81]

Various elements of the Irish branches' operations could not have been performed without access to Apple IP and management of the risks associated with such IP, including procurement, sales, distribution, marketing, localization, forecasting local demand for products, after-sale support and repairs, as well as quality assurance and control.[82] The EC concluded that:

> [T]he allocation of the Apple IP licenses outside of Ireland was not an allocation that could have been agreed to in an arm's length context between two unaffiliated companies. Given the lack of functions performed by the head offices and/or the functions performed by the Irish branches, the Apple IP licenses for the procurement, manufacturing, sales and distribution of Apple products outside of the Americas should have been allocated to the Irish branches for tax purposes.[83]

This finding enabled the EC to reject Ireland's claim that "since the Apple IP that generates the profits recorded by ASI and AOE is located outside of Ireland, the profits derived from

[81] *Id*. at para. 296.

[82] *Id*. at paras. 297–301. Regarding marketing, the EC also noted a 2008 marketing agreement between Apple Inc. and ASI which had the Irish address in Cork as the party contact information for ASI. *Id*. at para. 133.

[83] *Id*. at para. 305.

the IP should be subtracted from the taxable profits in Ireland. . . ."[84] Rather, the EC pointed to the companies' own characterization of their profits as trading income insofar as it was reported to be subject to the Irish trading income tax rate of 12.5% in the annual accounts of both companies from 2004 to 2008, with such accounts then applying a reduction described as "income taxed at lower rates."[85]

Ultimately, the EC wholly rejected the substance of the 1991 and 2007 rulings by finding that:

> Since neither ASI nor AOE have any physical presence or economic activity outside their Irish branches, the activity consisting of the procurement, sales and distribution of Apple products outside of the Americas performed by ASI and the activity consisting of the manufacturing of computer products for the markets outside of the Americas performed by AOE must be considered to be entirely carried out by their respective Irish branches. The income of ASI and AOE therefore represents active trading income arising from the branch activity, [because] there are no employees who could generate such income outside of Ireland. *In other words, income, such as the trading income recorded by ASI and AOE, should therefore not have been allocated to those companies' head offices either in full or in part.* However, even if any of that income could be considered to constitute IP income, Irish Revenue in any event failed to examine which proportion of the resulting residual profit transferred to the head offices, if any, could be attributed to a royalty-type income.[86]

Wrongly assuming that ASI's and AEO's Apple IP licenses should be allocated outside of Ireland ensured that the Irish tax rulings significantly reduced these companies' annual taxable profit in Ireland.[87] If the Irish and head office branches of these companies were at an arm's length, the Irish branches would not have acquiesced to have all of their profits beyond a limited amount allocated outside of Ireland, because this would impact their own profitability, particularly considering the IP licensing issues involved in the Irish branches'

[84] *Id.* at para. 306.

[85] *Id.* at para. 307.

[86] *Id.* (emphasis added and footnotes excluded).

[87] *Id.* at para. 320.

operations and risk management.[88] The Irish rulings were thus inconsistent with the arm's length principle and accordingly resulted in a derogation from the reference system that constituted a selective advantage to ASI and AOE.[89]

*III. Arm's Length Principle Not Adhered to in Profit-Allocation Method*

In addition, the EC found that the rulings departed from the arm's length principle regardless of whether the IP licensing was allocated outside of Ireland.[90] The method of profit allocation employed by Ireland in the 1991 and 2007 rulings was inconsistent with a reliable approximation of a market-based outcome on three counts. First, the Irish branches did not provide less complex functions than their head offices, and it was therefore inaccurate to use a one-sided profit allocation mechanism. Specifically:

> Given the limited capacity of the head offices to control any risk as compared to the scope of the activities of their respective Irish branches, the choice of the Irish branches as the tested, less complex, party to the transaction results in an annual taxable profit for ASI and AOE in Ireland that departs from a reliable approximation of a market-based outcome in line with the arm's length principle.[91]

Second, the EC found that using operating expenses as the chief variable for calculating the annual tax base was unrealistic because it did not reflect the actual business functions and risks undertaken by the two subsidiaries. Regarding ASI, this subsidiary carried considerable turnover risk, warrantee risk for Europe, the Middle East, India and Africa—the EMEIA region—and outsourcing risk related to third party distribution contractors.[92] Sales would have been a more accurate variable than operating expenses because these risks were carried by the Irish branch.[93] For its part, AEO carried inventory risk, and this was not captured in the use of operating expenses as the chief variable considered by the tax authority—total costs would have been a more accurate benchmark for this subsidiary.[94]

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[88] *Id.* at para. 319.

[89] *Id.* at para. 321.

[90] *Id.* at para. 326.

[91] *Id*. at para. 333.

[92] *Id*. at paras. 337–39.

[93] *Id.*

[94] *Id*. at para. 344.

Furthermore, the EC decided that the sheer levels of return accepted by the tax authority for the companies were too low to be considered a reliable estimation of market conditions because rational market actors would seek to maximize profit given the risks undertaken.[95] It is thus noteworthy to recall the taxable percentages on operating expenses. The amount was 12.5% on branch operating expenses for ASI in 1991, and 10 to 15% for this company branch in 2007. For AOE, in 1991 the amount was 65% on operating expenses up to 60 to 70 million USD and 20% after that amount; in 2007, it was 10 to 15% applied to operating costs, plus a 1 to 5 % IP return on branch turnover. None of the explanations put forward by Ireland or Apple were deemed acceptable and an *ex post facto* report prepared by Price Waterhouse Coopers was also found to not justify the amounts. As regarded ASI:

> [T]he trading income of ASI's Irish branch taxed at the standard Irish corporate tax rate of 12.5% was around USD [40–50] million in 2012, representing about [0.0–0.5] % of ASI's 2012 turnover. That amount is almost 20 times lower than the amount that would result from applying the lower quartile of the analysis in Figure 13, which is based on the corrected PwC comparability analysis.[96]

In summary, the EC decided that even if it had been accurate to treat the Irish branches as the tested—less complex—parties, the taxable profit of the subsidiary branches flowing from the tax rulings deviated from a reliable approximation of market conditions such that a selective advantage in breach of Article 107(1) was evident.[97]

*IV. Alternative Arguments*

As an alternative argument to the primary and subsidiary lines of reasoning presented above, the EC also opined that the arm's length principle was an implicit part of Section 25 of the Irish TCA 97.[98] The EC then reiterated that the substance of the two rulings represented a deviation from the arm's length principle.

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[95] *Id*. at paras. 346–48.

[96] *Id*. at para. 355.

[97] *Id*. at paras. 356–59.

[98] *Id*. at para. 377.

As a further alternative argument, the EC noted that if the arm's length principle did not form part of Irish tax law, as argued by Ireland,[99] that tax discretion would lack objective criteria to guide its exercise in the tax system. In other words, there was a presumption of selective advantage when an authority exercised discretion without objective criteria as its guide.[100]

Last, the EC attempted to complete the selectivity analysis using past administrative tax rulings by the Irish authority as the reference system, but concluded that it was "unable to identify any consistent set of rules that generally apply on the basis of objective criteria to all non-resident companies operating through a branch in Ireland."[101] After profiling eleven tax rulings the EC considered perceived discrepancies in such rulings and concluded that a lack of objective criteria was evident, which in turn supported a finding of selective advantage awarded to ASI and AOE.[102] For instance, discrepancies were noted in relation to when to use a profit split method—where costs are calculated as including sales—as compared with calculating costs as operating costs that exclude sales, as well as regarding variation in the quantum of percentage margins applied, including on IP returns.[103]

*V. Conclusion on the EC's Decision*

The EC determined that Ireland had extended State aid towards Apple in breach of its obligations under the TFEU.[104] The tax authority's rulings conferred a selective advantage upon Apple because they derogated from the arm's length principle and gave an advantage available to integrated companies that was not available to non-integrated companies.[105] Alternatively, the rulings conferred a selective advantage because they lacked objective criteria as their basis.[106] The limitation period applicable to a Competition Commission order for recovery is ten years.[107] The EC decision thus required Ireland to calculate the tax owing by ASI and AOE during the period beginning June 12, 2003 and September 27, 2014—due to Apple's subsequent change in legal structure, 2014 was the last year that the 2007 tax

[99] *Id.* at para. 381.

[100] *Id.*

[101] *Id.* at para. 383.

[102] *Id.* at paras. 385–403.

[103] *Id.*

[104] *Id.* at para. 414.

[105] *Id.* at para. 408.

[106] *Id.*

[107] *Id.* at para. 434.

ruling applied.[108] Because Ireland is appealing the EC decision, this amount owed by Apple is to be placed in an escrow account during the litigation.[109]

**C. Incoherent State Conceptualization of the MNE**

If simple firms with one parent and one subsidiary operating across a border are included, Apple is just one of at least 320,000 MNEs in operation.[110] 66.5% of MNEs are composed of this simple structure, and another 21.7% of MNEs have five or fewer subsidiaries.[111] This means that 88.2%, or almost 90% of MNEs, have five or fewer subsidiaries. Strikingly, these small MNEs, although very plentiful in absolute numbers, are not responsible for much of MNEs' economic activity in the global economy as measured by value added. They are only responsible for 10.7% of value added by all MNEs.[112]

Calculations completed by UNCTAD in 2016 show a dramatic inverse trend. The distribution of different sizes of MNEs'[113] percentage of the total absolute number of MNEs can be compared with their distribution as a percentage of the overall economic value added by all MNEs globally. At a MNE size of 6 to 20 entities there is nearly an equal ratio, with this size MNE responsible for 9.8% of the total number of MNEs and responsible for 10% of total MNE value added.[114] When the next size larger of MNE is examined, the inverse trend is obvious. MNEs of 21 to 100 entities are only 1.3% of the total number of MNEs but produce 20.2% of global value added by MNEs.[115] More dramatically, MNEs of 101 to 500 entities are only 0.6% of the world's MNEs but are responsible for 28.1% of global value added.[116] MNEs of 500 or more entities are only 0.1% of total MNEs, but are responsible for 31.0% of MNE value added.[117] As the UNCTAD report summarizes, "[l]ess than 1 per cent of MNEs have more

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[108] *Id.* at para. 447.

[109] *Apple, Department of Finance Negotiating Terms for €13bn Escrow Account,* RAIDIÓ TEILIFÍS ÉIREANN (Feb. 2, 2017), https://www.rte.ie/news/business/2017/0202/849541-noonan-defends-apple-ruling-appeal-decision/.

[110] *See* UNCTAD, WORLD INVESTMENT REPORT 2016 134 (2016), http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf [hereinafter UNCTAD WIR 2016]. Importantly, UNCTAD uses the terminology of "affiliates" rather than subsidiaries.

[111] *Id.*

[112] *Id.*

[113] The size of MNEs is calculated by number of entities within it.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

than 100 affiliates, but this group accounts for more than 30 per cent of the total number of foreign affiliates, and more than 60 percent of total MNE value added."[118]

This breakdown of MNE size versus overall role in the global economy, as evidenced by the UNCTAD research, is consistent with earlier scholarship on MNEs. Such research identified that although two-thirds of world trade is conducted by MNEs generally—with one-third of world trade being trade within MNEs[119]—50% of world trade and 90% of Foreign Direct Investment was attributable to the world's top 500 MNEs.[120]

The largest MNEs, which include Apple, are economic behemoths with internal legal complexity characterizing their intra-firm relationships and ownership and control structures.[121] As UNCTAD summarized in 2016 regarding the largest and most internationalized MNEs:

> The top 100 MNEs in UNCTAD's Transnationality Index have on average more than 500 affiliates each, across more than 50 countries. They have 7 hierarchical levels in their ownership structure (i.e. ownership links to affiliates could potentially cross 6 borders), they have about 20 holding companies owning affiliates across multiple jurisdictions, and they have almost *70 entities in offshore investment hubs*.[122]

UNCTAD, similar to general economics and business scholarship, primarily analyzes MNEs as integrated firms which pursue profit across borders. The individual corporations within the MNE, which have their own legal personality pursuant to the national legal systems under which they are incorporated, are not hard boundaries that define the MNE's economic existence. In other words, economic understandings see the MNE as a firm, and analyze the MNE as a holistic enterprise that operates according to centralized control in order to

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[118] *Id*.

[119] DEBRA JOHNSON & COLIN TURNER, INTERNATIONAL BUSINESS 37, 101 (Routledge 2003).

[120] ALAN M. RUGMAN, THE REGIONAL MULTINATIONALS 3 (Cambridge Univ. Press 2005).

[121] Indirect ownership of MNEs plays a role in affecting the power structures and key players behind such firms' roles in the global economy. While direct ownership connections may not be at a majority level in any individual MNE parent company, individual shareholding companies can themselves be subject to control, forming groups of inter-related shareholding companies. In other words, an MNE is one power structure, subject to the power structures represented in its ownership. On the quandary of indirect ownership see S. Vitali, J. B. Glattfelder, *The Network of Global Corporate Control* 6:10 PLOSONE (2011); James B. Glatttfelder, *Ownership Networks and Corporate Control: Mapping Economic Power in a Globalized World,* ETH ZURICH, Diss. ETH No. 1974, 156 (2010), http://e-collection.library.ethz.ch/eserv/eth:2007/eth-2007-02.pdf.

[122] *See* UNCTAD WIR 2016, *supra* note 110, at xiii (emphasis added).

conduct business.[123] Hence, there are popular and accessible rankings of MNEs, by various organizations, that list MNEs according to consolidated indicators such as revenues or market capitalization.[124] The internal corporate entity boundaries within the MNE are thus not central to an economic definition of the MNE.

Although the default legal treatment of MNEs by many domestic systems focuses primarily on the entities within the MNE, there are also domestic legal regimes that adopt an enterprise-level understanding of the MNE—that is, as a corporate group operating under common control. Statutory and case law-based regimes, including those dealing with bankruptcy, competition law, taxation, and pension liability, operationalize the notion of control within corporate groups, such that policy in these areas can be realized as it would be in economic firms.[125]

An MNE can thus be treated either as an integrated enterprise or as its individual entities.[126] Depending on the policy objectives at play, an enterprise-level understanding of the MNE can be employed, rather than a default reliance on the distinct legal personalities of the corporations within the MNE.[127] Problems arise when there is a lack of consistency within the same legal regime as to whether the MNE is an enterprise as compared to a collection of individual entities. A specific part of Irish tax law thus cannot treat Apple both as an enterprise and as its separate entities at the same time. Consistency in logic and policy coherence require that a MNE not be allowed to pick the best of both worlds, legally existing as a holistic enterprise as well as its individual entities.

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[123] CYNTHIA DAY WALLACE, THE MULTINATIONAL ENTERPRISE AND LEGAL CONTROL: HOST STATE SOVEREIGNTY IN AN ERA OF ECONOMIC GLOBALIZATION 156 (Martinus Nijhoff Pub. 2002) ("What we ultimately have in the MNE, then, is a single enterprise composed of a number of affiliated business establishments, each functioning simultaneously in different countries, and typically characterized by centralized control and decentralized decision-making, resulting in a kind of 'unity in diversity'.")

[124] *See, e.g.*, PWC GLOBAL TOP 100 COMPANIES, *supra* note 15. *See also The World's Biggest Public Companies*, FORBES https://www.forbes.com/global2000/list/ (last visited May 13, 2018) (reporting annual rankings of MNEs); Annebritt Dullforce, *FT Global 500* 2015, FIN. TIMES (June 19, 2015), https://www.ft.com/ft500 (ranking top global companies).

[125] Kurt A. Strasser & Phillip I. Blumberg, *Legal Models and Business Realities of Enterprise Groups—Mismatch and Change*, SSRN, CLPE Research Paper No. 18/2009 (2009); Robin F. Hansen, *MNEs as Enterprises in Public International Law*, *in* RESPONSIBILITIES OF THE NON-STATE ACTOR IN ARMED CONFLICT AND THE MARKET PLACE 127–53 (N. Gal-Or, C. Ryngaert & M. Noortmann eds., Brill 2015).

[126] PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY 90 (Oxford Univ. Press 1993).

[127] *See* Strasser, *supra* note 125, at 23; *see* BLUMBERG, *supra* note 126, at 120 ("Where implementation of the underlying legal policies and objectives in the particular areas so requires, legislatures, administrative agencies, and the courts are increasingly ready to depart from entity law and apply enterprise principles in cases involving component companies of corporate groups.").

This is precisely what Apple tried to do, however, in attempting to be treated simultaneously as a US-based enterprise as well as its individual Irish taxpaying entity. Apple tried to frame its value as being placed in the US,[128] arguing that it was an enterprise with the vast majority of its intellectual property based there, and with little value being abroad in Ireland.[129] At the same time, Apple nonetheless also tried to have its identity localized down to the entity level for tax purposes—down to the individual taxpayer level of the individual corporations of ASI and AEO. But ASI and AEO cannot be simultaneously treated as individuals themselves and as sharing an identity with Apple Inc. Either the corporate veil is applicable in the relevant legal analysis or it is not; Apple cannot have it both ways.

Because the legal analysis concerned individual entities for purposes of Irish tax law—namely the taxpayers ASI and AEO—the EC was correct to insist that an arm's length principle be applied to the tax authorities' conceptualization of these corporations' conduct, as well as a distinction of personalities between Apple Inc. and its subsidiaries. Insisting otherwise would result in a lack of an evident coherent principle in how MNEs are conceptualized by such public authorities; there would only be a partial treatment of ASI and AEO as the distinct legal entities that they presumably are within the Irish tax system.

**D. Non-Transparency by MNEs and States**

The Apple case illustrates how MNE profit-shifting is facilitated by a lack of transparency by MNEs and States as to the former's tax liabilities and structuring. Neither Ireland nor Apple openly publicized the terms of their tax arrangements. In ASI and AEO's annual reports from

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[128] CEO Tim Cook's narrative before the US Senate Subcommittee also took this tone, emphasizing Apple as a US company. He emphasized that 95% of the creativity behind Apple products was based in California. *See* Todd Shields, *Apple CEO Cook Rebuts $9 Billion Tax-Avoidance Claim*, BLOOMBERG (May 21, 2013), https://www.bloomberg.com/news/articles/2013-05-21/apple-ceo-cook-rebuts-9-billion-tax-avoidance-claim; *see also* Mikey Campbell, *Apple Publishes Execs' Opening Statements from US Senate Testimony*, Apple Insider (May 21, 2013), https://appleinsider.com/articles/13/05/21/apple-publishes-execs-opening-statements-to-us-senate-subcommittee (providing a link to a full copy of Tim Cook's opening statement before the permanent senate subcommittee on investigations); Mikey Campbell, *Cook Statement*, SCRIBD, https://www.scribd.com/document/142827825/Cook-Statement (last visited May 13, 2018) (providing an upload of Tim Cook's opening statement before the permanent senate subcommittee on investigations) [hereinafter Tim Cook Senate Statement].

[129] *See* EC Decision, *supra* note 7, at para. 290. The decision also adds:

> [T]he Commission cannot accept the reasoning set out in the [Apple's tax advisor] *ad hoc* report and the [Apple's 2nd advisor] *ad hoc* study, both submitted by Apple, which *include functions performed by Apple Inc. in the assessment of the allocation of profit of ASI and AOE.* The Irish branches of ASI and AOE are not branches of Apple Inc., the latter being a separate legal entity recording profits separate from the profits of ASI and AOE.

*Id.* (emphasis added).

2004 to 2008, the tax liabilities were presented using the 12.5% corporate tax rate, and then adjusted downward according to "income taxed at lower rates . . . ."[130] Providing even thicker obfuscation, the ASI 2008 annual report described the tax rate before downward adjustment as 1 to 5%, with a note stating that "[t]he average tax rate for all jurisdictions in which [ASI] operates is approximately [1-5]%."[131] The report offered the note despite the fact that the corporation operated only in Ireland.

In his presentation to the US Senate Subcommittee, Apple CEO Mr. Tim Cook emphasized that "[Apple] do[esn't] stash money on some Caribbean island."[132] This was presumably to contrast Ireland with tax havens that are well known in popular media, like the Cayman Islands. This statement is nevertheless misleading when one acknowledges that there are indeed entities within the Apple group residing in the Caribbean. These include Baldwin Holdings Unlimited, which was established in 2006 and holds residence in the British Virgin Islands.[133] The extent to which money is "stashed" on these islands is not evident, but it is undeniable that there is use of the tax benefits of the jurisdictions within this MNE's structuring. Notably, this now includes the island of Jersey, where corporate residence of some corporate persons in the Apple group was moved to from Ireland following Irish tax policy changes.[134]

There are initiatives underway aimed at encouraging States and MNEs to be more forthcoming in presenting their tax relationships, notably the aforementioned BEPS initiative by the OECD.[135] Nevertheless, the economic pressures against such disclosure are strong because States generally compete to meet the large market demand for secrecy and low taxes in the form of confidential capital destinations.

Regarding the latter market, that of tax and secrecy havens, it is apparent that States have incentives to sell themselves as such. They sell their jurisdiction because it is what they have to offer, and doing so is lucrative. With an estimated $21 to $32 trillion[136] of private and

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[130] *See* EC Decision, *supra* note 7, at paras. 278, 306.

[131] *Id.* at para. 306 n. 239.

[132] *See* Tim Cook Senate Statement, *supra* note 128, at 3.

[133] *See* EC Decision, *supra* note 7, at para. 47 n. 11.

[134] Jesse Drucker & Simon Bowers, *After a Tax Crackdown, Apple Found a New Shelter for Its Profits*, N.Y. TIMES (Nov. 6, 2017), https://www.nytimes.com/2017/11/06/world/apple-taxes-jersey.html.

[135] *See* BEPS Action Plan, *supra* note 2.

[136] *Super Rich Hold $32 trillion in Offshore Havens,* REUTERS (July 22, 2012), http://www.reuters.com/article/us-offshore-wealth-idUSBRE86L03U20120722; James S. Henry, *The Price of Offshore Revisited: New Estimates for "Missing" Global Private Wealth, Income, Inequality, and Lost Taxes,* TAX JUSTICE NETWORK 5 (2012), https://www.taxjustice.net/cms/upload/pdf/Price_of_Offshore_Revisited_120722.pdf.

largely untaxed wealth stashed confidentially in offshore accounts around the world as of 2012, there is evidently a market for quiet capital destinations.

As the UNCTAD summary above might suggest, and especially noting that the largest MNEs contain an average of 70 entities in offshore investment hubs as part of their internal structuring,[137] base erosion and profit-shifting through profit havens represents a mainstream aspect of the global economy. It is not a fringe activity conducted by a handful of multi-billionaires. Using the Bureau of Economic Analysis Data concerning US-based MNEs, Cobham and Jansky estimate that "shifted profit in 2012 . . . amount[ed] to $660 [billion], 27 per cent of US multinationals' gross profit or *approximately 0.9 per cent of world GDP*."[138] The authors further note that "a small group of high-income jurisdictions have captured increasingly disproportionate shares of profit, while almost all other countries in the sample have lost out—including the majority of G20 members."[139] Specifically, the authors identify that:

> [M]ore than a fifth of excess profit cannot be disaggregated from the residual "Rest of the World" category—jurisdictions which are not fully and individually accounted in the 2012 BEA data. Of the remainder, just four jurisdictions . . . account for more than 90 per cent of the misaligned profit: the *Netherlands, Ireland, Bermuda and Luxembourg.* A further 10% is due to *Switzerland and Singapore* . . . .[140]

Ireland's position in the Apple case thus requires further attention. Why did the country privately deviate so dramatically from the Irish corporate tax rate of 12.5% in its dealings with Apple? Ireland's response to the EC decision is telling. Taking the full amount of tax owed presently stipulated by the EC, "[w[ould be like eating the seed potatoes" explained the Minister of Finance, Michael Noonan in December 2016.[141] Ireland's jurisdiction *is* its commodity. It has earned its money by letting foreign customers—MNEs—behave in this way—that is, by using Irish tax authority as a marina whereby a small portion of a customer's

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[137] *See* UNCTAD WIR 2016, *supra* note 110, at xiii (emphasis added).

[138] Alex Cobham & Petr Jansky, *Measuring Misalignment: The Location of US Multinationals' Economic Activity Versus the Location of their Profits*, ICTD, WORKING PAPER 42, 24 (November 2015), http://www.ictd.ac/publication/2-working-papers/91-measuring-misalignment-the-location-of-us-multinationals-economic-activity-versus-the-location-of-their-profits (emphasis added).

[139] *Id.* at 7.

[140] *Id.* at 21 (emphasis added).

[141] Simon Bowers, *Apple and Ireland Will Fight the EU's €13bn Tax Ruling All the Way*, THE GUARDIAN (Dec. 19, 2016), https://www.theguardian.com/business/2016/dec/19/apple-ireland-eu-tax-ruling-european-commission-us-irs.

capital stays in Ireland as tax, but the majority is allowed to be sent off untaxed to a stateless sea. That is the niche Ireland that the "Celtic Tiger" has crafted for itself as a destination for foreign investors, and it has achieved a measure of success for itself in doing so. This should also be seen in light of Ireland's past status as a "have not" jurisdiction during the centuries of colonial economic exploitation. Like all States in their relations with MNEs, Ireland is a bargaining State[142] and the investment it receives as a small amount of tax is perceived as part of a fair exchange for the tax treatment it gives to untaxed capital. It is notable, nonetheless, that Ireland is responsive to pressures affecting its bargaining position and has changed its rules regarding tax residence in recent years.[143] Its conduct regarding transparency may also be subject to public influence.

Why are MNEs like Apple shifting profits between jurisdictions in this less-than-transparent fashion? Quite simply, it is in their nature. MNEs minimize transaction costs[144] around the globe; profit havens let them minimize the cost of profit. MNEs can be understood as creating uneven development[145] and hierarchy, and a pot of untaxed money at the top of the value chain is just another indication of this mode of operation.

**E. States' Self-interest and Changes to the Profit-Shifting System**

Considering the roles of profit-havens and MNEs, it is likely that such States and MNEs will not change the trajectory of current affairs without outside pressure. In contrast, States, like Australia have awakened to the fact that they are losing large amounts of their tax dollars and have consequently taken serious measures to address the base erosion and profit-shifting by MNEs, including a plan to hire 1,000 tax experts in the public service sector.[146] Brazil is taking an active BEPS stance as well, and in 2016 implemented

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[142] RAYMOND VERNON, IN THE HURRICANE'S EYE: THE TROUBLED PROSPECTS OF MULTINATIONAL ENTERPRISES 28 (Harv. Univ. Press 1998); Lorraine Eden, *The Realist Adjusts the Sails: Vernon and MNE-State Relations over Three Decades,* 6 J. OF INT'L MGMT. 335 (2000).

[143] *See* EC Decision, *supra* note 7, at para. 49; *but see* Antony Ting, *Old Wine in a New Bottle: Ireland's Revised Definition of Corporate Residence and the War on BEPS,* 3 BRITISH TAX REV. (2014).

[144] Ronald Coase first theorized in 1937 that "firms expand to the point where the organization costs for an extra transaction equal the cost of the using the market for that transaction, or the cost involved in organizing another firm." *See* Ronald H. Coase, *The Nature of the Firm,* 4 ECONOMICA 386 (1937); A. Edward Safarian, *Internalization and the MNE: A Note on the Spread of Ideas*, 34 J. OF INT'L BUS. STUD. 118 (2003).

[145] Stephen Hymer, *The Multinational Corporation and the Law of Uneven Development*, *in* ECONOMICS AND WORLD ORDER FROM THE 1970S TO THE 1990S 37 (J. Bhagwati ed., Collier Macmillan 1972); Lorraine Eden, *Bringing the Firm Back In: Multinationals in the Global Political Economy, in* MULTINATIONALS IN THE GLOBAL POLITICAL ECONOMY 31 (Lorraine Eden & Evan H. Potter eds., St. Martin's Press 1993); *See also* Edward M. Graham, *The Contributions of Stephen Hymer: One View* 21:1 CONTRIBUTIONS TO POLITICAL ECONOMY 31 (2002).

[146] Gareth Hutchens, *ATO Taskforce to Crack Down on Multinational Tax Avoidance*, THE GUARDIAN (May 4, 2016), https://www.theguardian.com/australia-news/2016/may/04/ato-taskforce-to-crack-down-on-multinational-tax-avoidance-budget-2016.

country-by-country reporting requirements for those Brazilian MNEs with annual turnover greater than 750 million Euro.[147] Ecuador's President has vowed to address tax havens within his mandate 2017 Chair of the G77, which includes pushing for a UN-level tax body.[148] The EC, for its part, has also become aware of MNE profit-shifting as a threat to free competition and has several ongoing investigations underway.[149] This occurred despite the fact that the EU, and in particular the UK and France, vocally opposed the creation of a UN tax body at the UN Financing for Development Summit in Addis Ababa in 2015.[150]

Researchers have identified that all States, except for a few profit havens, lose significant tax revenues due to MNE base erosion and profit-shifting.[151] This revenue loss is especially significant for lower income countries.[152] If all States—save for a few havens—are losing money from MNE tax minimization, then there should be strong impetus for large numbers of States to cooperate and address this issue. As Keohane and Ooms wrote in 1975, "[w]e can only expect extensive international regulation on a global scale where the principal issues pit the [S]tate against the enterprise, rather than the [S]tate against [S]tate with the

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[147] Francisco Lisboa Moreira, *Brazil's Country-by-Country Reporting Obligation,* MNE TAX (May 10, 2017), http://mnetax.com/brazils-country-country-reporting-obligationbrazils-country-country-reporting-requirements-21070 (citing the RFB Normative Instruction 1,681/2016 published in Dec. 2016).

[148] Thalif Deen, *Ecuador Revives Campaign for UN Tax Body*, IPS (Jan. 27, 2017), http://www.ipsnews.net/2017/01/ecuador-revives-campaign-for-un-tax-body/.

[149] *See* EC Press Release Aug. 30, 2016, supra note 11 (noting investigations into State aid issues in Luxembourg regarding McDonalds and Amazon).

[150] Frederika Whitehead, *Ecuador's Foreign Minister Steps Up Campaign for UN Tax Body*, THE GUARDIAN (Sept. 21, 2016), https://www.theguardian.com/global-development/2016/sep/21/ecuador-foreign-minister-guillaume-long-steps-up-campaign-for-un-tax-body.

[151] See Cobham & Jansky, *supra* note 138, at 7.

[152] Ernesto Crivelli, Ruud De Mooij & Michael Keen, *Base Erosion, Profit Shifting and Developing Countries,* INT'L MONETARY FUND, WP15/118 21 (2015), http://www.imf.org/external/pubs/ft/wp/2015/wp15118.pdf. The authors conclude:

> [T]he revenue apparently at stake is, as one would expect, much larger for OECD members. Relative to GDP, the implied long run revenue losses for these countries are in the order of 1 percent of GDP—close to the estimate of Gravelle (2013). Notable, however, while far smaller in absolute terms, relative to GDP the apparent revenue losses are if anything somewhat larger in developing countries, at around 1.3 percent of GDP. This is a significant amount, especially relative to their lower levels of overall revenue . . . .

*Id.* (*citing* Jane G. Gravelle, *Tax Havens: International Tax Avoidance and Evasion*, CONG. RES. SERV. (Jan. 15, 2013)).

enterprise only as a willing or unwilling intermediary."[153] It is not clear whether all the States that are losing money due to MNE tax minimization see it as being in their interest to effectively cooperate with other States to address the issue. Some States appear to be losing money from MNE tax minimization while simultaneously not making any significant policy moves to quell base erosion and profit-shifting by MNEs.

In particular, MNE home States play a complex role in this equation. MNE home States are key to addressing MNE tax conduct because, generally speaking, they are in the strongest regulatory position vis-à-vis the MNE through their jurisdictional access to the MNE parent company and its assets. In our case example, and in the case of many of the world's largest MNEs, the relevant country is the United States. The United States' Treasury Department White Paper, issued a few days before the EC's decision, denounced[154] the approach taken by the EC in the Apple case and others. This came despite the fact that under US law in effect at that time, the United States is not currently entitled to tax Apple's foreign, albeit stateless, income.[155] The income would only be taxed if Apple choose to "repatriate" such income.[156] The negative stance towards the EC's investigation presented in the White Paper must be reconciled with the aforementioned US Senate Permanent Subcommittee on Investigations' close scrutiny of Apple's tax conduct, which preceded the EC's commencement of its investigation, and in fact brought the Irish subsidiaries' "statelessness" to light.

Noting the 2016 White Paper as well as the fact that the United States was not presently entitled to such money, why would the United States be critical of another public authority investigating Apple's untaxed billions abroad? Some US politicians doubtlessly see Apple as

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[153] Robert O. Keohane & Van Doorn Ooms, *The Multinational Firm and International Regulation* 29:1 INT'L ORG. 169, 184 (1975).

[154] U.S. DEP'T OF THE TREASURY, THE EUROPEAN COMMISSION'S RECENT STATE AID INVESTIGATIONS OF TRANSFER PRICING RULINGS (2016). Specific complaints, quoting an earlier letter to the EC, included that:

> First, the Commission has "sought to impose penalties retroactively based on a new and expansive interpretation of state aid rules." Second, the investigations appear "to be targeting U.S. companies disproportionately." Third, the new enforcement theory "appears to target, in at least several of its investigations, income that Member States have no right to tax under well-established international tax standards.' Fourth, the Commission's investigations "could undermine U.S. tax treaties with EU Member States."

*Id.* at 5 (footnotes excluded).

[155] Jeffery M. Kadet, *Thoughts on Treasury's White Paper on EU State Aid,* 83:10 TAX NOTES INT'L 877 (2016); Reuven Avi-Yonah & Gianluca Mazzoni, *Apple State Aid Ruling: A Wrong Way to Enforce the Benefits Principle?,* SSRN, U. of Mich. L. & Econ. Res. Paper Series Paper No. 16-024 5 (2016); J. Clifton Fleming, *The EU Apple Case: Who Has a Dog in the Fight?,* 154:2 TAX NOTES 251, 254 (Jan. 9, 2017).

[156] *See* Keohane, s*upra* note 153.

a national champion and an American success story. The United States also may see Apple as an extension of itself and a means to realize its international interests, but this remains a questionable conclusion because Apple is a free actor and has different objectives as a MNE than does the State.[157]

Nevertheless, one important driver of the US position may be Apple's heavy hinting that it intends to repatriate a large amount of its overseas cash as soon as there is a repatriation holiday, as was the case in 2004,[158] or as soon as there is cost saving change made to US tax law, as was recently brought into effect.[159] Apple CEO Tim Cook has said that this would be good for Apple and very good for the United States, and that he wants to bring the money home as soon as it is financially friendly to do so.[160] There is thus an interdependent relationship between the United States and those MNEs that have their parent companies there. The MNEs benefit from the *Pax America* global political and economic climate realized by US foreign policy and taxation policy. The United States sees itself as benefiting indirectly from the competitive advantage that its tax policy provides to "its" multinationals. It similarly sees itself as entitled to the potential repatriation of "its" MNEs' foreign earnings, representing an incredible amount of wealth today.[161] Considering that Russia permitted a capital return with amnesty in 2015, the United States is not the only State which uses repatriation holidays or the like.[162]

It is possible that US policy towards Apple and other tax minimizing multinationals is akin to the approach taken centuries past towards State-sanctioned privateers. Privateers were free to profit at the expense of other countries, so long as this was in the interest of the State

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[157] Ellen Nakashima, *Apple Vows to Resist FBI Demand to Crack iPhone Linked to San Bernardino Attacks,* WASH. POST (Feb. 17, 2016), https://www.washingtonpost.com/world/national-security/us-wants-apple-to-help-unlock-iphone-used-by-san-bernardino-shooter/2016/02/16/69b903ee-d4d9-11e5-9823-02b905009f99_story.html.

[158] Kristina Peterson, *Report: Repatriation Tax Holiday a 'Failed' Policy*, WALL STREET J. (Oct. 10, 2011), https://www.wsj.com/articles/SB10001424052970203633104576623771022129888.

[159] Alex Webb, *Apple to pay $38 Billion Tax on Repatriated Cash, Invest Billions on U.S. Jobs, Manufacturing, Data centres*, FIN. POST (Jan. 17, 2018), http://business.financialpost.com/technology/apple-to-pay-38-billion-tax-on-repatriated-cash-invest-billions-on-u-s-jobs-manufacturing-data-centres.

[160] *See* Hughes, *supra* note 16.

[161] Jeff Cox, *US Companies are Hoarding $2.5 Trillion in Cash Overseas*, CNBC (Sept. 20, 2016), http://www.cnbc.com/2016/09/20/us-companies-are-hoarding-2-and-a-half-trillion-dollars-in-cash-overseas.html ("American companies are holding $2.5 trillion abroad, an increase of nearly 20 percent over the past two years, according to the latest calculations from forecaster Capital Economics. The total is equivalent to nearly 14 percent of total U.S. gross domestic product.")

[162] Fred Lambert, *Putin Offers Amnesty to Russians Who Repatriate Offshore Money*, UPI (June 9, 2015), http://www.upi.com/Top_News/World-News/2015/06/09/Putin-offers-amnesty-to-Russians-who-repatriate-offshore-money/1211433879901/.

which awarded the *letter de marque*.[163] The reasoning was that privateers, in taking from State adversaries to profit for themselves, were in part furthering the interests of the sanctioning State. A consensus arose against privateering when Britain pushed for its abolishment in the 1856 Declaration of Paris, as it had become against Britain's self-interest to continue the practice in light of its growing relations with the United States.[164] This ended what had been a longstanding practice. Indeed, Hugo Grotius' first foray into international law was a brief in defense of the Dutch East India Company for the seizure at sea of a Portuguese merchant ship and its cargo.[165] Interestingly, many of the same jurisdictions that were privateer bases, such as Bermuda, remain tax havens today.[166]

Presently, States turn a blind eye to the tax avoidance and evasion of their MNEs abroad, not for the freedom of the high seas, but in the name of free enterprise and the free market. It is clear that enterprises at the largest multinational level are so free that they distort the market. While free trade is based on the principle of comparative advantage and related wealth maximization,[167] MNEs that can dramatically minimize their national tax levels using base erosion and profit-shifting have an absolute advantage over businesses that do not engage in such practices and which must pay full taxes on their profits where they earn them.

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[163] *See* Nicholas Parrillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19:1 YALE J. OF L. & THE HUMAN. 1, 3 (2007):

> For much of U.S. history, one of the most important options in the U.S. military repertoire was the use of privateers, that is, privately owned and operated ships, licensed to cruise the oceans, forcibly capture enemy merchant vessels and cargo, and bring them back to port, where the captured property was auctioned and a share granted to the privateer's owner, who divided it by contract with the crew.

*Id. See also* Gary M. Anderson & Adam Jr. Gifford, *Privateering and the Private Production of Naval Power*, 11 CATO J. 99, 100 (1991) ("Privateers were privately owned and operated vessels that were granted licenses to seize the shipping assets belonging to the citizens of enemy states and to sell the "prizes" at auction. Privateers preyed on the seaborne communications of enemy nations.").

[164] JAN MARTIN LEMNITZER, POWER, LAW AND THE END OF PRIVATEERING 13 (Palgrave 2014).

[165] Martine Julia van Ittersum, *Hugo Grotius in Context: Van Heemskerck's Capture of the "Santa Catarina" and its Justification in "De Jure Praedae" (16041606)*, 31:3 ASIAN J. OF SOC. SCI. 511 (2003); Peter Borschberg, *Hugo Grotius, East India Trade and the King of Johor,* 30:2 J. OF SOUTHEAST ASIAN STUD. 225 (1999).

[166] Gavin Shorto, *Bermuda in the Privateering Business*, THE BERMUDAN (Arp. 5, 2018), https://www.thebermudian.com/heritage/heritage-heritage/bermuda-in-the-privateering-business/; Hilary Osborne, *Bermuda is World's Worst Corporate Tax Haven, Says Oxfam*, THE GUARDIAN, (Dec. 12, 2016), https://www.theguardian.com/world/2016/dec/12/bermuda-is-worlds-worst-corporate-tax-haven-says-oxfam.

[167] PAUL R. KRUGMAN, MAURICE OBSTFELD & MARC MELITZ, INTERNATIONAL ECONOMICS: THEORY AND POLICY 24 (Addison-Wesley 9th ed. 2012).

Judging by the tone of the August 2016 Treasury White Paper, it does not presently appear that the US leadership sees that it is in its interest to collaborate with the EU to combat MNE base erosion and profit-shifting. The leadership appears content to allow US-based MNEs to amass fortunes outside of the United States that are largely tax-free, so long as there is the possibility that every few years the occasional repatriation holiday will result in a windfall for the Internal Revenue Service.

Considering that the US like many other countries is losing significant revenue due to aggressive MNE tax minimization,[168] US leadership may need to revisit its apparent conclusion that it is in its interest when US-based MNEs like Apple engage in aggressive tax minimization. It is more likely that it is in the country's long term interest to work with other States to stop the MNEs from hemorrhaging taxable profits from their economies into tax havens and statelessness. Apple, and other MNEs, are largely independent, international economic actors, not States, and the US may be overstating the value of its contemporary relationship with MNEs.

There is a parallel between a laggard State's stance and an MNE's tax dodging stance. If State A is content to have "their" MNE not pay taxes to other States because State A sees the weakening of other States as being in its interest, as well as seeing the MNE's interest as being aligned with its own, then State A seeks to profit from a semblance of international civilization without actually committing to that system in good faith, and instead will try to game the system for its own end. A laggard State is in this way taking more from the international system than it gives.

One solution to MNE profit-shifting is unitary global MNE taxation with country by country reporting.[169] Such would clearly amount to a major undertaking.[170] Nevertheless, it is worthwhile to push for inter-State cooperation on this front to create such a regime. It is also worthwhile to push individual MNEs to be more transparent in their tax reporting—a particularly achievable task because there are only a few hundred MNEs which have profound economic consequences. Finally, it is also worthwhile to push individual States to cooperate with each other and become more principled and transparent in structuring their tax relationships with MNEs.

When will the international community better come to terms with MNEs and coordinate their regulation? At the moment, a divide and conquer strategy is evident. MNEs seek to pit

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[168] *See* Cobham & Jansky, *supra* note 138 at 7, 22–3 (reporting missing MNE tax payments to the United States for 2012 at US$ 84.8 billion).

[169] INDEP. COMM'N FOR THE REFORM OF INT'L CORP. TAX'N, DECLARATION 4 (2015), http://www.un.org/esa/ffd/wp-content/uploads/sites/2/2015/03/ICRICT_FINAL.pdf.

[170] *Id.* at 10–11.

States against one another, with some home States like the United States seemingly accepting a net benefit to non-taxation abroad that is itself not demonstrable. When all the world's largest multinationals[171] are using offshore financial centers in their structuring, presumably to shift capital away from taxability, we have a problem that effects everyone. Tax is the price we pay for civilization, as Olivier Wendell Holmes Jr. once wrote,[172] and if we want functional States with schools, roads, hospitals, and elections, State leadership ought to realize that we cannot have the global economy's money become untaxable.

**F. Conclusion**

This Article has presented the EC's reasoning on how Ireland's treatment of Apple constituted State aid, distorting competition within the EC. The EC found that Ireland had failed to employ the arm's length principle in allocating the profits of the Irish branches of ASI and AEO, as compared with their "head office" branches.[173] In the alternative, the allocation was not based on evident objective criteria,[174] meaning that such tax treatment conferred a selective benefit to Apple that constituted State aid.

This Article further noted that the Apple decision shows how States can lack coherent principles in their treatment of MNEs, and that this incoherence facilitates aggressive MNE tax minimization. In particular, States may lack consistency regarding when to teat MNEs as integrated enterprises as opposed to distinct entities. In other words, there is incoherence regarding when authorities will regard the corporate veils within the MNE as being permeable and when they are not. Here, Ireland simultaneously treated Apple as being an integrated enterprise and as its distinct entities. It taxed ASI and AEO individually, but then seemingly ignored how ASI and AEO were separate from Apple Inc. because they needed to have access to IP rights that were distinct from those of Apple Inc..

In addition, the Apple case highlights how the non-transparency by States and MNEs regarding MNEs' international tax liabilities facilitates MNE profit-shifting. This is because arrangements that are achieved behind closed boardroom doors are not necessarily socially acceptable in the eyes of MNE stakeholders or State citizens.[175] In order to change the

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[171] *See* UNCTAD WIR 2016, *supra* note 110, at xiii.

[172] Paul Sweeney, *If Apple Won't Pay Tax What Hope is There for Civilization?,* THE IRISH TIMES (Feb. 2, 2017), http://www.irishtimes.com/opinion/if-apple-won-t-pay-tax-what-hope-is-there-for-civilisation-1.2959603; *see Compania Gen. De Tabacos De Filipinas v. Collector of Internal Revenue,* 275 U.S. 87, 100 (1927) (Holmes, J., dissenting).

[173] *See* EC Decision, *supra* note 7, at paras. 411–12.

[174] *Id.* at para. 381.

[175] Vanessa Barford & Gerry Holt, *Google, Amazon, Starbucks: The Rise of "Tax Shaming",* BBC NEWS MAG. (May 21, 2013), http://www.bbc.com/news/magazine-20560359; Simon Neville & Jill Treanor, *Starbucks to Pay £20m in Tax Over Next Two Years After Customer Revolt,* THE GUARDIAN (Dec. 6, 2012),

current *status quo* characterized by MNEs shifting profits on a massive scale[176] such that they minimize taxes, individual States and Protectorates must take a public role in the system and subject individual MNEs' tax conduct to public scrutiny. MNEs, including Apple and its competitors,[177] currently operate as if quiet profit-shifting is an acceptable—and perhaps necessary—part of doing business internationally. Until MNE decision-makers realize that it is not acceptable, they will continue to behave in such a manner. Exposing the scale and players involved in contemporary profit-shifting is a vital part of reducing this practice. While tax exchange agreements between States are important in their own right, as well as for increasing transparency amongst States, such exchanges will not necessarily translate into publically available information that may then generate social pressures on MNEs and States.

Income taxation, including corporate income taxation, is a key tool available to States to address this social inequality.[178] Unless there is effective tax policy which addresses MNE

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https://www.theguardian.com/business/2012/dec/06/starbucks-to-pay-10m-corporation-tax ("Starbucks is volunteering to pay £10m in taxes in each of the next two years as it attempts to win back customers following revelations that it has paid no corporation tax in the UK in the past three years."); Elle Hunt, *Apple Paid No Tax in New Zealand for at Least a Decade, Reports Say*, THE GUARDIAN (Mar. 22, 2017) https://www.theguardian.com/world/2017/mar/23/apple-paid-no-tax-in-new-zealand-for-at-least-a-decade-reports-say.

[176] *See* Cobham & Jansky, *supra* note 138, at 24.

[177] Google, for its part, employs the so-called "Double Irish" or "Dutch Sandwich" in its tax strategy. *See* Jeremy Kahn & Martijn Van Der Starre, *Google Lowered 2015 Taxes by $3.6 Billion Using "Dutch Sandwich"*, BLOOMBERG (Dec. 21, 2016), https://www.bloomberg.com/news/articles/2016-12-21/google-lowered-2015-taxes-by-3-6-billion-using-dutch-sandwich ("By moving most of its international profits to Bermuda, the company was able to reduce its effective tax rate outside the U.S. to 6.4 percent in 2015, according to Alphabet's filings with the U.S. Securities and Exchange Commission."). Google arrived at a tax settlement of 130 million pounds with the UK government in 2016, and French police are investigating Google for tax fraud in relation to the MNE's Irish structuring. *See* Brian Womack, *Google Agrees to Pay $185 Million in U.K. Tax Settlement,* BLOOMBERG (Jan. 22, 2016), https://www.bloomberg.com/news/articles/2016-01-22/google-agrees-to-pay-185-million-in-u-k-tax-settlement; Gaspard Sebag & Stephanie Bodoni, *French Tax Investigators Swoop on Google's Paris Offices,* BLOOMBERG (May 24, 2016), https://www.bloomberg.com/news/articles/2016-05-24/french-tax-investigators-swoop-on-google-s-paris-offices. Furthermore, Google—Alphabet Inc.—briefly displaced Apple as the world's largest MNE by market capitalization in February 2016. *See* PwC Global top 100 Companies, *supra* note 15, at 7.

[178] NAREN PRASAD, POLICIES FOR REDISTRIBUTION: THE USE OF TAXES AND SOCIAL TRANSFERS 27 (2008), http://www.oit.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_193159.pdf. Prasad concludes:

> This paper examined the extent to which taxes and social transfers have managed to redistribute the gains and losses from economic growth over the past 15 years or so. A key finding is that, despite increasing income inequality, the redistributive impact of taxes and social transfers has generally not been able to reverse this raising trend. One reason for this failure is that taxation has become less progressive and therefore less likely to address growing income inequality found in many countries. Generally speaking, indirect

profits, the future may be characterized by exacerbated inequality and resulting social instability. A tax base which fails to accurately include MNE activities will not reflect actual economic activities and may further lead to impotent, underfunded States that are unable to operate democratic institutions or to execute public policy. States thus need to discern for themselves whether now is the time to act decisively in their collective self-interest in order to curtail tax base erosion and profit-shifting by MNEs.

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> taxes—which are typically regressive—have become a more important source of government revenue. By contrast, tax rates both on corporate income and on top personal incomes have, on average, declined over the past 15 years or so.

*Id.*