PREVENTION OF INCOME AND PROFIT-SHIFTING TO TAX HAVEN COUNTRIES IN NIGERIA

HAFSAT IYABO SA'ADU* and AHMED OLATUNJI ISAU**

I. INTRODUCTION

The integration of international trade and economy from various technological advancements in transportation and communication resulted in globalisation of the world economy. Globalisation, in turn, freed the erstwhile geographical and territorial limitations and boundaries in international trade and business activities. This allowed companies to extend their business activities and operations by establishing subsidiaries in countries other than where they are headquartered.[1] The geographical boundary between a company located in one country and its subsidiary located in another country makes it possible for cross-border international transfer of goods and services to occur in transactions between the company and its subsidiary.

The basic economic objectives of every company are to reduce tax payment and increase the profit and wealth of their shareholders.[2] This is a legal obligation which every company owes their shareholders.[3] Therefore, as rational economic actors, companies exploit various ways to achieve these economic objectives to promote their success as well as the interest of their shareholders. The major strategy usually employ by companies to achieve these economic objectives is to avoid tax payment by shifting their incomes or profits from high tax jurisdictions/countries to low or no tax jurisdictions/countries.[4] This is mostly

* PhD, Reader, Department of Business Law, Faculty of Law, University of Ilorin, Kwara State, Nigeria.

** PhD, Lecturer, Faculty of Law, Kwara State University, Malete, Kwara State, Nigeria.

1 A. A. Lazarus, 'Multinational Corporations', in N. J. Smelser and P. B. Baltes (eds), *International Encyclopedia of Social and Behavioural Science*s (Elsevier 2001) 1099.

2 P. Sikka and H. Willmott, *The Dark Side of Transfer Pricing: Its Role in Tax Avoidance and Wealth Retentiveness* (Essex Business School, University of Essex 2010).

3 See the Companies and Allied Matters Act (CAMA) CAP. C20 Laws of the Federation of Nigeria 2004 section 279(3) which requires directors of companies to promote the success of the company and in that process have regard for the interests of their shareholders.

4 H. D. Ki and T. Lau, 'An Exploratory Study of Transfer Pricing Practices by Multinationals with International Affiliates', 31 (4) *International Tax Journal* (2005) 6.

African Journal of International and Comparative Law 30.4 (2022): 539–559
Edinburgh University Press
DOI: 10.3366/ajicl.2022.0424
© Edinburgh University Press
www.euppublishing.com/ajicl

achieved by over-invoicing/pricing of transaction for the purpose of shifting income or profit.[5]

These low or no tax jurisdictions/countries are referred to as tax haven countries[6] which normally use sovereign legislative powers to preserve the secrecy of financial transactions of companies and provide light regulations and levy low or no tax on the incomes or profits of companies.[7] This often attracts companies seeking to set up shell corporations for the purpose of shifting income from high tax jurisdictions to tax haven countries where their incomes and profits will not be subjected to taxation.[8]

The implication is that companies nowadays avoid paying tax in countries where income or profit is earned. It is believed that capital flight arising from incomes and profits shifting activities of companies has devastating effects on the economy of developing countries including Nigeria.[9] The Organisation for Economic Co-operation and Development (OECD) in its 2014 Report noted that illicit financial flow arising from income and profit-shifting activities strip resources from developing countries that could be used to finance much-needed public and social services such as health and education and that also weakens the financial systems and the economic potential of developing countries.[10]

It is observed that income and profit-shifting activities can have a negative impact on the economic, social and political objectives of the governments who are in need of tax revenue to provide public welfare for their citizens and to redistribute wealth in the society to ensure socio-economic development of their countries.[11] Therefore, to secure the much-needed revenue in this regard, governments will have to put in place regulation to prevent their tax bases from being eroded through the tax avoidance scheme of income and profit-shifting to tax haven countries.[12]

In the light of the foregoing, the article examines the fundamental features of tax haven countries and the magnitude of revenue loss arising from income and profit-shifting to tax haven countries. The article also considers the negative effects of income and profit-shifting on the economy of developing countries, its regulations in Nigeria as well as its international regulations. The article makes a

5 L. W. Maseki, 'Effects of Transfer Pricing on Revenue Generation by Multinational Enterprises in Kenya', Unpublished MSc Research Project, University of Nairobi (2015).

6 R. Baker, *Capitalism's Achilles Heel: Dirty Money and How to Renew the Free- Market System* (John Wiley & Sons 2005).

7 P. Sikka, 'The Role of Offshore Financial Centres in Globalisation', 27 (4) *Accounting Forum* (2003) 365–99.

8 United Nations Economic and Social Council (UNESCO), *Enhancing Social Protection and Reducing Vulnerability in a Globalized World* (United Nations Library 2001) 10, and W. Britain-Catlin, *Offshore: The Dark Side of the Global Economy* (Farrar, Straus & Giroux 2005) 19.

9 Organisation for Economic Co-operation and Development (OECD), Measuring OECD Responses to Illicit Financial Flows from Developing Countries (OECD Publishing 2013) 15.

10 *Ibid*.

11 K. Zannah, 'An Empirical Investigation of Transfer Pricing Regulations for Nigeria with a Particular Emphasis on the Petroleum Sector', Unpublished PhD thesis (Aberdeen Business School, Robert Gordon University 2015).

12 *Ibid*.

series of recommendations to prevent companies from shifting their incomes and profits out of Nigeria to tax haven countries.

II. WHAT IS A TAX HAVEN?

There is no universal definition of the term 'tax haven'.[13] This is a consensus among scholars. For example, the Gordon Report noted thus: 'there is no single, clear, objective test which permits the identification of a country as a tax haven'.[14]

Nonetheless, tax havens are also known as Offshore Financial Centres (OFC) and secrecy jurisdictions which involve lack of transparency in the implementation of a legal framework.[15]

The OECD identifies tax havens as countries/jurisdictions/territories that apply no or nominal taxes to non-residents (individuals and corporations) primarily with a view to the avoidance of taxation in their home jurisdictions.[16] In addition, the OECD identifies a tax haven as any country whose laws or administrative practices prevent the effective exchange of relevant information with other governments on taxpayers benefiting from the low or no tax jurisdiction, lack of transparency and the absence of a requirement for substantive activity in the tax haven jurisdiction.[17] Likewise, the International Monetary Fund (IMF) identified three recurring characteristics of tax haven countries to wit: (1) the primary orientation of business toward non-residents; (2) the favourable regulatory environment (low supervisory requirements and minimal information disclosure); and (3) the low- or zero-taxation schemes.[18] The IMF itself proposed the following definition: '. . . a country or jurisdiction that provides financial services to non-residents on a scale that is incommensurate with the size and the financing of its domestic economy.'[19]

The Tax Justice Network (TJN) regards tax havens as countries that create legislations designed to assist persons whether real or legal to avoid regulatory obligations imposed upon them in the place where they undertake the substance of their economic transactions.[20] The TJN now refers to tax haven and offshore financial centres (OFCs) as secrecy jurisdictions, which cover many more issues than tax, emphasises the international nature of the problem, and highlights the

13 R. Palan, R. Murphy and C. Chavagneux, *Tax Havens: How Globalization Really Works* (Cornell University Press 2010).

14 Gordon Report, *Tax Havens and Their Use by United States Taxpayers – An Overview* (United States Treasury Report 1981) 13 <https://archive.org/stream/taxhavenstheir...> (accessed 15 March 2019).

15 European Commission, *Where Does the Money Come From?* (2014) <https://www.ec.europa.eu/budget/explained/budg_system/financing/fin_en.cfm> (accessed 15 March 2019).

16 OECD, *Harmful Tax Competition – An Emerging Global Issue* (1998) <https://www.oecd.org/daaoecd/33/1/1904184.pdf> (accessed 15 March 2019).

17 *Ibid*.

18 A. Zoromé, *Concept of Offshore Financial Centers: In Search of an Operational Definition*, IMF Working Paper (2007), 4–7 <https://www.imf.org/enternal/pubs> (accessed 15 March 2019).

19 *Ibid*.

20 R. Murphy, *Creating Turmoil: Tax Justice Network Submission to the Treasury Select Committee* (2008) <https://www.taxresearch.org.uk/Crea...> (accessed 16 March 2019).

fact that secrecy is the most important corrosive issue that must be addressed if the abuse is to be prevented in the future.[21]

A. Tax Haven Countries

There is no official list of tax haven countries. However, international institutions and organisations such as the OECD and International Monetary Fund (IMF) have over the years developed their respective lists of tax haven countries. According to *Fortune* Magazine, the twelve most popular tax havens in the world are Bermuda, the Netherlands, Luxemburg, the Cayman Islands, Singapore, the Channel Islands, the Isle of Man, Ireland, Mauritius, Monaco, Switzerland and the Bahamas.[22]

A report by the OECD in 2000 identified a number of countries as tax havens.[23] The countries listed as tax havens in the OECD's 2000 report were: Andorra, Anguilla, Antigua and Barbuda, Aruba, Bahamas, Bahrain, Barbados, Belize, British Virgin Islands, Cook Islands, Dominica, Gibraltar, Grenada, Guernsey, Isle of Man, Jersey, Liberia, Liechtenstein, Maldives, Marshall Islands, Monaco, Montserrat, Nauru, Netherlands Antilles, Niue, Panama, Samoa, Seychelles, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Tonga, Turks and Caicos Islands, US Virgin Islands and Vanuatu. Tonga and the Maldives were subsequently identified as not meeting the criteria for tax havens.

An IMF analysis in 2000 identified 63 jurisdictions as offshore financial centres.[24] A 2007 IMF study, using a modified methodology identified 22 jurisdictions as offshore financial centres.[25] The revised list included three countries that were not included in the previous list: Latvia, the United Kingdom and Uruguay. Four jurisdictions included in the 2000 list, which were also covered by the 2007 study, were Costa Rica, Lebanon, Macau and Malaysia.[26] The 2007 IMF list includes 13 jurisdictions that were not on the OECD's 2000 list of tax havens and eight that were not identified as tax havens in the OECD's 2009 progress report.

B. Revenue Loss Arising from Income and Profit-Shifting to Tax Haven Countries

The use of tax haven subsidiaries for the purposes of shifting income and profit from high tax jurisdictions to tax haven countries is regarded as an

21 *Ibid*.

22 A. Depiretro, 'The 12 Most Lucrative Tax Havens in the World', *Fortune Magazine*, 22 February (2017) <https://www.fortune.com/2017/02/22/world-best-tax-havens-countries-corporate-business/> (accessed 19 March 2019).

23 OECD, *Report to the 2000 Ministerial Council Meeting and Recommendations by The Committee Fiscal Affairs – Progress in Identifying and Eliminating Harmful Tax Practices* (2000) <https://www.oecd.org/countries/liechtenstein/listofunco-operativetaxhavens.html> (accessed 19 March 2019).

24 International Monetary Fund, *Offshore Financial Centers*, IMF Background Paper (2000) <https://www.imf.org/external/np/mae/oshore/2000/eng/back.html> (accessed 19 March 2019).

25 Zoromé, *supra*, note 18.

26 *Ibid*.

aggressive and abusive form of corporate tax avoidance/evasion known as 'abuse of transfer pricing'.[27] Abuse of transfer pricing simply means the intentional over-invoicing/pricing or under-invoicing/pricing of the prices of goods and services in transactions between two associated or related entities for the purpose of reducing the global tax burden of a multinational corporation (MNCs) group.[28] In this regard, the price of a transaction may be overpriced to shift profit or income out of a subsidiary located in a high-tax jurisdiction/country to a low tax jurisdiction/country.[29]

Revenue loss to income and profit-shifting is not peculiar to particular region of the world; rather, it is a menace negatively impacting on global revenue-generation including developed countries that one would have expected to be equipped with the requisite capacity to deal with the menace. In the United States of America (US), for example, Apple Inc. was reported to have shifted its income and profit to Ireland (which is a low tax jurisdiction compared to the USA) leading to an estimated revenue loss amounting to more than US$2.4 billion in 2014.[30] In another instance, Starbucks was reported to have paid a paltry sum of UK£8.6 million in taxes to the Her Majesty's Revenue and Custom (HMRC) since it started business in the United Kingdom (UK) in 1998, despite making more than UK£3 billion profit in the country.[31] Likewise, in 2012, it was reported that Microsoft avoided paying more than UK£1.7 billion in corporate taxes in the UK by shifting its incomes and profits to Luxembourg which is a low tax jurisdiction in Europe.[32]

The negative impact of income and profit-shifting on revenue generation is more pronounced in developing countries that usually lack the ability to check the aggressive practices of companies in their jurisdictions.[33] Although little is known about the magnitude of revenue loss in these countries this is attributable to the lack of data to measure or quantify such revenue loss while the available data is limited in terms of both quality and quantity and cannot be relied upon to determine the magnitude of abuse of transfer pricing in developing countries.[34]

27 J. R. Graham and L. T. Alan, 'Tax Shelters and Corporate Debt Policy', *Journal of Financial Economics* (2006) 81.

28 L. Eden, 'Taxes, Transfer Pricing and the Multinational Enterprises', in A. M. Rugman (ed.), *The Oxford Handbook of International Business* (Oxford University Press 2009) 593. See also M. Kobetsky, *International Taxation of Permanent Establishments: Principles and Policy* (Cambridge University Press 2011) 71.

29 L. Eden, *Transfer Price Manipulation, Draining Development? Controlling Flows of Illicit Funds from Developing Countries*, World Bank Report 2012 <http://www.worldbank.org> (accessed 20 March 2019).

30 R. Kitty and J. Craig, *Offshore Corporate Profits: The Only Thing Trapped in Tax Revenue* (2014) <https://www.americanprogress.org/issues/tax-reform/report/2014/01/09/81681/offshore-corporate-profits-the-only-thing-trapped-is-tax-revenue> (accessed 25 March 2019).

31 N. Huber, 'Starbucks Tax Bill Stirs Transfer Pricing Spat' (2012) <http://www.accountingweb.co.uk/business/finance-strategy/starbucks-tax-bill-stirs-transfer-pricing-spat> (accessed 25 March 2019).

32 J. Chew, '7 Corporate Giants Accused of Evading Billions in Taxes' (2016) <https://www.fortune.com/2016/03/11/apple-google-taxes-eu/> (accessed 27 March 2019).

33 S. C. Borkowski, 'The Transfer Pricing Concerns of Developed and Developing Countries', 32 (3) *International Journal of Accounting* (1997) 321–36.

34 C. Fuest and N. Riedel, *Tax Evasion, Tax Avoidance and Tax Expenditures in Developing Countries: A Review of the Literature*, Report prepared for the UK Department

However, some international organisations and non-governmental organisations (NGOs) have tried to quantify the amount of tax revenues lost by developing countries to incomes and profits-shifting activities of companies. For example, Oxfam estimated that US$50 billion in tax revenue is lost yearly to income-shifting activities of multinational corporations (MNCs).[35] Other research by Oxfam revealed that developing countries lost more than US$80 billion in tax revenue to income-shifting activity of the MNCs to tax havens in 2009.[36] This figure increased in 2016 when further research by Oxfam in this regard estimated that developing countries lost more than US$172 billion in tax revenue.[37] Oxfam predicted that the tax revenue loss in this regard will continue to increase in developing countries in the coming years.

Research commissioned by the African Union (AU) and the United Nations Economic Commission for Africa (UNECA)[38] estimated that the amount of revenue loss as a result of income and profit-shifting activities of MNCs operating in African countries in the last 50 years amounted to more than US$1 trillion. The research further estimated that African countries are currently losing between US$50 billion annually from incomes and profits shifted out of the continent. The disclosures from Panama[39] and Paradise papers[40] about the incomes, profits and assets of MNCs and private individuals stashed in tax haven countries indicate that tax haven countries are providing the fertile ground for companies and individuals alike to avoid tax by shifting their incomes and profits away from higher tax jurisdictions/countries where their business activities are conducted to low or no tax jurisdictions/countries where they have little or no activity.

In Nigeria, there is minimal evidence about the magnitude of tax revenue lost to income and profit-shifting due to the limitation of data.[41]

There have been reported cases of income- and profit-shifting by MNCs operating in the upstream oil and gas industry in the country through the obnoxious tax avoidance scheme known as abuse or manipulation of transfer pricing. For example, Shell International Petroleum Limited, Halliburton and Chevron were accused by the Federal Inland Revenue Service (FIRS) to have avoided estimated sum of US$17,857,142.86 million, US$14,285,714.20 million

for International Development (DFID) (Oxford University, Centre for Business Taxation <https://r4d.dfid.gov.uk/PDF/Outputs/EcoDev/60670_TaxEvasionReportDFIDFINAL1906.pdf> (accessed 27 March 2019).

35 Oxfam, 'Tax Havens: Releasing the Hidden Billions for Poverty Eradication' (2000) <https://www.taxjustice.net/cms/upload/pdf/oxfam_paper_-_final_version __06 _00.pdf> (accessed 28 March 2019).

36 Oxfam, *The Hidden Billions: How Tax Havens Impact Lives at Home and Abroad*, Oxfam Research Reports 2016 <https://www.oxfam.org.au> (accessed 28 March 2019).

37 *Ibid*.

38 African Union and United Nations Economic Commission for Africa, *Illicit Financial Flow: Report of the High-Level Panel on Illicit Financial Flows from Africa* (2015) <https://www.uneca.org/.../iff_main_report_26fe> (accessed 28 March 2019).

39 International Consortium of Investigative Journalists (ICIJ), *Investigative Report on Panama Papers* (2016) <https://www.panamapapers.icij.org> (accessed 28 March 2019).

40 *Ibid*.

41 Zannah, *supra*, note 11, at 39.

and US$710,506,000 in taxes for the years 2003, 2002 and 1999 respectively through over-invoicing of transfer of goods and services to shift income out of the country to low/no tax jurisdictions.[42]

As a result of the tax revenue loss as can be seen from above, incomes and profits shifting to tax haven countries is now globally recognised as a major form of transfer pricing abuse draining and hurting the revenue-generation of most countries.[43] It is predicted that tax revenue loss to income and profit-shifting to tax haven countries will continue to rise each year.[44] The reason for this is not far-fetched in that tax haven countries do not charge tax on the incomes and profits of companies, provide light or lax regulation and guarantee banking and corporate secrecy. It therefore becomes necessary for the country to have in place regulations to prevent or control income and profit-shifting to tax haven countries.

III. INTERNATIONAL REGULATION OF INCOME AND PROFIT-SHIFTING TO TAX HAVEN COUNTRIES

As noted earlier, income and profit-shifting to tax haven countries is regarded as a form of abuse of transfer pricing. This means that the Arm's Length Principle (ALP) recommended by both the OECD and the United Nations (UN) to prevent the abuse of transfer pricing is equally applicable to prevent over-invoicing or pricing of transactions for the purpose of income and profit-shifting.

Article 9 (1) of OECD Model Tax Convention on Income and Capital 2017 provides the general standard for the application of the ALP. In this respect, the application of the ALP is predicated on treating a company and its subsidiaries as separate and distinct entities. This is to ensure that in a transaction between a company and its subsidiary, the price of such transaction must reflect the price that would have been charged were the transaction between independent entities. In other words, the price charged by independent entities in a similar transaction is the measure to benchmark or verify the price to be charged in a transaction between a company and its subsidiary and it is what determines whether or not a company has over-invoiced the transaction for the purpose of shifting income and profit to its tax haven subsidiary.[45] This benchmarking process is what is known as 'comparability analysis' and it is regarded as the heart of the application of the ALP.[46] It is important to note that the ALP is not an anti-tax avoidance provision; rather, the provision is meant to achieve the double purposes of ensuring an equitable inter-nation allocation of taxing rights on the income and profit of

42 Oxfam, *supra*, note 35.

43 Kobetsky, *supra*, note 28.

44 R. S. Avi-Yonah, 'The Rise and Fall of Arm's Length: A Study in the Evolution of U.S. International Taxation', 15 V *Virginia Tax Review* (1995) 89–90.

45 United Nations, Practical Manual on Transfer Pricing for Developing Countries (2017), <https://www.un.org/esa/ffd/documents/UN_Mannual_TranferPricing.pdf> (accessed 3 April 2019).

46 OECD, *OECD/G20 Base Erosion and Profit Shifting Project: Aligning Transfer Pricing Outcomes with Value Creation* (2015) <https://dx.doi.org/10.1787/9789264241244-en> (accessed 3 April 2019).

companies in different tax jurisdiction and to prevent the incidence of economic double taxation.[47]

The application of the ALP is, however, not without its own challenges for which it has been severely criticised. A major challenge in this regard is the emergence of a globalised economy which renders geographical boundaries irrelevant for business decision-making as companies were now able to conduct their business activities in different geographical jurisdictions without necessarily creating a permanent establishment in those jurisdictions.[48] With the challenges presented by globalisation, it is argued that the current ALP system is no longer suited for the global nature of international business.[49] This is because its application of treating a company and its subsidiary as separate entities has been significantly weakened.[50]

Another challenge in this regard is the difficulty on the part of both the tax authorities and the taxpayers in obtaining sufficient information on prices of transactions between independent entities to conduct this comparability analysis.[51] This is perhaps the most widely acknowledged major problem and challenge confronting the application of the ALP. In fact, both developed and developing countries have all expressed serious concerns about the non-availability of data on transactions between independent parties that can be used to conduct comparability analysis.[52]

These challenges have provoked a lively debate of whether the ALP should be replaced or not.[53] It is in this respect that reputed scholars and professionals such as Avi-Yonah,[54] Clausing[55] and Durst[56] proposed a move away from the current ALP system to another system that will reflect the present international business and economic realities rather than the illusion created under the ALP system which has resulted in a continuous loss of tax revenue.[57] They, therefore,

47 OECD, Committee on Fiscal Affairs, *Report of the OECD Committee on Fiscal Affairs on Transfer Pricing and Multinational Enterprises* (OECD 1979) para. 3.

48 R. S. Avi-Yonah, Clausing K. A. and M. C. Durst, 'Allocating Business Profits for Tax Purposes: A Proposal to Adopt a Formulary Profit Split', *Florida Tax Review* (2009) 497–500.

49 R. S. Avi-Yonah and K. A. Clausing, *Reforming Corporate Taxation in a Global Economy: A Proposal to Adopt Formulary Apportionment* (2007) <https://www.brookings.edu/research/reforming-corporate-taxation-in-a-global-economy-a-proposal-to adopt-formulary-apportionment/> (2007) (accessed 5April 2019).

50 Kobetsky, *supra*, note 43, at 76.

51 OECD, *Transfer Pricing Comparability Data and Developing Countries* (2014) <https://www.oecd.org/.../transfer-pricing-comparability-data-and-developing-countries.html> (accessed 5 April 2019).

52 *Ibid*.

53 Avi-Yonah, Clausing and Durst, *supra*, note 48.

54 R. S. Avi-Yonah and I. I. Cohn, Professors of Law Specialising in Corporate and International Taxation <https://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=aviyonah> (accessed 5 April 2019).

55 K. Clausing, Professor of Economics at Reed College <https://www.reed.edu/economics/clausing/> (accessed 5 April 2019).

56 C. Michael Durst is a former Director of the Internal Revenue Service (IRS) Advance Pricing Agreement Program <https://www.ictd.ac/about-us/ictd-team> (accessed 5 April 2019).

57 Avi-Yonah and Clausing, *supra*, note 49.

advocated for a global adoption of Formulary Apportionment (FA) also known as Unitary Taxation as an alternative to the ALP.[58]

The application of the FA is predicated on treating an MNC and its permanent establishments (subsidiaries, branches and affiliates) as a single entity or as a unitary business whereby the incomes, expenses, profits and losses of the corporate group are allocated on a pre-determined term across the various taxing jurisdictions where the MNC groups have permanent establishments.[59] In this situation, unlike under the ALP system, an MNC and its permanent establishments are treated as a single global taxpayer and its profit is calculated by subtracting its worldwide expenses from a global income without regard to legal distinctions between the MNC and its permanent establishments.[60] The resulting profit is thereafter allocated and apportioned among various taxing jurisdictions where it does business based on a formula that takes into account the economic realities, activities and contributions of each of the permanent establishments to the global incomes and profits of the MNCs group.[61] Each taxing jurisdiction will then apply its tax rate to the profit apportioned to its jurisdiction.[62]

The major advantage of the FA over the ALP is that it does away with the illusory assumption created under the ALP system that an MNC and its permanent establishments are separate and distinct entities. The implication of this is that the need to conduct a comparability analysis which can be a very difficult task is not applicable under the FA system.[63] The application of the FA therefore ensures economic substance and realities of the integrated nature of the MNCs in the new globalised economy and this is reflected in its transactions because by treating an MNC group as a single worldwide taxpayer, the global income and profit of the MNC is distributed among members of the group to reflect their contributions to the global income.[64]

The OECD has, however, criticised the idea of replacing the ALP system with the FA. It rejected the notion and it continued to view the ALP as the only appropriate means to prevent income and profit-shifting to tax haven countries. Instead, the OECD recommended that the ALP should rather be reformed to overcome its challenges instead of being thrown away.[65] The reforms recommended by the OECD formed part of the 15-Action Plan developed by

58 Avi-Yonah, Clausing and Durst, *supra*, note 48.

59 *Ibid*.

60 Avi-Yonah and Clausing, *supra*, note 49.

61 J. M. Weiner, *Formulary Apportionment and Group Taxation in the European Union: Insights from the United States and Canada* (2005) <https://europa.eu.int/comm/taxation_customs/taxation/taxation.htm> (accessed 10 April 2019).

62 *Ibid*.

63 L. Sheppard, 'Transfer Pricing is the Leading Edge of What is Wrong with International Tax' (2012), <https://www.taxjustice.net/cms/front_content.php?idcat=139> (accessed 10 April 2019).

64 T. J. H. Dennis, 'Unitary Formulary Apportionment as a Solution to the Conundrum of Source 7' (2010) <https://www.jmls.edu/academics/.../Faherty_1.pdf> (accessed 10 April 2019).

65 OECD, *Action Plan on Base Erosion and Profit Shifting* (2013) <https://dx.doi.org/10.1787/9789264202719-en> (accessed 10 April 2019).

the OECD and the G20[66] to address the issue of profit-shifting under a general package known as the Base Erosion and Profit Shifting (BEPS) Project.[67] The BEPS project is briefly examined below.

A. The OECD/G20 15-Action Plan against Base Erosion and Profit-Shifting (BEPS)

Base Erosion and Profit Shifting (BEPS) is a term generally used to refer to various tax avoidance schemes/strategies usually employed by taxpayers to artificially shift profits from a high tax jurisdiction to a low or no-tax location.[68] BEPS schemes enable taxpayers to move profits to where they are taxed at lower rates and expenses from where they are taxed at higher rates. The result of this is the reduction of revenue accruable to the government.[69]

In acknowledging the global revenue loss from BEPS, the OECD in its Explanatory Statement to Base Erosion and Profit Shifting Project Final Report of 2015 at page 4, paragraph 2, stated thus:

> The stakes are high. Although measuring the scope of BEPS proves challenging, the findings of the work performed since 2013 confirm the potential magnitude of the issue, with estimates indicating that the global corporate income tax (CIT) revenue losses could be between 4% to 10% of global CIT revenues, i.e. USD 100 to 240 billion annually. The losses arise from a variety of causes, including aggressive tax planning by some multinational enterprises (MNEs), the interaction of domestic tax rules, the lack of transparency and coordination between tax administrations, limited country enforcement resources and harmful tax practices. The affiliates of MNEs in low tax countries report almost twice the profit rate (relative to assets) of their global group, showing how BEPS can cause economic distortions. Estimates of the impact of BEPS on developing countries, as a percentage of tax revenues, are higher than in developed countries given developing countries' greater reliance on CIT revenues. In a globalised economy, governments need to cooperate and refrain from harmful tax practices, to address tax avoidance effectively, and provide a more certain international environment to attract and sustain investment. Failure to achieve

66 The G20 (or G-20 or Group of Twenty) is an international forum for the governments and central bank governors from 20 major economies. Currently, these are Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, the United Kingdom, the United States and the European Union <https://www.g20.org/Webs/G20/DE/Home/home_node.html> (accessed 10 April 2019).

67 OECD, *Explanatory Statement: OECD/G20 Base Erosion and Profit Shifting Project* (2015) <https://www.oecd-ilibrary.org/taxation/oecd-g20-base-erosion-and-profit-shifting-project_23132612> (accessed 10 April 2019).

68 *Ibid*.

69 *Ibid*.

> such cooperation would reduce the effectiveness of CIT as a tool for resource mobilisation, which would have a disproportionately harmful impact on developing countries.[70]

Addressing the issue of BEPS was therefore a key priority of governments around the globe. It was in this respect that in 2012 the OECD countries and the G20 countries[71] working together embarked on the most significant and ambitious objective of re-writing the international tax rules in a century.[72] This ambition was to revise the ALP rule and align it to developments in the world economy to ensure that profits are taxed where economic activities are carried out and where value is created.[73]

Beyond securing revenues, the OECD/G20 BEPS Project also aim to create a single set of consensus-based international tax rules to address BEPS and to protect tax bases while offering increased certainty and predictability to taxpayers.[74] While the OECD and G20 countries recognised the need to address the issue of BEPS internationally, they did not want to unravel the existing consensus-based international framework such as the ALP which has been internationally accepted as the standard for regulating transfer pricing. Their fear is that unravelling the ALP might lead to decreased international cooperation and uncoordinated unilateral actions in the tax sphere which would multiply uncertainty and unpredictability.[75]

Thus the process of addressing BEPS issues internationally did not only involve the OECD and G20 countries alone but it also involved the developing countries who provided direct input to the process through their various regional tax organisations such as the African Tax Administration Forum (ATAF), Centre de Rencontres et d'Etudes des Dirigeants des Administrations Fiscales (CREDAF), the Intra-European Organisation of Tax Administrations (IOTA), the Inter-American Center of Tax Administrations (CIAT) and other international organisations such as the United Nations (UN), the International Monetary Fund (IMF) and the World Bank Group (WBG).[76]

There were also contributions from stakeholders in which more than 1,400 submissions were received from industries, advisers, NGOs and academics, totalling approximately 12,000 pages of comments.[77] Eleven public consultations were held, gathering a variety of stakeholders for open and frank discussions of their views and suggestions and to ensure full transparency. These public consultations were streamed live on webcasts while the OECD Secretariat periodically updated the public on the status of the project.[78]

70 *Ibid*.
71 The G20, *supra*, note 66.
72 OECD, *Explanatory Statement*, *supra*, note 67.
73 *Ibid*.
74 *Ibid*.
75 *Ibid*.
76 *Ibid*.
77 *Ibid*.
78 OECD, *OECD/G20 Base Erosion Shifting Project 2015*, *supra*, note 66.

All of the above efforts paid off on 12 February 2013 when the OECD issued a lengthy report to address BEPS known as the BEPS Report.[79] This was followed up with the publication of a concrete 15-Action Plan on BEPS on 19 July 2013 (Action Plan).[80] The 15-Action Plan otherwise known as the BEPS Package equips the governments with the domestic and international instruments needed to tackle BEPS and was eventually endorsed by the G20 Finance Ministers during their meeting of 8 October 2015 in Lima, Peru, while the G20 Leaders followed suit by endorsing the BEPS package during their summit held in Antalya, Turkey between 15 and 16 November 2015.[81] The 15-Action Plan is listed below:

1. Address the tax challenges of the digital economy;
2. Neutralise the effects of hybrid mismatch arrangements;
3. Strengthen controlled foreign company rules;
4. Limit base erosion via interest deductions and other financial payments;
5. Counter harmful tax practices more effectively, taking into account transparency and substance;
6. Prevent treaty abuse;
7. Prevent the artificial avoidance of PE status;
8. Assure that transfer pricing outcomes are in line with value creation-intangibles;
9. Risk and capital;
10. Other high-risk transactions;
11. Establish methodologies to collect and analyse data on BEPS and the actions to address it;
12. Require taxpayers to disclose their aggressive tax planning arrangements;
13. Re-examine transfer pricing documentation;
14. Make dispute resolution mechanisms more effective; and
15. Develop a multilateral instrument.[82]

All of the above 15-Action Plan are meant to prevent all kind of tax avoidance schemes. To ensure international consistency on the application of the Action Plan and as required by Action Plan 15, a Multilateral Convention to implement tax treaty-related measures to prevent BEPS (Multilateral Instrument) was opened for signing on 7 June 2017.[83] This Multilateral Instrument is considered as the solution for governments to close the gaps in existing international tax rules by transposing results from the OECD/G20 BEPS Project into various bilateral tax

79 OECD, *Addressing Base Erosion and Profit Shifting* (2013) <https://www.oecd.org/ctp/beps.htm> (accessed 10 April 2019).

80 OECD, *Action Plan on Base Erosion and Profit Shifting*, *supra*, note 65.

81 OECD, *OECD/G20 Base Erosion Shifting Project 2015*, *supra*, note 66.

82 *Ibid*.

83 OECD, 'Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS' (2018) <https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm> (accessed 15 April 2019).

treaties worldwide without the necessity of amending the treaties. This is because signing the Multilateral Instrument automatically modifies the bilateral tax treaties of signatory countries to include the BEPS 15-Action Plan to prevent not only tax avoidance schemes but also to prevent treaty shopping and increase greater certainty in tax treatment among the signatory countries.[84]

Thus many countries have adopted the OECD/G20 Base Erosion and Profit Shifting (BEPS) 15-Action Plan to address the income and profit-shifting strategies of companies in their respective jurisdictions by signing the Multilateral Convention to implement tax treaty-related measures to prevent base erosion and profit-shifting (Multilateral Instrument or MLI) and the Common Reporting Standard Multilateral Competent Authority Agreement (CRS MCAA) as recommended by the OECD. It is highly commendable that Nigeria signed the Multilateral Convention on 17 August 2017.[85] This saves the country the need to renegotiate its existing tax treaties with countries who are also signatories to the convention, bearing in mind that such renegotiation can be time-consuming, resource-intensive and cumbersome.[86] As at 17 August 2017, 71 countries have signed the Multilateral Instrument including the African countries Burkina Faso, Cameroun, Egypt, Gabon, Nigeria, Senegal and South Africa.[87] Countries around the world are expected one way or the other to implement this 15-Action Plan BEPS package by amending their various tax legislations to counteract income and profit-shifting to tax haven countries.

IV. REGULATION OF INCOME AND PROFIT-SHIFTING TO TAX HAVEN COUNTRIES IN NIGERIA

The arm's length provision in section 22(2)(b) of the Companies Income Tax Act (CITA) 2004 is an anti-avoidance provision meant to prevent abusive transfer pricing practices such as income and profit-shifting to tax haven countries. By virtue of this provision, a transaction between a company and its subsidiary will be deemed to be artificial or fictitious unless such transaction was conducted as if they were separate entities dealing with each other at arm's length. The purport of this provision therefore is that any transaction between a company and its subsidiary that is not conducted at arm's length will be deemed to be artificial or fictitious.

Accordingly, under section 22(2)(b) of CITA, the over-invoicing/pricing of a transaction between a company located in Nigeria and its subsidiary in a tax haven

84 OECD, Opening Remarks by Angel Gurria, OECD Secretary-General, on 7 June 2017 at the Signing Ceremony: Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS <https://www.oecd.org/tax/signing-ceremony-multilateral-convention-on-tax-treaty-related-measures-to-prevent-BEPS> (accessed 17 April 2019).

85 Interview with the Director of Transfer Pricing Division of the Federal Inland Revenue Service, Ikoyi, Lagos State, Nigeria, 10 July 2017.

86 *Ibid.*

87 OECD, Signatories and Parties to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: Status as of 17 August 2017 <https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf> (accessed 17 April 2019).

country to shift income and profit out of the country to the tax haven country to avoid taxation will be considered as artificial or fictitious. Such transaction to shift income and profit out of Nigeria will be disallowed by the Federal Inland Revenue Service (FIRS) for being abusive or manipulative and constituting a form/scheme of corporate tax avoidance/evasion.[88]

The provision of section 22(2)(b) of CITA can be likened to the arm's length principle (ALP) recommended by both the OECD and the UN which requires that transactions between a company and its subsidiary should be set to reflect the price that would have been charged were the transaction between independent and unrelated entities.[89] Thus the essence of the provision of section 22(2)(b) of CITA, like the OECD's ALP, is to prevent companies and their subsidiaries in tax haven countries from taking advantage of their parent–subsidiary relationship to manipulate prices of transactions to shift income and profit for the purpose of avoiding tax.

By virtue of the provision of section 22(2)(b), it can be said that the menace of income and profit-shifting to tax haven countries had always been under regulation in Nigeria.[90] The provision of section 22 of CITA therefore occupies a critical position in the country's anti- tax avoidance armoury to protect and shore up the tax base of the country as it empowers the FIRS to prevent companies from shifting their incomes and profits to their tax haven subsidiaries.[91]

On the other hand, the experiences in Nigeria over the years have shown that the provision of section 22(2)(b) of CITA can sometimes be ineffective to prevent income and profit-shifting. This has created doubts as to the effectiveness or otherwise of the provision to prevent income and profit in the country.[92] This stems from the fact that there is no guidance on how to determine the appropriate arm's length price of a transaction between a company and its subsidiary under the CITA. In fact, there is no provision in the CITA stipulating the methods to be adopted or the procedures through which the arm's length price of such transactions will be determined.

The absence of guidance in this regard means that determining the arm's length price is left to the whims and caprices of the companies and their subsidiaries resulting in an inconsistent application of the arm's length provision.[93] This often triggers avoidable contention, controversies and/or disputes with the FIRS.[94] This

88 M. T. Abdulrazaq, *Principles and Practice of Nigerian Tax Planning and Management* (Stirling-Horden 2013) 116. See also *Latilla* v. *IRC* (1973) AC 377.

89 *Ibid*., at 133.

90 T. Oyedele, A. Curtis, E. Sweigart and R. Smallwood, *The Impact of Nigeria's New Transfer Pricing Rules on Multinational Enterprises* (2013) <https://lexis.com/research/xlink?go=tax> (accessed 24 April 2019). See also PwC, *Transfer Pricing Perspectives: Special Edition* (2011) <https://www.pwc.com/transferpricingperspectives> (accessed 24 April 2019).

91 *Ibid*.

92 D. Asada, *The Socio-Economic Problem of Tax Avoidance and Evasion in Nigeria: An Overview* <https://www.dspace.unijos.edu.ng/The%20Socio-Economic%20Problem%20of%2> (accessed 24 April 2019).

93 Interview with Ms Yomi, Tax Manager of Oando, Nigeria Plc, Zenon House Ajose Adeogun Victoria Island, Lagos State, Nigeria, 13 July 2017. See also T.Oyedele, *supra*, note 90.

94 Interview with the Director of Transfer Pricing, *supra*, note 85.

made the application of the arm's length discretionary, subjective, speculative and arbitrary thereby rendering the provision less effective in preventing income and profit-shifting out of the country.[95] The implication of this is that the country's tax base continues to be eroded through income and profit-shifting thereby preventing the country from getting its fair share of tax on all the activities and operations of companies in the country.[96]

It was in this respect that the FIRS concluded that the arm's length in section 22(2)(b) as well as the entire General Anti-Avoidance Rules (GAAR) provision in section 22 of CITA is weak, defective and too generic to achieve its objective to prevent abusive transfer pricing practices such as income and profit-shifting.[97] Therefore the FIRS released a specific Transfer Pricing Regulation in 2012 to provide guidance on how to determine the arm's length price of transactions between a company and its subsidiaries in tax haven countries.[98]

A. The Income Tax (Transfer Pricing) Regulations 2012

The ineffectiveness of the arm's length provision in section 22(2)(b) of CITA to prevent income and profit-shifting necessitated the need for the introduction of a specific regulation to provide statutory guidance to prevent the abusive transfer pricing practice of income and profit-shifting. In this respect, the FIRS, by virtue of its powers under section 61 of the Federal Inland Revenue Service (Establishment) Act (FIRSEA) No. 13 2007 and with the approval of the then Minister of Finance,[99] released a transfer pricing regulation known as 'Income Tax (Transfer Pricing) Regulations' (Regulation)[100] in September 2012.[101] The Regulation adopted the Arm's Length Principle (ALP) as recommended by both the OECD and the UN as the standard for assessing and regulating transfer pricing practices in Nigeria.[102] For taking this bold step, the FIRS deserves commendations for this significant effort of developing a specific transfer pricing regulation to checkmate abuse of transfer pricing in Nigeria.

The FIRS is saddled with the responsibility of administering the Regulation. The FIRS, pursuant to its autonomous powers under the FIRSEA 2007, created

95 *Ibid*.

96 M. Eboh, 'Nigeria Losing Trillions from Non-Regulation of Transfer Pricing', *Vanguard Newspaper*, 6 April 2012 <https://www.vanguardngr.com/2012/04/nigeria-losing-trillions-from-non-regulation-of-transfer-pricing-pwc/> (accessed 25 April 2019).

97 Interview with Mr A. A. (Anonymous Staff), Deputy Manager in the Transfer Pricing Division of the Federal Inland Revenue Service, Ikoyi, Lagos State Nigeria, 10 July 2017.

98 *Ibid*.

99 Mrs Ngozi Okonjo-Iweala was the Nigerian Minister of Finance in 2012. See the Executive Profile of Ngozi Okonjo – Iweala, PhD <https://www.bloomberg.com/reserach/stocks/private/person.asp?personld=39279262&privcapld=544741> (accessed 25 April 2019).

100 Income Tax (Transfer Pricing) Regulations 2012, No. 1 Government Notice No. 206 at 815–839 21 September 2012 Federal Republic of Nigeria Official Gazette Vol. 99. See further Income Tax (Transfer Pricing) Regulations 2018.

101 A. O. Isau, 'Transfer Pricing: The Nigerian Perspective', 2 (2) *International Journal of Accounting and Taxation* (2014), 26 <https://aripd.org/journal/index/ijat/vol-2-no-2-june-201rent-issue-ijat4-cur> (accessed 28 March 2019).

102 *Ibid*. See also Income Tax (Transfer Pricing) Regulations, *supra*, note 100, para. 11(b).

a separate and dedicated unit known as the 'Transfer Pricing Division (TPD)' to administer the Regulation.[103] This is in line with international best practices as recommended by the OECD for the administration of transfer pricing[104] and the need to ensure proper and effective administration and implementation of the Regulation to prevent abuse of transfer pricing in the country.[105] This demonstrates willingness on the part of the FIRS to prevent the abusive transfer pricing practice such as income and profit-shifting by providing adequate attention to enable the Regulation achieve its objective.

The purpose of the Regulation is to strengthen and give effect to the existing anti-avoidance provisions in relevant tax legislations such as the GAAR provisions in section 22 of the Companies Income Tax Act (CITA) 2004, section 17 of the Personal Income Tax Act (PITA) 2011 as amended and section 15 of the Petroleum Profit Tax Act (PPTA) 2004.[106] This was to address the mischief created by the arbitrary application of the GAAR provision in the absence of statutory guidance.[107] The objectives of the Regulation are stated in paragraph 2(a–e) of the Regulation. The major objective of the Regulation is to provide a platform for the FIRS to appropriately and effectively tax the economic substance of intra-company transactions between associated entities.[108] The Regulation therefore constitutes a vital tool in the hand of the FIRS to combat tax avoidance and evasion in the country by providing the basis to prevent under- or over-pricing of intra-company transactions in and out of the country respectively.[109]

Another important objective of the Regulation is to reduce the risk of economic double taxation by providing for a corresponding adjustment in situations where a transfer pricing adjustment resulted in incomes and profits that are taxable in Nigeria and in another country that has a double tax treaty with the country.[110] The Regulation also sets out to provide a level playing ground for MNCs and independent entities operating in the country.[111] This is to ensure that the MNCs do not exploit their parent–subsidiary relationship which is not available to independent entities to gain a tax advantage.[112] In addition, the Regulation is meant to ensure certainty on the treatment of transfer pricing in the country to prevent any distortion in the tax system.[113] All the above objectives are in line with international best practices as recommended by the OECD.[114]

103 *Ibid*.
104 Deloitte, *Transfer Pricing Regime in Nigeria – How Far Have We Gone?* <https://www.doingbusiness.org/data/exploreeconomies/nigeria/> (accessed 25 April 2019).
105 Interview with the Director of Transfer Pricing, *supra*, note 94.
106 Income Tax (Transfer Pricing) Regulations 2012, *supra*, note 100, para.1.
107 *Ibid*.
108 *Ibid*., para. 2(a).
109 *Ibid*., para. 2(b).
110 *Ibid*., para. 2(c).
111 *Ibid*., para. 2(d).
112 Interview with the Director of Transfer Pricing, *supra*, note 94.
113 Income Tax (Transfer Pricing) Regulations 2012, *supra*, note 100, para. 2(e).
114 Interview with the Director of Transfer Pricing, *supra*, note 94.

As stated earlier, a fundamental feature of the Regulation is that it adopts the arm's length principle (ALP) as the basis and standard for assessing transfer pricing in the country. The Regulation stipulates that its application shall be done in a manner consistent with the ALP in Article 9 of the OECD and UN Model Tax Conventions on Income and Capital.[115] The Regulation defines the ALP as a principle which requires that the conditions of a transaction between a company and its subsidiary should not in any way or form differ from the conditions that would have applied between independent entities in comparable transactions and carried out under comparable circumstances.[116] The definition of the ALP provided under the Regulation is a significant departure from what was obtainable under the provision of section 22(2)(b) of CITA where no definition of the ALP was provided.

It is important to note that since the application of the Regulation is predicated on the ALP, it means that the Regulation is not immune from the challenges and problems associated with the application of the ALP. While these are general problems and challenges faced by all countries, including developed countries, there are some practical challenges peculiar to the application and implementation of the Regulation in Nigeria. These practical challenges are what both the FIRS and companies have experienced in the application of the Regulation since its introduction in 2012.

Perhaps, the major challenge confronting the application of the ALP in Nigeria is the practical difficulty in conducting comparability analysis which is dependent on getting financial information and data on prices of transactions between independent entities to benchmark or determine the appropriate price to be charged in a transaction between a company and its subsidiary. In fact, Nigeria is ranked among the countries with the least financial information or data of transactions between independent entities to meet the basic requirements for the application of the ALP.[117] The practical difficulty in this regard is due to the lack of a local commercial database to conduct comparability analysis.[118] This has rendered the application of the ALP in the country a very difficult task if not impossible.

Another problem with the application of the ALP is the lack of bilateral tax treaties with tax haven countries which has prevented exchange of information about income and profit shifted to tax haven countries. Nigeria presently has bilateral tax treaties with thirteen countries, namely Canada, Pakistan, Belgium, France, Romania, the Netherlands, the United Kingdom, China, South Africa,

115 Income Tax (Transfer Pricing) Regulations 2012, *supra*, note 100, para. 11(b).

116 *Ibid*., para.19.

117 The Platform for Collaboration on Tax: A Toolkit for Addressing Difficulties in Accessing Comparable Data for Transfer Pricing Analyses, Appendix 4, 2017 <https://oecd.org/.../discussion-draft-a-toolkit-for-addressing-difficulties-in-accessing-comparable-data-for-transfer-pricing-analyses.pdf> (accessed 27 April 2019).

118 *Ibid*.

Italy, the Philippines, the Czech Republic and Slovakia.[119] Article 26 of the OECD Model Tax Convention which forms the basis upon which Nigeria's bilateral tax treaties are based provides the legal basis to exchange information to prevent abusive transfer pricing practices such as income and profit-shifting and other forms of tax avoidance.[120] This allows the FIRS to exchange information with countries to prevent tax avoidance and tax evasion in the country.[121] However, except for the Netherlands, Nigeria does not have bilateral tax treaty with any of the tax haven countries. The implication of this is that the government will not be able to obtain the necessary information to prevent income and profit-shifting by companies operating in Nigeria to their subsidiaries in tax haven countries excluding the Netherlands that she has a bilateral tax treaty with.[122]

Even though, as stated earlier, the Nigerian government recently signed the Multilateral Convention to implement tax treaty related measures to prevent base erosion and profit-(MLI) and the Common Reporting Standard Multilateral Competent Authority Agreement (CRS MCAA) as recommended by the OECD to prevent companies from shifting their incomes and profits to tax haven countries,[123] it is contended that the signing of the OECD instrument is not enough to prevent income and profit-shifting in Nigeria but that the country has to step further in ensuring that the necessary legal framework is put in place, otherwise the instrument will not be able to achieve its objectives in the country.[124] For example, the objective of the MLI is to transpose the OECD/G20 BEPS project into their existing bilateral double tax treaties network without going through the rigours of amendment. Nigeria has ratified bilateral double tax treaties with just thirteen countries. This means that the MLI is only applicable in respect of thirteen countries which do not even include most of the tax haven countries identified by the OECD and other international organisations. The number of bilateral double tax treaties has therefore been held to be too limited to achieve the objective of the MLI. Likewise, in respect of implementing the CRS MCAA, Nigeria is yet to have domestic legislation mandating financial institutions in the country to collate the financial information of relevant taxpayers which will be forwarded to the FIRS for onward automatic exchange with other countries.[125] The implication of this is that Nigeria will not be able to exchange information of this kind with countries that do not have a bilateral double tax treaty with the country.[126]

119 FIRS Tax Treaties (2020) <https://www.firs.gov.ng/Tax-Management/Pages/Tax-Treaties.aspx> (accessed 27 April 2019).

120 Interview with the Director of Transfer Pricing, *supra*, note 94.

121 *Ibid.*

122 Interview with Taofeeq Salman Esq., Managing Partner, Krispy Legal and Tax Services, Lagos, Western House, Lagos Island, Lagos, Nigeria, 21 August 2017.

123 OECD, Nigeria sign both the Multilateral BEPS Convention and the CRS Multilateral Competent Authority Agreement to tackle international tax avoidance and evasion, 2017 <https://www.oecd.org/tax/nigeria-sign-both-the-multilateral-beps-convention-and-the-crs-multilateral-competent-authority-agreement-to-tackle-international-tax-avoidance-and-evasion.hmtl> (accessed 27 April 2019).

124 Interview with Taofeeq Salman Esq., *supra*, note 122.

125 *Ibid*.

126 *Ibid*.

It is therefore important that the Nigerian government should put all necessary legal frameworks in place to adopt the BEPS 15-Action Plan in line with the new international best practices. A country such as the United States of America (US) has shown a strong interest in regulating the use of offshore tax havens by signing Tax Information Exchange Agreements (TIEAs) with the tax haven countries in order to obtain income and profit-shifting activities of the MNCs.[127]

In addition, in order to secure information on the income and profit-shifting to tax haven countries, the Nigerian government launched a tax amnesty programme known as the Voluntary Assets and Income Declaration Scheme (VAIDS) to encourage companies to declare and report their undeclared assets, incomes and profits held in offshore tax haven countries. The voluntary disclosure programme was, however, a time limited programme that ended on 30 June 2018.[128]

However, the voluntary nature of the programme means that it is optional and a company can decide whether or not to declare its offshore assets, incomes and profits. This can hamper the objective of securing information on undeclared assets and incomes in tax haven countries. The situation applicable in Nigeria is unlike disclosure programmes in other jurisdictions which are mandatory in nature and are not time limited. An example of this is the Disclosure of Tax Avoidance Schemes (DOTAS) in the United Kingdom (UK) under which it is mandatory for MNCs to disclose to Her Majesty's Revenue and Custom (HMRC) any income and profit shifted to their tax haven subsidiaries or any other arrangements.[129] Failure to do so attracts certain penalties and carries a presumption that the taxpayer is avoiding tax in the country.[130]

It is clear from the above that Nigeria does not have an adequate legal framework to prevent the shifting of income and profit by companies operating in the country to their tax haven subsidiaries. The application of the ALP under the Income Tax (Transfer Pricing) Regulations 2012 had been blighted with practical challenges. Likewise, the signing of the MLI and the CRS MCAA and the introduction of VAIDS have not provided adequate measures to prevent income and profit-shifting away from the country. It is therefore not surprising that despite the disclosure of the huge amount of incomes and profits shifted by individuals and companies in Nigeria to tax haven countries in both the Panama[131] and Paradise papers,[132] the Nigerian government has yet to take any serious action in this respect.

127 M. A. Desai, F. C. Foley and R. H. James,'The Demand for Tax Haven Operations', *Journal of Public Economics* (2006) 90.

128 See 'Voluntary Assets and Income Declaration Schemes (VAIDS)' (2017) <https://vaids.gov.ng> (accessed 28 April 2019).

129 Investopedia, 'Disclosure of Tax Avoidance Schemes (DOTAS)' (2020) <https://www.investopedia.com/terms/d/dotas-disclosure-of-tax-avoidance-scheme> (accessed 28 April 2019).

130 *Ibid.*

131 International Consortium of Investigative Journalists (ICIJ), *supra*, note 39.

132 *Ibid*.

V. CONCLUSION

The article provides an in-depth understanding of how companies shift incomes and profits to their tax haven subsidiaries to avoid taxation. The article observed that due to the amount of income that has been lost to income and profit-shifting to tax havens, it is now seen as a major form of transfer pricing abuse employed by companies to avoid taxation. The article found that the international response to income and profit-shifting is the arm's length principle (ALP) recommended by the OECD and the UN which is not without its weaknesses. The 15-Action Plan on BEPS was developed to address the weaknesses of ALP. It is concluded that even though Nigeria relied on the arm's length provision in section 22(2)(b) of the Companies Income Tax Act 2004 to prevent income and profit-shifting, the country has not implemented the 15-Action Plan on BEPS recommended by the OECD/G20 or any other legal framework to stem the tide of incomes and profit. This has severely affected the fight against the income and profit-shifting in the country. In the light of the above, the article recommends as follows:

1. The Nigerian government should work with the IMF, the OECD and other international organisations to develop its own official list of tax haven countries.
2. The Nigerian government should endeavour to sign Tax Information Exchange Agreements (TIEAs) with these tax haven countries in order to obtain incomes and profit-shifting activities of the MNCs group. This is in line with what is obtainable in the United States of America (USA).
3. The country should as a matter of urgency amend the CITA to include a provision known as 'Controlled Foreign Companies Rules' (CFC Rules). The CFC Rules are anti-avoidance provisions designed to prevent diversion of incomes and profits made in one country to tax haven countries. Where the income and profit is diverted to the tax haven countries the income and profits are charged to corporate tax of the country where they were diverted from. Countries such as the UK have been using the CFC Rule to tax incomes and profits diverted to tax haven countries. The CFC Rules will therefore allow the Nigerian government to levy company income tax on incomes and profits shifted away from the country to tax haven countries. This recommendation is in line with Action 3 of the OECD/G20 BEPS Project where it was recommended that countries should design controlled foreign company rules in their respective jurisdictions.
4. The OECD/G20 15-Action Plan BEPS Project should be implemented in Nigeria by putting in place the necessary legal frameworks to incorporate the Action Plans into CITA.
5. The government should implement the Common Reporting Standard by including provisions in the transfer pricing legislation to mandate

automatic exchange of bank account information of MNCs with other countries and vice versa.

6. The country should provide for stricter criminal penalties in the form of jail sentences without the option of a fine for directors of MNCs where the income and profit-shifting results in tax evasion.