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# A half-century of resistance to corporate disclosure

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As the complexity of transnational corporations (TNCs) grew in the post-war period, their effective degree of disclosure diverged from what is standardly expected of single-country firms. Country-by-country reporting is the key proposal to re-establish appropriate TNC disclosure, and ultimately TNC accountability – and as such, has been consistently resisted by many TNCs, professional services firms and some key headquarters countries in the Organisation for Economic Cooperation and Development. This paper charts two main waves of pressure for progress. The first, most visible from the late 1960s to the early 1980s, reflects the claims of the New International Economic Order and the rise of the G77 group of countries, while the second saw international civil society take a leading role. The current phase sees these two impulses combine and may finally deliver meaningful progress. The paper addresses both the political underpinnings and the developing technical component to the claims for deeper TNC disclosure, ultimately shaped into the pursuit of an international standard for public, country-by-country reporting – and the resistance to it. The paper also provides illustrative results based on the existing country-by-country reporting data for banks. It concludes with a discussion of the prospects for country-by-country reporting.

**Keywords:** Corporate accountability, country-by-country reporting, TNC disclosure, Sustainable Development Goals, tax avoidance, tax havens

## 1. Introduction

The story of country-by-country reporting (sometimes referred to as CbCR) is the story of the search for equal accountability for transnational corporations (TNCs) and domestic companies – an attempt to set a floor for disclosure requirements for TNCs. Over the last sixty years, two major waves of pressure for progress can be distinguished. The first, most visible from the late 1960s to the early 1980s, reflects the claims of the New International Economic Order (NIEO) and the rise

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of the G77 group of countries – both related in important ways to Raul Prebisch's intellectual and political leadership, including as the first head of UNCTAD. The second wave, reflecting both global civil society's engagement with the nature of TNCs and the specific development of a tax justice movement, began to grow in the early 2000s and continues to the present day. The use of country-by-country reporting data in an indicator under discussion for the Sustainable Development Goals target on illicit financial flows reflects the two waves combining as G77 and G20 members jointly set the international agenda, with support from civil society. The inclusion of such an indicator in the Sustainable Development Goals would represent important progress; and the range of other initiatives ongoing suggests that the TNC resistance to disclosure may eventually be overcome.

This paper charts the two waves of pressure for progress, addressing both their political underpinnings and the developing technical component to the claims for deeper TNC disclosure, ultimately resolved into the specific aim of an international standard for public, country-by-country reporting.

What emerges most clearly is the dominance of political dynamics over technical issues. While the concepts involved are necessarily highly technical, the debate is not over technical concepts but over the ability of TNCs to resist regulation through the process of evolving an equal accountability regimen by calling on professional services companies to make their case or by lobbying governments directly.

Whereas section 2 discusses the two main drives for progress, their political underpinnings and the developing technical component to the claims for deeper TNC disclosure, section 3 uses the outcomes of the second wave – country-by-country data for banks – to provide some preliminary results, illustrating the opportunities but also the need for a technically robust standard. The final section concludes with a discussion of the prospects for finally achieving public country-by-country reporting from TNCs.

## **2. CbCR: a half-century of struggle for corporate accountability**

Although there are important reasons to be cautious about comparing the revenues of individual governments with the turnover of individual companies, it is nonetheless striking that 69 of the largest 100 economic entities in the world on this basis are TNCs (Global Justice Now, 2016). The level of information each is required to publish about its activities is quite different. Governments have greater responsibility to citizens than do companies to their stakeholders, perhaps, but the discrepancy in data disclosure is marked. We know, for example, the line-by-line breakdown of government revenues. For most multinationals, we do not even know the level of sales in different countries. Or of staff. Or assets. Or profits. Or tax paid. Or all the companies or names under which a multinational operates.

By contrast, the annual accounts of companies that operate in a single jurisdiction contain most of this information – as was the case for all companies at the time when corporate law and accounting norms began to emerge, with the rare exceptions of a handful of enterprises such as the East India Company and the Royal Niger Company, which operated on behalf of imperial powers (Amujo & Cornelius, forthcoming). In many jurisdictions, those annual accounts have long been required to be placed in the public domain.

This reflects a crucial decision in the development of entrepreneurship, by which governments allowed the liability of individuals who run companies to be capped, so that commercial activity was not held back, for example, by the risk that business failure would also mean the loss of a director's family home. Although limited liability companies have existed for centuries, it was only in the early 19<sup>th</sup> century that the structure became formalised in legislation, which led to it being widely adopted. The effective quid pro quo for this protection was the requirement to publish company accounts, signed off by an approved auditor. Limited liability socialises some of the private risks of business failure; the publication of audited accounts provides the transparency needed to allow external stakeholders and investors to manage their exposure to those risks.

In the 20<sup>th</sup> century, the growing emergence of business groups operating transnationally necessitated major changes to national regulatory frameworks that had hitherto been purely domestically focused. This shift saw the League of Nations take a leading role in establishing the basis for international tax rules that first governed imperial-era interaction in the multinational tax sphere and were later taken up by the OECD (Picciotto, 2013).

Compared with tax regulations, regulations on transparency were pursued with less rigour for the globalising world. With most multinationals headquartered in and owned from current or former imperial powers, the OECD country governments could be largely confident in their ability to ensure domestic regulatory compliance and access to the data required to levy appropriate tax charges in their own jurisdictions. As we explore below, this confidence began to erode as some states' pursuit of deliberate "tax haven" strategies, and the promotion by professional services firms of schemes to exploit these strategies, changed the compliance decisions of TNCs (Palan, 2003; Tax Justice Network, 2018).

## **2.1. The G77's fight for corporate disclosure**

While the key objective of the NIEO was for developing countries to improve their terms of trade and ensure sovereignty over their natural resources, a significant element of the NIEO was to establish disciplines for the regulation of transnational corporations in their jurisdictions. On this front, the G77 took the lead in the 1970s

(Bair, 2015). Its emergence dating back to the Bandung Conference of 1955 or perhaps the establishment of UNCTAD with Prebisch at the helm in 1964, the NIEO was formally laid out in a United Nations document in 1974 (United Nations General Assembly, 1974).

The seventh principle, of a total of 20, calls for the “regulation and supervision of the activities of transnational corporations by taking measures in the interest of the national economies of the countries where such transnational corporations operate on the basis of the full sovereignty of those countries”. It confirms the extent to which the NIEO saw regulation of TNCs as a priority in its own right and as fundamental to achieving sovereignty and a more equal global distribution. In practical terms, this prioritisation directly informed one of the key practical steps taken in pursuit of the NIEO: the Draft Code of Conduct on TNCs.

After a failed 1972 coup attempt against Chile’s president Salvador Allende, in which US multinationals were widely seen as complicit (e.g. Garcés, 1976; Kornbluh, 2013), Chile requested the establishment of a UN committee for transnational enterprises.<sup>1</sup> A group of Eminent Persons, personally selected by the UN Secretary General, began investigating financial and other affairs of multinational companies. After long negotiations the UN Commission for Transnational Corporations (UNCTC) was founded in 1975. Within this commission, a Group of Experts on International Standards of Accounting and Reporting (GEISAR) was convened to improve the financial transparency of transnational corporations.

Among the experts there was consensus that public reporting requirements should shed more light on the corporate networks and finances of multinational corporations. Accordingly, the GEISAR recommendations issued in 1977 contained the requirement to publish financial reports for each company that a multinational corporation operated, including information on intra-group trade (Ylonen, 2017: 45-46; Rahman 1998: 600, 611), which is particularly vulnerable to tax avoidance. These far-reaching proposals were unanimously adopted by GEISAR and passed on to the UNCTC for ratification. If ratified, these recommendations would have become binding and would have been implemented by the United Nations Economic and Social Council (ECOSOC).

The publication of GEISAR’s recommendations in 1977 drew a reaction from two leading business lobby groups: the International Chamber of Commerce (ICC) and the International Organisation of Employers (IOE). They formed a working group to coordinate opposition and subsequently published a detailed letter ahead of the meeting of the UNCTC, where the recommendations were to be considered and

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<sup>1</sup> The following paragraphs draw on Meinzer & Trautvetter (2018).

voted upon (16–27 May 1978). The likelihood of endorsement of the report was high because the Commission operated on the principle of majority voting, and lower-income countries supported the report's endorsement and had an absolute majority in the Commission (Rahman 1998: 601).

In order to block progress, the lobbyists successfully mobilised support from within the negotiation room. The OECD representatives threatened to leave the UNCTC, not to accept nor to implement its recommendations, and to stop financial support if majority voting was not replaced with unanimous decision making. In practice, this might have implied that the Commission's recommendations would have remained without effect, as most multinational companies were headquartered in OECD countries. Ultimately, the OECD countries were successful: the principle of consensus was introduced and the far-reaching recommendations of the GEISAR report were not adopted. Instead, the Commission recommended launching a new Ad hoc Intergovernmental Group of Experts on International Standards of Accounting and Reporting. Power to nominate the experts was yielded to governments, and for the next 15 years, until the dissolution of the UN Commission, no consensus on binding standards was reached because OECD members rejected disclosure proposals from lower-income countries. In some cases, the objections were more narrowly held: “[...] the United States and Japan alone have exercised such de-facto veto in order to block many decisions otherwise agreed upon by all other nations” (Ibid.: 616, 609-611).

In June 1973, shortly after the Group of Eminent Persons had taken up their initial investigation of multinational company affairs, an alternative body was set up. The International Accounting Standards Committee (IASC) was founded as a federation of audit associations from 10 OECD countries and Mexico, which in turn were strongly influenced by the big audit companies. Within the first 13 months of its existence this body produced 26 accounting standards (Rahman 1998: 605; Obenland, 2010: 1), enabling the creation of an alternative set of business-led standards to the UN proposals – without any of the latter's required disclosures.

In March 1980, less than two years after the OECD countries had introduced the consensus principle in the UN Commission, the IASC presented a draft for an accounting standard on segmental reporting (IAS 14). This introduced financial segment reporting by geographic area (i.e. at the regional rather than country level) (Giunti, 2015: 22, 40-41) – aggregating multiple jurisdictions so that national accountability was not supported. The UN process for ambitious accounting standards with public disclosure was closed down as private actors captured the political space and put in place a much weaker standard.

The conflict was never, of course, a technical one over accounting standards, but a political one over the right to regulate and, ultimately, the right to development. The defeat of disclosure was followed by a broader shift in the approach to TNCs.

Bair (2015) has evaluated the evolution of three related efforts to constrain TNCs within the United Nations system: the Code of Conduct drafted by the UNCTC; the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, developed and circulated in 2003 by a Sub-Commission of the Human Rights Commission; and the Guiding Principles on Business and Human Rights (the “Ruggie Principles”), which supplanted the Draft Norms and were endorsed by the Human Rights Council in 2011.

Bair compares the basis for corporate obligations in each of the three and concludes (p. 169): “what the distance between the Code of Conduct and the Draft Norms marks is not simply the rehabilitation of the corporation, but also – and more profoundly – a transformation in our view of the state, and its role in development”. Seen in this way, the defeat of the GEISAR process is a pivotal moment in the failure of the NIEO. It reflects the failure to establish an obligation for corporate disclosure by TNCs not only in general, but also specifically as an element in a project “geared toward the realization of what the G77 understood as a collective right to development, vested in the state” (Bair, 2015, p. 161). It might be seen as inevitable, given the relative economic and political power of OECD members and TNCs together, and the absence of broader public or civil society engagement. But that assessment also points the way towards the potential for progress.

The GEISAR process took place during what Hill (2004) refers to as the first of three generations of UN–civil society relations, running from the UN’s creation after World War II to the end of the Cold War. Hill writes that international NGOs (INGOs) were the main civil society actors, and “[w]hat is striking about this period is how little actual engagement there was of INGOs in the work of the UN” (Hill, 2004, paragraph 1). The second generation saw UN engagement by a much broader group: “In marked contrast to the first generation of UN relations with non-governmental actors, the newly-emerged national and regional NGOs sought to engage directly in intergovernmental deliberations and, through advocacy and mobilization work, influence their outcomes” (Hill, 2004, paragraph 3) Hill then speculates that a third generation of UN–civil society relations is emerging: one that has space for like-minded coalitions of governments and civil society organisations. As we explore below, such a like-minded coalition has emerged in a somewhat ad hoc fashion around country-by-country reporting – and with the potential for comprehensive success.

## **2.2. Civil society and a country-by-country accounting standard**

As the social, political and economic tribulations of structural adjustment, coupled with the end of the Cold War, left the G77 and much of the UN system in a quite different position, the mantle of challenging TNCs in order to defend the right to

development was taken up by civil society – albeit not always with the consistent view that such a right should be vested in the State.

The tax justice movement, which coalesced with the formal establishment of the Tax Justice Network in 2003 and has developed globally since then, does take the view that States are key actors and that power relations vis-à-vis TNCs are important to the former's ability to ensure the progressive realisation of rights. At the same time, however, States are themselves duty-bearers that must also be held accountable.

The first draft accounting standard for a country-by-country reporting requirement (Murphy, 2003a) set out the basis for making data public to ensure that TNCs would provide effective disclosure about their activities and risks at the country level and that this would also provide the public with the necessary data to hold governments to account for their approaches to TNC taxation. In keeping with the spirit of the GEISAR disclosure proposals, the standard provides for consistent and detailed reporting of TNCs' activities, jurisdiction by jurisdiction.

Although swiftly taken up by civil society transparency advocates, initially focusing on the extractive sector and subsequently spreading to tax avoidance more broadly, the proposals were resisted at the International Accounting Standards Board and at the OECD. As well as advancing technical proposals, however, tax justice advocates sought to change the underlying political narrative, challenging publicly the idea that tax “minimisation” was just “smart business practice”.

News stories on tax avoidance by individual multinationals are so commonplace today that it is easy to forget that the first major story was just ten years ago.<sup>2</sup> On 6 November 2007, The Guardian ran under the headline: “Revealed: how multinational companies avoid the taxman” on the front page, the results of a six-month investigation of the international banana trade supported by the Tax Justice Network (Lawrence & Griffiths, 2007). The generic nature of the headline would not be appropriate in 2018 and reflects just how little prior coverage of this issue there had been.

The headline also reflects the main dynamic which has persisted since 2007: the view that tax avoidance is perpetrated by multinationals and against the State. Subsequent exposés – for example of Apple, SAB Miller and Starbucks – have typically been met with two responses: that companies have a duty to shareholders to minimise their tax and that each multinational group abides by the law (and taxation) in each country where it operates. By implication this response puts the onus back on States that are responsible for the laws in question.

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<sup>2</sup> The following paragraphs draw on material prepared for a forthcoming chapter in a volume on tax justice and human rights, edited by Nikki Reisch and Philip Alston.

In general, such responses have been met with public scepticism. The shareholder duty element has largely fallen away. First, legal advice obtained by the Tax Justice Network from a top law firm provides a direct challenge to the claim (Farrer & Co, 2013). Second, academic evidence has shown that shareholders do not benefit from lower effective tax rates – in fact, they face higher risks and no higher returns (Brooks, Godfrey, Hillenbrand, & Money, 2016). Third, public awareness of the costs of tax avoidance has risen sharply, so that rather than seeing it as smart business, it is increasingly seen as anti-social business practice (e.g. a survey carried out for the UK tax authority found that 61% of respondents felt that it was never acceptable to use a tax avoidance scheme, most commonly because “it is unfair on others who pay their taxes” (Shah, 2016)).

Recent developments have, for the first time, focused more closely on the role of the State in avoidance: the LuxLeaks revelations have shown how Luxembourg had approved hundreds of secret low- or zero-tax deals proposed by the big four accounting firms of major multinationals, led by PwC; and the European Commission’s State aid investigations have shown the Belgian and Irish States directing substantial efforts to facilitate profit-shifting from fellow member States of the European Union (EU). The Irish case, in which the Commission followed up on a US Senate committee investigation that had revealed a large share of Apple’s profits recorded in an Ireland-based entity ostensibly with no tax jurisdiction, was pivotal to this change in focus.

Finally, the phenomenon of profit-shifting had itself changed over the period – from a marginal activity in the early 1990s to a globally significant one by the late 2000s. As Cobham & Janský (2017) show, the proportion of US TNCs’ profits that were declared in jurisdictions other than where the underlying economic activity took place rose from just 5-10% of global profits in the 1990s to 25-30% by the early 2010s.

After the financial crisis of 2008-09, the combination of fiscal pressures and a growing public willingness to appreciate the risks as well as the benefits associated with TNCs, along with a highly engaged civil society movement, led to country-by-country reporting reaching the agenda of the G8 and G20 groups of countries.<sup>3</sup> For the first time, perhaps, the convergence of interests between the public in higher- and lower-income countries became visible – and with it the possibility of an informal alliance between international civil society and the G77.

As early as 2010, and in reaction to the financial crisis, the first rules were approved in the United States as part of the Dodd-Frank Act, requiring listed companies from the extractive industries to publish their tax payments and payments to governments on a country-by-country or project-by-project basis. Although this

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<sup>3</sup> The following paragraphs draw on Meinzer & Trautvetter (2018).



requirement was broadly matched by the European Parliament in September 2010, the corresponding implementing regulation by the Securities Exchange Commission (SEC) was annulled by the courts in the United States shortly after its adoption in 2012.<sup>4</sup> In May 2013, the Extractive Industry Transparency Initiative (EITI) reformed its criteria to include more detailed country reports and the EU passed the new accounting directive that included reporting obligations for extractive industries starting in 2016.

Against this background and the specific direction of the G8 and G20, the OECD's 2013 Base Erosion and Profit-Shifting (BEPS) Action Plan (p. 23) stated that the organisation would

[d]evelop rules regarding transfer pricing documentation to enhance transparency for tax administration, taking into consideration the compliance costs for business. The rules to be developed will include a requirement that [TNCs] provide all relevant governments with needed information on their global allocation of the income, economic activity and taxes paid among countries according to a common template.

On behalf of the G8, the OECD developed a country-by-country reporting standard, which in its final version closely resembled the original proposal by Richard Murphy (Tax Justice Network, 2013: 6), except in two key areas. Instead of requiring consolidation at the country level, and consistency with the global financial accounts, it allowed country-level aggregation of individual subsidiaries (OECD 2015: 32). Cobham, Gray, & Murphy (2017) compare the specific variables required by the various reporting standards with civil society proposals, identifying the various shortcomings of current standards (see Table 1). They also discuss in detail the user case for country-by-country reporting that underpins the civil society case (section 3 illustrates the potential value of public country-by-country reporting data).

Second, instead of creating transparency for investors, consumers, journalists and tax authorities alike, the reporting was reinterpreted as an instrument of transparency for tax authorities alone. An OECD memorandum from October 2013 confirms that the OECD sees the data as disposable for the exclusive use of tax authorities. This reframing implied that the data would be covered by tax secrecy and thus hidden from public view.

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<sup>4</sup> In 2012 the American Petroleum Institute, the US Chamber of Commerce, the Independent Petroleum Association of America and the National Foreign Trade Council filed suit in federal court in the District of Columbia, seeking to strike down the relevant disclosure rules. The suit claimed that mandatory disclosures were unconstitutional violations of companies' First Amendment rights. No individual company associated itself publicly with the action taken.

Table 1. Comparison of data fields in country-by-country reporting standards

	Civil Society Proposal	OECD CbCR	CRD IV	Dodd-Frank	Canada	EITI	EU
<b>Identity</b>	Group name	Group name	Group name	Group name	Payee name	Payee name	Group name
	Countries	Countries	Countries	Countries	Countries	Legal and institutional framework	Countries
	Nature of activities	Nature of activities	Nature of activities	Projects (as in: by contract)	Same data required by project as well as by country	Allocation of contracts and licenses	Projects (as in: by contract)
	Names of constituent companies	Names of constituent companies		Receiving body in government	Subsidiaries, if qualifying reporting entities	Exploration and production	
<b>Activity</b>	Third-party sales	Third-party sales				Social and economic spending	
	Turnover	By the process of addition	Turnover				
	Number of employees FTE	Number of employees FTE	Number of employees				
	Total employee pay						
<b>Intra-group transactions</b>	Tangible assets						
	Intra-group sales	Intra-group sales					
	Intra-group purchases						
	Intra-group royalties received						
	Intra-group royalties paid						
	Intra-group interest received						
<b>Key financials</b>	Intra-group interest paid						
	Profit or loss before tax	Profit or loss before tax	Profit or loss before tax				
	Tax accrued	Tax accrued					
<b>Payments to/from governments</b>	Tax paid	Tax paid	Tax paid	Income taxes paid	Tax paid	Profits taxes	Taxes levied on the income, production or profits of companies
	Any public subsidies received		Any public subsidies received				

Source: Cobham, Gray & Murphy (2017).

Note: CRD IV = Country Reporting Directive IV, EITI = Extractive Industries Transparency Initiative, EU = European Union, FTE = full-time equivalent.

Following the OECD's call for written comments on the first draft of CbCR at the beginning of 2014, 135 submissions were made. Fully 87% of these were from the private sector. Of these, Deloitte and PwC made two submissions each and KPMG made one submission. Apart from two, all private sector submissions rejected public country-by-country reporting. Of the responses, 130 came from developed countries, with the largest proportion from the United States and the United Kingdom (43%), and not one from tax authorities in developing countries (Godfrey 2014: 11). In contrast, in a survey conducted by PwC at the beginning of 2014, of 1,344 CEOs surveyed from 68 countries, 59% were in favour of public reporting. A detailed analysis of the OECD discussion (Corlin Christensen, 2015) confirms that it was focused narrowly on people with technical expertise from the private sector and excluded other interests.

Following the consultations, KPMG Switzerland welcomed the weakened CbCR proposals on 4 April 2014, and in particular, the intention not to make the data public. Just one day before, a KPMG partner from the United Kingdom had been appointed as head of the OECD Transfer Pricing Unit, which has been responsible for CbCR through the OECD BEPS Action Plan since 2013. Also in May 2014, the Business Roundtable, a powerful US business association, wrote to the US Secretary of the Treasury and warned about the consequences of the OECD's actions on BEPS and possible reporting requirements.

At the end of 2014, Pascal Saint-Amans, head of the OECD Centre for Tax Policy and Administration, stated the position plainly: "Now to come back to the country by country reporting, the agreement clearly – and that was a condition to the agreement – is that this information will remain confidential. It's to be used by the tax administration ... it is not designed to be publicly released. Otherwise there would be no agreement ... That's something I know a number of businesses were concerned about. This solution makes unhappy a number of people, particularly the NGOs ..."

According to reports from the negotiations, it was above all the United States and Germany along with the Big Four that insisted the data should not be made public (see Meinzer & Trautvetter, 2018 for more detailed discussion of this point). And with this decision, the data are to be reported directly only to the tax authorities in the country where the multinational company is headquartered, and then exchanged with selected tax authorities under complex, newly created exchange arrangements. The data are subject to strict tax secrecy – and interested countries have to fulfil demanding technical requirements to participate in the exchange. As a consequence, as Figure 1 shows, almost all lower-income countries remain excluded – despite international commitments, such as the UN Sustainable Development Goals, which require global measures to curtail illicit financial flows including corporate tax avoidance, and European obligations such as the Lisbon



Treaty, which call for all policy areas to be consistent with and to complement international poverty reduction targets.

### **2.3. Southern leadership and the Sustainable Development Goals**

While unbalanced access to OECD CbCR data exacerbated the inequalities in global taxing rights rather than ameliorated them, one lower-income region was taking the challenge into its own hands. Starting in 2012, the African Union/UN Economic Commission for Africa High-Level Panel on Illicit Financial Flows from Africa had begun the work that would deliver a major report in 2015 – and, perhaps more importantly, exerted a clear influence even before then, by ensuring that illicit financial flows were targeted in the Sustainable Development Goals framework.

The High-Level Panel's focus on TNC disclosure, and the specific tool of country-by-country reporting, is clear:

We were encouraged by the emergence of discussions on country-by-country reporting of employees, profits, sales and taxes as a means of ensuring transparency in cross-border transactions. Country-by-country reporting, publicly available, will help to show where substantial activity is taking place and the relative profits generated and taxes paid. In the absence of a universal tax administration, country-by-country reporting will enable tax and law enforcement agencies to gain a full picture of a company's activities and encourage companies to be transparent in their dealings with African countries. (p. 45)

African States should require multinational corporations operating in their countries to provide the transfer pricing units with a comprehensive report showing their disaggregated financial reporting on a country-by-country or subsidiary-by-subsidiary basis. African governments could also consider developing a format for this reporting that would be acceptable to multiple African revenue authorities. (p. 81)

The Panel calls for partner countries to require publicly available disaggregated, country-by-country reporting of financial information for multinational companies incorporated, organized or regulated in their jurisdictions. (p. 85)

The High-Level Panel's predominant focus on tax avoidance by TNCs – largely matched in the report of the UN Secretary-General's High-Level Panel of Eminent Persons on the Post-2015 Development Agenda – has ensured that the issue was carried through to the Sustainable Development Goals (SDGs).<sup>5</sup>

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<sup>5</sup> Specifically, SDG 16 target 4: By 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime.

Thus far, at least, the depth of political support for the G77 and within parts of the UN system at least has ensured that retrospective efforts of lobbyists, and possibly of OECD member states, to remove TNCs from the scope of the target have been unsuccessful. Moreover, one of the two indicators proposed for SDG 16.4 would draw directly on OECD country-by-country reporting data in order to construct a measure of profit misalignment (Cobham & Janský, 2018). The misaligned profit indicator is defined as the value of profits reported by TNCs in countries for which there is no proportionate economic activity of multinational enterprises. A central feature of the indicator is that the underlying country-level misalignment measures provide monitoring and accountability for individual States seeking to reduce the (negative) misalignment suffered – for example, to demonstrate to citizens and domestic businesses that TNCs are being fairly taxed – and for States that benefit from profit-shifting at the expense of others, an accountability mechanism to demonstrate their commitment to global progress.

One potential issue relates to the channel through which the data might enter the UN system. Most straightforward in practical terms at least would be to work with the OECD, as it gathers partially aggregated data from tax authorities. Some States provide headquarters to only one or a few TNCs passing the threshold, and until public reporting is agreed, the question of confidentiality may affect what data can be shared through the OECD. The OECD will publish, from late 2019, country-by-country data, aggregated to the country level to preserve confidentiality. This may well prove sufficiently high quality to allow the construction of the misalignment indicator, depending on the extent of suppressions to protect TNC identities in individual jurisdictions. Alternatively, a delegated UN body could – in tandem with the OECD or separately – obtain additional data directly from member States' tax authorities, with the guarantee of protecting the confidentiality of individual reporting TNCs. Given the cooperation of OECD and/or member States, either approach is broadly feasible. It goes without saying that the best approach to construct such an indicator would be to overcome TNC confidentiality issues to facilitate the disclosure originally envisaged by GEISAR and by civil society proponents of country-by-country reporting. The misaligned profit indicator is defined in a similar way to some of the indicators applied to the data for European financial institutions in section 3.

### **3. CbCR: transparency for accountability**

In this section we explore the practical value of proposed TNC disclosures. This is possible, with some important limitations, using country-by-country data that is published by European financial institutions under the fourth Capital Requirements Directive (CRD IV). As shown in Table 1, the CRD IV disclosures fall well short of the civil society template in terms of the reported variables. In addition, the transposition

of the directive into EU members' national laws allowed for major inconsistencies within and between countries. The results are nonetheless illustrative of the potential value of the data. Our findings are among the first based on CRD IV data, and although necessarily preliminary (a full paper is forthcoming), provide clear indications of the scope available to hold TNCs and States accountable for tax behaviour. Before turning to the data and the preliminary analytical results, we review the related literature. This section is based on Janský (forthcoming).

### 3.1. Literature

There are three areas of relevant literature: the use of banks' country-by-country reporting data, the use of other country-by-country reporting data and the measurement of the misalignment of real economic activity and profits. The bank data have become available only recently, but there are already a few notable analyses. Richard Murphy, the originator and advocate of the CbCR (Murphy, 2003b), published one of the first empirical analyses using the data, in a report for a group of members of the European Parliament (Murphy, 2015). Murphy (2015) uses data for 26 banks, 17 of which had published the full data and seven of which had published only partial data, to conclude that overstatement of profits in low-tax and offshore jurisdictions appears to be occurring. Jelínková (2016) uses the data for 32 banks (28 of them for both 2014 and 2015) in her student thesis and finds that banks report their profits disproportionately to their activities. She estimates that if profits were apportioned across countries on the basis of employees and turnover, on average about 60% of reported profits would be redistributed. Oxfam has been very active in this area, with a few reports focused on individual countries such as France (Oxfam, 2016) and a recent report (Oxfam, 2017) – for which the Centre for Research on Multinational Corporations SOMO (2017) prepared estimates – focused on the country-by-country reporting data of 20 European banks and their presence in tax havens. In this section we use a larger data set (with more banks, including those most important for the Czech Republic), but employ a methodological approach consistent with Oxfam (2017) to enable direct comparisons.

The introduction of public country-by-country reporting for extractive sector companies listed in the EU and United States (Wójcik, 2015) was significant, if partial, success for the international civil society campaign launched in 2003 (Seabrooke & Wigan, 2015). Johannesen & Larsen (2016) found that country-by-country reporting of tax payments is associated with significant decreases in value of firms in extractive industries, and they associate this effect of disclosure rules with a reduction of rents derived by firms from tax avoidance. Akamah, Hope, & Thomas (2017) find that US multinational companies that operate more extensively in tax havens tend to disclose their foreign operations at a higher level of aggregation.



They argue that the evidence is consistent with managers attempting to avoid strong criticisms of their firms' tax-avoidance practices by making geographic disclosures less transparent.

Some research studies the misalignment between reported profits and economic activity: how much more profit is reported in tax havens in comparison with economic activity undertaken there. The policy consensus (OECD, 2013) on the need to apply corporate taxation where a given value was created is empirically investigated through two sets of estimates. Cobham & Loretz (2014) use company-level balance sheet data retrieved from the Orbis database provided by Bureau van Dijk. Cobham & Janský (2017) estimate the size of the misalignment of economic activity using US data provided by the government Bureau of Economic Analysis. Relatedly, Riedel, Zinn, & Hofmann (2015) find that the tightening of transfer pricing rules raises the reported operating profits of high-tax affiliates, and vice versa for low-tax ones, and reduces the sensitivity of affiliates' pre-tax profits to corporate tax rate changes. They therefore suggest that the regulations are effective in limiting tax-motivated profit-shifting behaviour. In another similar analysis, MSCI (2015) identifies 243 companies (out of 1,093 in the MSCI World Index constituents; health care and IT companies stood out) paying an average rate of 17.7%, versus the 34.0% that would result if these companies were paying taxes in the jurisdictions where they generate revenues, i.e. equivalent to comparing the location of reported profits and sales (the total difference amounts to US\$82 billion per year).

Overall, the literature supports three relevant points: first, that tax avoidance by TNCs represents a material distortion to the world economy, imposing major revenue losses for many countries; second, that the level of TNC disclosure is associated, possibly in multiple ways, with the degree of tax avoidance; and third, that country-by-country reporting can reveal important aspects of that behaviour. It is the final element to which the current analysis contributes.

### 3.2. Data

Credit institutions and investment firms established in the EU (hereafter "banks") have had to publish sectoral country-by-country reports since 2015. The banks' data are available thanks to disclosures required by the Capital Requirements Regulations 2013. The requirements originate from Article 89 of the Capital Requirements Directive – CRD IV, of which paragraph 1 says:

From 1 January 2015 Member States shall require each institution to disclose annually, specifying, by Member State and by third country in which it has an establishment, the following information on a consolidated basis for the financial year:

- (a) name(s), nature of activities and geographical location;
- (b) turnover;



- (c) number of employees on a full time equivalent basis;
- (d) profit or loss before tax;
- (e) tax on profit or loss;
- (f) public subsidies received.

Since the resulting data are not aggregated across banks by any institution and are often hard to find on banks' webpages, Janský (forthcoming) uses a data set collected by a group of researchers at Charles University in Prague. The paper uses the data as they were on 31 January 2017, but updates continue and the intention is to make the full data set publicly available through Open Data for Tax Justice (<http://datafortaxjustice.net>).

The selection of these banks was created in the following way. We focused on the biggest banks. To see which they are, we use a leading list of Europe's 50 largest banks by assets in 2015 and 2016 (SNL, 2016). In addition, a few relatively large banks that are not on this list, but for which data are available in the data set were included in the analysis to improve the coverage. Although the data are available as a result of the EU regulations, the data also provide information about other European as well as non-European countries' and banks' activities. So rather than having an EU or European focus, we use the data to shed light on the global activities of banks using a sample skewed heavily towards having better EU and European coverage. There are in total 56 banks. The data for all variables seem to be available for 35 banks. For 10 banks, there are no data. For the 11 remaining banks, only some data are available. Given the nature of the data and the underlying research still in progress, the results should be considered preliminary and illustrative only.

### 3.3. Methodology

Janský (forthcoming) constructs a range of measures of profit misalignment. The most graphically striking are the relative misalignment measures, which show the ratios, aggregated for all banks in the sample, of each country's profit and turnover, and of profit and employment. In this way, a number over one hundred (%) indicates a country with a higher proportion of bank profit than of economic activity. The most extreme cases show profit misalignment far in excess of any proportionate real activity; and to countries that consistently fail to capture an aligned profit share.

The indicator of relative misalignment is the ratio of the shares of a given country's profit and turnover (or employees), multiplied by 100 for a clearer interpretation:

$$\text{Relative misalignment}_{it} = \frac{\text{Share of profit}_{it}}{\text{Share of turnover/employees}_{it}} \times 100 \quad (1)$$

The relative misalignment can have values between zero and, theoretically, infinity. The higher the estimated values of relative misalignment, the higher is the misalignment. If all the profits were aligned perfectly with turnover, the relative misalignment would have values of 100 for all countries. In reality, we expect countries with a concentration of real economic activity to have values of between 0 and 100, and for tax havens to have values higher than 100. This helps to answer questions such as which countries have a higher share of banks' income than turnover. If a country has a value of 200, that implies that twice as much profit is reported there than would correspond to its share of turnover. It can also be interpreted with a percentage sign; in the same example, 100% more profit than turnover was reported in a given country.

### 3.4. Preliminary results

Figures 2 and 3 show preliminary results for the year 2015. Both graphs show countries only if their income is higher than €1 billion. Figure 2 shows the relative extent of gross profit misalignment, according to equation (1). Figure 3 plots the relative misalignment of profit with the number of employees against the relative misalignment with turnover, with the size of the circle reflecting the absolute value of profit reported in the country.

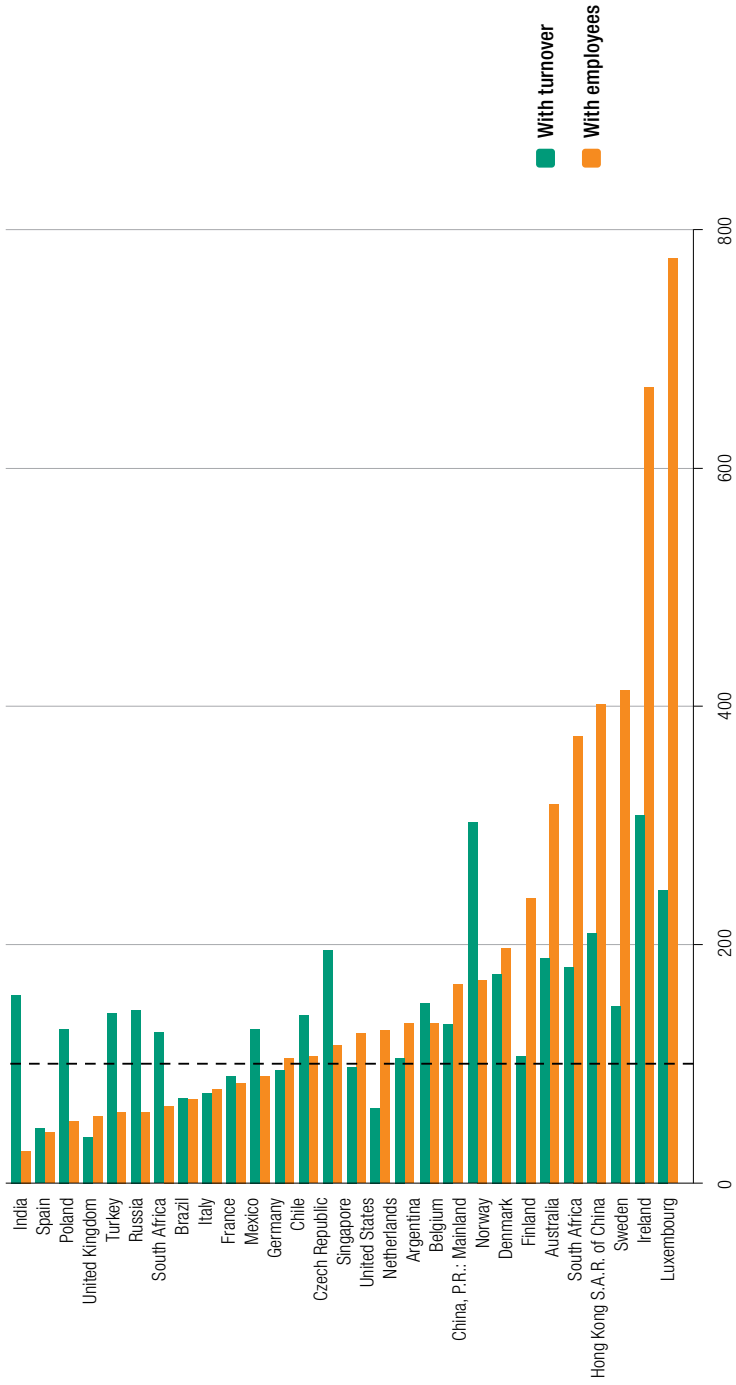
The results in Figures 2 and 3 point to countries being spread along quite a wide spectrum of relative misalignments. Most big economies, including France and Germany, have very low misalignments. Their values are about 100 for both the number of employees and turnover (i.e. TNCs are declaring the same proportion of their global gross profits as the share of their global economic activity in these jurisdictions). Some selected jurisdictions have substantially more income reported than the number of employees or turnover of banks suggested. These jurisdictions include Ireland and Luxembourg, for which there are ample data. There are other tax havens with similar relative misalignment, such as Cayman Islands, Curacao, Jersey, Mauritius and Qatar, but for these there are not many observations and the income reported in them is below the €1 billion.

Ireland and Luxembourg stand out for a number of reasons. They are the two countries with the highest relative misalignments with the number of employees, and first and third highest relative misalignment with turnover. Their misalignments with the number of employees are about 700 for both and with turnover about 250 for Luxembourg and 300 for Ireland. Hong Kong (China), another jurisdiction that is often considered a tax haven, has high levels of reported profits and exhibits high levels of relative misalignment with both the number of employees and turnover. In addition to examining further the role of these tax havens, research should focus on other results that we find hard to explain. Some other countries' results do not allow for a straightforward interpretation and are suitable cases for future research

with the CbCR and other data sources. Examples are those of China (which show high relative misalignment with turnover in particular) and of the United Kingdom and of Spain (which both seem to have substantially less income reported than the number of employees or turnover of banks would suggest).

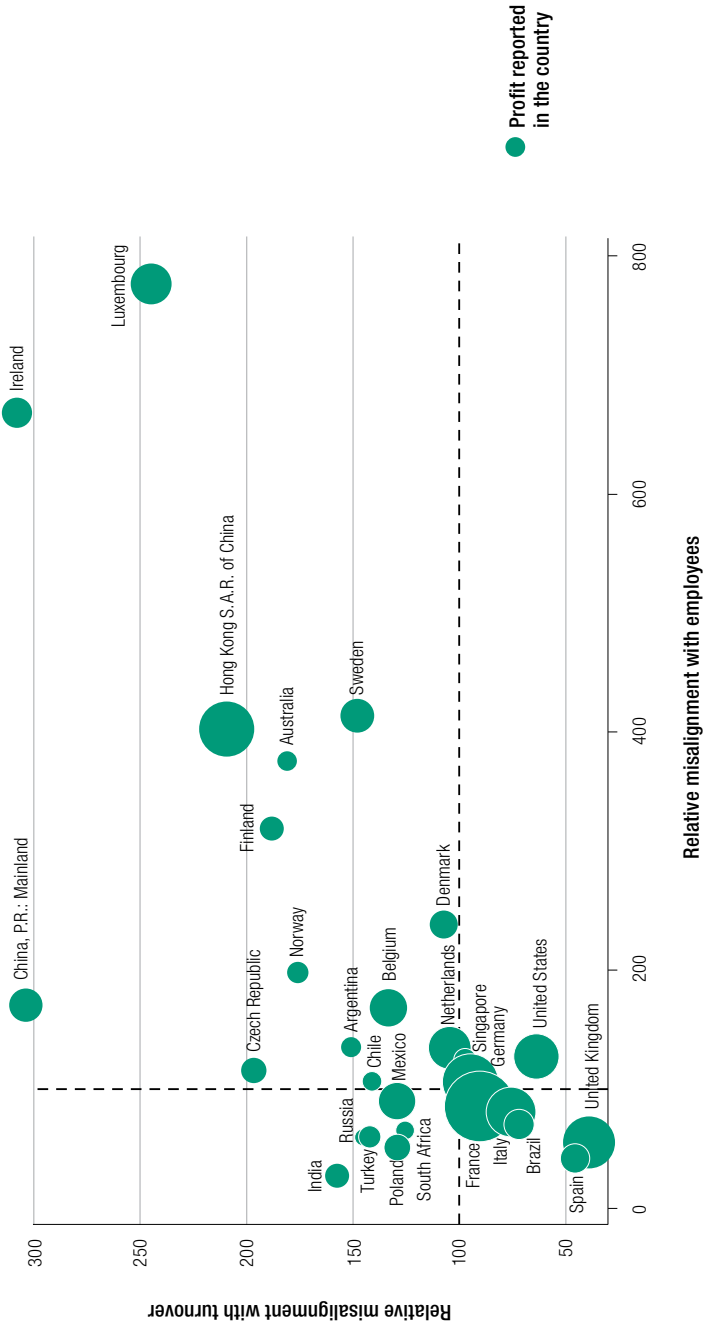
The CRD IV data are not of sufficient quality to support specific claims in relation to tax revenues at risk from profit shifting, as the civil society proposals for country-by-country reporting would allow. But even these data provide clear indications of the pattern and scale of profit misalignment, and of the individual TNCs and jurisdictions that appear to pose the greatest threat to the countries where most of their real economic activity takes place. It is the implied threat of accountability that underpins the long-standing resistance to TNC disclosures, of TNCs themselves, the professional services firms that profit from selling tax avoidance services and a number of key OECD members (both headquarters jurisdictions and profit-shifting hubs).

**Figure 2. Relative extent of gross profit misalignment with number of employees and turnover 2015**  
(Per cent of gross profits)



Source: Jansky (forthcoming).

**Figure 3. Relative extent of gross profit misalignment with number of employees and turnover**  
(Per cent of gross profits)



Source: Jansky (forthcoming).

#### **4. Conclusion: the future of country-by-country reporting**

Ending the exceptions that allow TNCs to be simultaneously among the biggest economic actors on the planet and the least transparent would provide a significant step towards accountability – and also towards the ability of States to deliver on the collective right to development, and of the public to hold States to account for doing so. Public country-by-country reporting will not revive the New International Economic Order, but it would shift accountability in a meaningful way for both TNCs and tax havens. The OECD can provide a valuable step forward by facilitating the publication of partially aggregated CbCR, as outlined in Annex C of a recent report (OECD, 2018). But the rejection by powerful member States of full publication prevents the OECD from delivering the level of disclosure necessary to bring TNCs in line with other economic actors.

As a result, three other channels are under exploration. One is the voluntary route. In line with the Ruggie principles, this depends on TNC willingness to go beyond the minimum necessary. There are potential champions here – Vodafone, for example, has committed to publish its OECD standard reporting from 2019, and its fellow members of the ‘B Team’ alliance have indicated some interest. The Global Reporting Initiative (GRI) is in the process of piloting a much more technically robust standard than the OECD’s, designed specifically for public reporting. Voluntary approaches are difficult, as the data would inevitably focus attention on the absolute levels of a given TNC’s profit misalignment – rather than any relative superiority to less transparent rivals. But uptake across a given sector – for example, by the members of the International Council on Mining and Metals, which backs the GRI – would largely overcome this question. The Open Data for Tax Justice hub will by 2019 host a live database of publicly available country-by-country data, nesting various standards to enable analysis. But the brief survey of the history of TNC disclosure here should make clear that voluntary efforts can provide only piecemeal progress, at best, rather than the comprehensive solution ultimately needed.

A second channel is that of unilateral requirement for publication. The UK parliament has already legislated to allow publication, but the government has not yet chosen to impose the requirement. The French parliament had passed a measure mandating publication, before the last government reversed this with an archaic technical manoeuvre. In the absence of multilateral agreement at the OECD, pressure will continue for others, such as the EU, to take the lead – despite the reported reluctance on Germany’s part.

The third channel is for the issue of TNC disclosure to return to the UN system. One possibility here would be for ISAR, the successor to GEISAR, to develop a mandatory public standard. Another would be for the requirement to be embedded within the draft treaty on TNCs and human rights. Perhaps the most obvious

channel, however, given UNCTAD's central role in analysing data on the investment (and more recently, profit-shifting) behaviour of TNCs, would be for that organization to become the repository for country-by-country reporting data, and the guardian of a strong standard to deliver the data to underpin an indicator of profit misalignment for the SDGs.

From its establishment more than 50 years ago, UNCTAD took a leading role in identifying the need for greater regulation of TNCs to ensure a positive contribution to global development. Through the 1970s and 1980s, UNCTAD provided the key international forum to consider new corporate disclosures – until ultimately the lobbying of TNCs and their professional service providers closed down the space. Now, with civil society and Southern countries in alliance in seeking redress to the problem, and the value of country-by-country reporting as a tool, UNCTAD could re-emerge as a leading forum.

A more natural fit might now be the UN technical committee on tax, which has been a focus of recent civil society and G77 efforts to establish a more politically representative and global forum to replace the OECD in international tax discussions. Despite the recent, leading support of India, however, the tax committee currently lacks the resources and the political space to play such a role. Another alternative could perhaps emerge through the OECD Inclusive Forum, through which lower-income countries can join discussions if they commit to the BEPS Action Plan on which OECD member States led during 2013-15. But this could become a more representative space only if OECD members were willing to cede some of their power, which at present seems unlikely.

The experience of the last fifty years confirms that bringing TNC disclosure in line with that of other economic actors will not happen easily – despite its importance to the right to development. The efforts of the G77 and of international civil society are increasingly aligned around the goal of advancing TNC disclosure, through public country-by-country reporting. But the resistance of TNCs, professional services firms and OECD member States has proven durable over the years.

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