Taxation, illicit financial flows and human rights

May 2022

TAX JUSTICE NETWORK

The Tax Justice Network's submission to the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights.

Call for Contributions: Taxation, illicit financial flows and human rights

Call for Input | Special Procedures

1. What specific challenges in international tax governance call for reform?

In short, and much as the Independent Expert and colleagues have made clear in their recent correspondence with the OECD, the current international tax governance arrangements generate major inequalities in taxing rights between countries and give rise to systematic failures to achieve human rights progress all around the world.

These problems have however been evident for many years, and the solutions are not unknown.

The main failings involve four main elements, closely related. We summarise these here, followed by their outcomes which constitute systematic rights failures.

First, progress on international tax and financial transparency measures has both been slow and has largely excluded lower-income countries. After initially being written off as unrealistic and utopian, the Tax Justice Network's ABC policy platform has been welcomed onto the global policy agenda since 2013 – but only partially delivered at best.

The A, automatic exchange of information on financial accounts, has given rise to a multilateral instrument, the OECD Common Reporting Standard. This sees more than 100 jurisdictions actively participate, but most lower-income countries receive little or no information; and the largest financial centre, the United States, remains uncooperative with impunity. It is no coincidence that the US has risen, since this emergence of multilateral information exchange, to the top of the Financial Secrecy Index in 2022 as the jurisdiction responsible for the greatest global threat. [1]

The B of the ABC, beneficial ownership transparency, has seen the adoption of public registers of company ownership in a growing number of countries at all per capita income levels; and some progress for trusts and other legal vehicles. There is at present no official process to move towards the interlinking of registers for legal vehicles and assets of high value including property, to create a powerful public good open to all. There is, however, growing interest in the proposal for a global asset registry to perform this function, as proposed variously by Thomas Piketty, the Tax Justice Network and by the Independent Commission for the Reform of International Corporate Taxation (ICRICT).

The C, country by country reporting by multinational companies, is again characterised by deeply unequal delivery. Despite adopting a standard close to that originally proposed by the Tax Justice Network, the OECD not only refused to require publication of the reporting, but went further and restricted it to multinationals' home country tax authorities. The complex arrangements to

[1] Tax Justice Network, 'Financial Secrecy Index 2022', *Tax Justice Network*, 2022 <https://taxjustice.net/indexes-tools/> [accessed 27 May 2022].

provide the information to other tax authorities results, systematically, in lower-income and smaller countries being less able to access data.

Overall, it seems likely that the biased adoption of the ABC to date will have actively exacerbated the inequalities in taxing rights between countries at different per capita income levels – since the great bulk of the benefits of additional transparency have been withheld from lower-income countries.

The **second** element of failure relates to the absence of consistent, aggregate statistics on key components of international tax. Only a handful of countries, Australia and Germany among them, publish aggregate bilateral statistics on the balances or income streams that are subject to the OECD Common Reporting Standard for automatic exchange. This prevents the holding account of tax authorities for closing the gaps between jurisdictions' reporting and the self-reporting of tax residents, which is the central opportunity the transparency allows. This failure also prevents accountability for those jurisdictions responsible for the largest gaps faced by others – that is, for the tax evasion elsewhere.

Under Sustainable Development Goal 16.4, there is a globally agreed target to reduce illicit financial flows, including cross-border corporate and individual tax abuse. The main indicators proposed would rely on consistent access to aggregate statistics on both automatic information exchange and country by country reporting – both currently unavailable. The OECD does publish some aggregate country by country data, for some member countries, and this provides the most accurate picture so far of the scale of corporate tax abuse (published annually by the Tax Justice Network in the State of Tax Justice reports).

The same data provides the basis for the research by TJN and other independent researchers to assess the country-level implications of new corporate tax proposals – which the OECD is unable to do, apparently due to restrictions placed by its member states on how their data can be used. The result is that most countries, and in particular almost all lower-income countries, are simply unable to assess accurately the likely effect of particular proposals – despite the data now actually being compiled, since the introduction of the reporting requirement.

The **third** element of failure in international tax governance relates precisely to the corporate tax rules. Since the imperial powers at the League of Nations determined in the 1920s and 1930s that the arm's length approach would be used to determine where multinationals' taxable profits arise, and the OECD's taking up of this mantle after it was established in the 1960s, the setting of international tax rules has largely excluded lower-income countries (most former colonies).

The OECD Base Erosion and Profit Shifting initiative (BEPS), 2013-2015, followed this pattern. The BEPS Action Plan did not deliver substantial reform (with the exception of formalising the requirement for country by country reporting), and its patchwork of measures can be seen instead as the last serious attempt to defend the arm's length approach. Lower-income countries were then invited into the newly established 'Inclusive Framework' on condition that they accepted entirely the BEPS Action Plan – even as the US and EU immediately brought forward policies that were inconsistent.

That reflected the widespread sense that BEPS had not dealt with the problem, and 'BEPS 2.0' began in January 2019 with a mandate to go beyond the arm's length approach, and with the Inclusive Framework now including a range of lower-income countries setting the workplan.

Sadly, neither of these ambitions have been delivered. The Inclusive Framework members set a workplan for the OECD secretariat to evaluate three alternatives, including a comprehensive shift to unitary taxation instead of the arm's length approach. Following bilateral US-French negotiations, however, the workplan was abandoned, with G7 support.

Today, in mid-2022, the process that was scheduled to deliver before the end of 2020 continues. The ambition has however been all but completely lost. Rather than going beyond the arm's length approach, and apportioning profits according to the location of multinationals' real economic activity – in line with the single goal of the G20 when it mandated the OECD as far back as 2012 – the OECD proposals would maintain the arm's length approach almost in its entirety. A unitary approach would be taken for just a small fraction of the profits of just a small fraction of the largest and most profitable multinationals, excluding some key sectors.

Alongside this, the proposals include a minimum tax rate for multinationals worldwide; but this too has been heavily watered down and also made markedly more complex – making the lack of country-level OECD estimates of the potential revenue gains all the more problematic for countries seeking to decide whether to align with the proposals. At the same time, there is increasing scepticism over whether the US will even conform – despite it having played by far the greatest role in setting the terms of the proposals.

If the third element of failure in international tax governance is the failure to deliver corporate tax rules based on unitary taxation (to make profit shifting much harder) and a minimum effective tax rate (to make profit shifting unrewarding), the **fourth** and overarching element is also visible here: the failure to provide an institutional setting in which countries at all levels of income are meaningfully represented, and their preferences transparently and fairly mediated into decision-making.

A similar dynamic to the OECD's tax work also unsurprisingly permeates their sister body, the Financial Action Task Force (FATF) – widely called out for its dominance by a few major OECD members (among its only 39 permanent members), and its inability either to apply its current standards fairly or to raise its standards effectively, most recently and in no little detail by its longstanding and recently departed executive secretary.

In summary of these four failings, the problem of international tax governance is that it is characterised by institutions that are neither inclusive nor effective in addressing the challenges of international tax abuse.

The effects for human rights around the world are grave indeed.

The immediate impacts are that financial secrecy and tax abuse go unchallenged. Indeed, the Financial Secrecy Index and the Corporate Tax Haven Index which assess jurisdictions on their relative global threats of each kind, tell a common story: the worst damage is done by a group of OECD member countries and their dependent territories (those of the UK in its 'spider's web', in particular).

These more granular assessments of risk are confirmed fully by the broad estimates of the scale of revenue loss caused and suffered by different countries and jurisdictions, including those of our State of Tax Justice reports published with the Global Alliance for Tax Justice, FES and Public Services International.[2] These and other research confirm the same pattern of culpability, of a group of OECD member countries and their dependent territories. They also show that major economies are those that lose the largest amounts in absolute terms; while lower-income countries lose by far the most when losses are considered as a share of current tax revenues, or of current public spending on, for example, health.

These immediate impacts translate directly and indirectly into the most serious damage to human rights. The **4Rs of tax justice** provide the basis for that translation (see also TJN submission to the Independent Expert, October 2021).[3] The 4Rs reflect an important set of concepts which reflect human rights principles including social justice, transparency, accountability and strengthening participative foundations of a social, or eco-social contract.

Revenue is ultimately necessary to provide inclusive public services, and tax is *the* source of independent domestic revenues. Progressive redistribution can be achieved through the combination of inclusive public spending and direct taxes on incomes, profits, capital gains and wealth – all of which can be defeated by the exploitation of financial secrecy and opportunities for corporate tax abuse provided by other jurisdictions. Tax also offers scope for repricing of public goods and public 'bads', from tobacco consumption to carbon emissions – without which, the hope for global transformation to protect the planet seems increasingly unlikely.

Last and perhaps most important, effective taxation underpins political representation. The process of contributing through tax underpins the social contract, and gives citizens both the relationship with government and the desire to hold it account for how 'their' money is being spent. The evidence shows that the share of tax in government expenditure is almost alone in being associated, over time, with consistent improvements in democratic governance.[4]

With direct taxes being especially important in the Rs of redistribution and representation, international failures of tax do powerful damage. They not only weaken the overall revenues available to governments – the most easily quantifiable element – but they erode the scope for progressive taxation in particular, and the strength of political representation. The result over time is states with fewer resources and less accountability, pursuing more regressive and less inclusive policies on both the tax and spending sides of the budget.

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[2] Global Alliance for Tax Justice, Public Services International, and Tax Justice Network, *The State of Tax Justice: 2021* (16 November 2021) <https://taxjustice.net/wp-content/uploads/2021/11/State_of_Tax_Justice_Report_2021_ENGLISH.pdf> [accessed 7 May 2022].

[3] Tax Justice Network, 'A Mandate to Tackle IFF and Inequalities Tax Justice Network Submission to the Independent Expert on Foreign Debt, Other International Financial Obligations and Human Rights, Prof. Attiya Waris' Call for Input for Report: Taking Stock and Looking Forward - A Vision for the Work of the Mandate'.

[4] Liz Nelson, *Tax Justice & Human Rights: The 4 Rs and the Realisation of Rights* (7 June 2021) <https://taxjustice.net/reports/tax-justice-human-rights-the-4-rs-and-the-realisation-of-rights/> [accessed 8 September 2021]. P.23.

The human rights impacts are clear too. Women, racialised minorities, indigenous people, LGBT+ groups and people with disabilities are all consistently over-represented in lower-income households – those that stand to benefit most immediately from progressive spending and taxation policies. International tax failures weaken the prospects for effective, representative states to address the overlapping and intersecting inequalities in societies.

Dramatically deepening this damage is the international pattern that results – that lower-income countries see the greatest losses in their taxing rights. It is the states most in need of additional revenues, and where those revenues have the greatest potential to contribute to the progressive achievement of human rights, that suffer the worst losses.

Are there examples or initiatives in the past that might serve to guide this process?

TJN has previously highlighted initiatives within the mandate which serve as guiding documents for the Independent Expert. The influence of the Guiding Principles on foreign debt and human rights (A/HRC/20/23) provides a powerful demonstration of the potential of the mandate to shift discourse, even without hard law changes, as does the questionnaire and report on the international debt architecture (A/76/167) [5].

Several progressive moves towards intergovernmental cooperation and inclusive negotiations for tax justice, progress towards the SDGs and the realisation of rights have been proposed African nations, G77 and others. These initiatives which have given a focus for reform in international tax include AU/ECA High Level Panel on IFFs out of Africa, consistent statements of the Africa Group and G77 at the UN, the UN SG's Initiative on FfD during the Pandemic, and the High-Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda (UN FACTI Panel).

The UN FACTI Panel recommendations aligned with human rights principles and underlined within its recommendations the importance of transparency, accountability and inclusivity. Indeed, the Panel made a multilateral inclusive approach one of the key recommendations of its final report when it called for a UN tax convention and an intergovernmental tax body under UN auspices.

The South Centre – the intergovernmental organisation of lower-income countries – published a briefing by Abdul Chowdhary and our senior adviser Prof Sol Picciotto, detailing a proposal for a framework UN convention on tax;[6] while Eurodad with the support of the Global Alliance for Tax Justice has published a full draft convention.[7] The latter provides a comprehensive set of articles, and

[5] Tax Justice Network, 'A Mandate to Tackle IFF and Inequalities Tax Justice Network Submission to the Independent Expert on Foreign Debt, Other International Financial Obligations and Human Rights, Prof. Attiya Waris' Call for Input for Report: Taking Stock and Looking Forward - A Vision for the Work of the Mandate' (2021).

[6] Abdul Muheet Chowdhary and Sol Picciotto, *Streamlining the Architecture of International Tax through a UN Framework Convention on Tax Cooperation*, Tax Cooperation Policy Brief (1 November 2021) <https://wsouthcentreww..int/tax-cooperation-policy-brief-21-november-2021/> [accessed 27 May 2022]. P.7.

[7] https://taxjustice.net/2022/03/10/a-draft-un-tax-convention-building-momentum/

has been followed by a call for negotiations to begin from the African Union-ECA Conference of Ministers, May 2022.[8]

Other notable initiatives provide important guidance**.** An early blueprint on a multilateral approach to policy reform is the Beijing Declaration and Platform for Action. Targeting gendered inequalities the Declaration is threaded with important human rights principles. It underlines the importance of transparency, accountability and participation as prerequisites to economic reforms:

'a commitment to equal rights, equal responsibilities and equal opportunities and to the equal participation of women and men in all national, regional and international bodies and policy-making processes' (p.7)[9]*.*

In 2017 the Global Alliance for Tax Justice Tax and Gender Working Group, a coalition including of feminist activists and advocates, used the intention of the Beijing Declaration to draft the Bogota Declaration.[10] Marginalised already within a geo-political system favouring private interests and the wealthiest economies, the Bogota Declaration acknowledges women's exclusion from the structures and powerful systems that dominate domestic and international fiscal policy and financial architecture. The progressive standards set out in the Bogota Declaration present a useful guide for underpinning principles that must be reflected in any international tax reforms.

The document 'Framing Feminist Taxation': Making Taxes Work for Women also offers important understanding of how work towards progressive tax reforms using feminist principles could be transformative. This tool provides guidance and recommendations for policy making and advocacy using principles which apply at national, regional and international levels.[11]

2 What should be the nature, scope and purpose of an international tax reform that supports human rights?

The four failings of the international tax governance identified above must each be addressed, for a comprehensive response that supports human rights.

Which alternatives could be considered and how do they differ from each other and from existing efforts of better collection and regulation of international taxation, for example from the OECD/G20 Agreement achieved in 2021, and its Two Pillar Solution?

[8] https://taxjustice.net/press/g7-countries-cost-the-world-115-billion-in-lost-tax-african-finance-ministers-call-for-a-un-tax-convention/

[9] Fourth world Conference on Women, 'Beijing Declaration and Platform for Action: The Fourth World Conference on Women' (1995) <https://www.un.org/womenwatch/daw/beijing/platform/>.

[10] Global Alliance for Tax Justice, 'The Bogota Declaration on Tax Justice for Women's Rights' (2017) <https://www.globaltaxjustice.org/sites/default/files/EN_Bogota-Declaration-Tax-Justice-for-Womens-Rights.pdf> [accessed 28 May 2022].

[11] Global Alliance for Tax Justice, '"Framing Feminist Taxation": Making Taxes Work for Women', *Global Alliance for Tax Justice*, 2021 <https://www.globaltaxjustice.org/en/latest/framing-feminist-taxation-making-taxes-work-women> [accessed 29 May 2022].

The four elements of current failings are each the subject of a specific, proposed solution; and all four could be delivered through the same instrument, a **UN tax convention**. This has the potential to deliver:

- comprehensive, globally inclusive transparency standards covering the ABC – and therefore providing the basis for a global asset registry;
- consistent aggregate statistics and analysis through a Centre for Monitoring Taxing Rights, as proposed by the UN FACTI Panel; and
- the basis to shift to unitary taxation with a genuine and fair, minimum effective corporate tax rate;
- all delivered through a truly inclusive, intergovernmental tax body under UN auspices.

The potential for equal voting on a globally inclusive basis, within the negotiations and the resulting institutions, is the clear strength of these proposals. While much more would need to be done to acknowledge existing formulas that address structural inequalities and embed normative principles of human rights, the potential is for a dramatic step forward from current governance.

3 What would be the advantages/disadvantages of a single global tax entity?

Tax is global, and so too are the benefits of financial transparency – hence the need for common standards. But for too long, these have been set by a small group of countries that include those responsible for the worst damage to each other and third countries. What is needed is a single, intergovernmental tax body, under UN auspices and with full transparency and accountability in its working methods to ensure a fair voice for all, and with the accompanying adequate resources would bring existing initiatives and activities 'under one roof' and 'set them on a sounder basis of political accountability and legitimacy.[12]

A single entity under the auspices of the United Nations, and as proposed in the FACTI Panel recommendations, be compelled to work within with human rights principles. When and where it did not the advocacy arguments and ability to appeal to human rights norms would be clear. Conversely the OECD, the current incumbent, has no requirement to follow human rights law as part of its G20 mandate for international tax reform.

The draft proposal for a UN Convention on Tax published by Eurodad explicitly uses principles based upon the Universal Periodic Review (UPR) process. The draft comments on Article 21 *Compliance* pointing out the desire to follow the underpinning principles from the UPR - 'a transparent process that allows, and in fact encourages, participation by observers'.[13]

[12] Chowdhary and Picciotto, *Streamlining the Architecture of International Tax through a UN Framework Convention on Tax Cooperation*. P.6.

[13] Tove Ryding, *Proposal for a United Nations Convention on Tax* (Brussels, Belgium, 1 March 2022) <https://www.globaltaxjustice.org/sites/default/files/un-tax-convention-mar09-final_0.pdf> [accessed 27 March 2022]. P.38.

How would a global tax body ensure equal representation of the interests, needs and concerns of different States, particularly low and middle-income countries? What would be the advantages/disadvantages of regional fiscal or tax entities?

International reforms and the establishment of one single reforming institution would allow for an incremental approach to compliance in the case of lower income countries. To do so would avoid the risk of resetting along punitive lines in a 'one rule fits all' approach. An example of this applied in the OECD Common Reporting Standard for automatic exchange of information between jurisdictions' tax authorities, would see an end to the requirement for all countries to enter the process immediately on a reciprocal basis, since this has inevitably disadvantaged lower income countries. The burden placed on countries with limited resources to provide the reciprocal information in equal measure was blatantly inequitable. The importance of agreements with a non-reciprocal provision became self-evident.[14] This issue illustrates well the importance of the design and intention of reforms to work with human rights principles including to establish social justice, sustainability within a broader fiscal framework, the non-retrogression in the protection of rights, and creating an enabling environment for the protection of rights.[15]

A single global tax entity could also replace, for example, the complex, outdated, and largely inequitable bilateral tax treaties network. An intergovernmental body with universal coverage could work to simplify the asymmetric arrangements which have unequalised tax treaty negotiations. Such treaties, often a legacy of colonialism, are disadvantaged by inequities of capacity and resources. Lower income countries are often left with unfavourable terms which further embed inequalities.[16] At the same negotiating table high income countries use the advantage of expensive lawyers and other professional advisers, leaving governments from lower income counties with unfavourable terms.

4 What measures and mechanisms should be put in place to ensure that a global tax entity incorporates human rights principles and priorities in its processes and outcomes?

A key principle, as mentioned above, is that must any single global institution should 'create an enabling global governance environment with the aim of achieving the full realization of human rights' (Principle 13).[17] Established within the United Nations, the commitments to the Sustainable Development Goals and the obligations under human rights treaties provide different but critical and established measures and mechanisms for human rights accountability. A Centre

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[14] Andres Knobel and Markus Meinzer, *Automatic Exchange of Information: An Opportunity for Developing Countries to Tackle Tax Evasion and Corruption* (June 2014) <http://www.taxjustice.net/wp-content/uploads/2013/04/AIE-An-opportunity-for-developing-countries.pdf> [accessed 4 May 2022].P.3.

[15] Blanco and others, 'Principles for Human Rights in Fiscal Policy'.P.7.

[16] East African Tax and Governance Network Tax Justice Network Africa, *The Good, the Bad and the Ugly, and Examination of Kenya's Double Taxation Agreements with Portugal and Turkey* (Nairobi, 1 May 2022) <https://taxjusticeafrica.net/wp-content/uploads/2022/05/The-Good-the-Bad-and-the-Ugly-An-Examination-of-Kenyas-DTAs-with-Turkey-and-Portugal-1.pdf?ct=t(EMAIL_CAMPAIGN_5_10_2022_19_17_COPY_01)> [accessed 30 May 2022].

[17] Blanco and others, 'Principles for Human Rights in Fiscal Policy'.

for Monitoring Taxing Rights would also ensure ongoing accountability for the intergovernmental body, for its progress globally and at national level.[18]

5 What would be the arguments in favor of a UN Convention on Tax? What would be the benefits of such an instrument for developing countries, including Small Island Developing States and Least Developed Countries?

As set out above, a key benefit of the UN tax convention approach would be to ensure that the voices of lower-income countries including SIDS and LDCs would be included in rule-setting – reversing the longstanding and structurally racist tradition that these countries have been rule-takers, with current and former imperial powers the rule-setters in most areas related to tax and financial transparency.

6 In recent months, there has been a stronger call for a Global Beneficial Ownership Registry. What should be the process and mechanisms to achieve this goal? What measures or considerations are needed to ensure that such a registry is framed along human rights principles? What practices, legislation or policies at the national or regional level might serve as good references?

All countries should establish central beneficial ownership registries for all types of legal vehicles (companies, partnerships, foundations, trusts, etc). These central registries should be publicly accessible, for free and in open data format. This is the best way to ensure obliged entities (e.g. banks, lawyers), as well as CSOs and journalists will have access to information, to hold authorities to account. In extreme cases where a person's safety could be at risk, authorities could accept restrictions to public access on a case-by-case basis. Information on beneficial owners may lead to disclosure and resolve cases of illicit financial flows including money laundering, tax evasion, corruption or the financing of terrorism.

Once central beneficial ownership registries are established, countries should interconnect their beneficial ownership registries to local asset registries (e.g. real estate, aircrafts, cars, vessels, etc). In this way it will be possible to determine the beneficial owners of assets to determine global inequality, identify money laundering cases, ensure asset recovery or apply wealth taxes.

Again, the basis for a global asset registry of this type would effectively be established by ensuring comprehensive beneficial ownership standards through the UN tax convention; and a specific body could be charged with the establishment of the interlinkages and the registry itself within the negotiated text.

[18] FACTI Panel, *Financial Integrity for Sustainable Development: Report of the High Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda* (25 February 2020) <https://uploads-ssl.webflow.com/5e0bd9edab846816e263d633/602e91032a209d0601ed4a2c_FACTI_Panel_Report.pdf> [accessed 25 February 2021].

7 For a number of years, linked to various global reports from investigative journalists' consortiums, including the most recent "Pandora Papers", there has been a call to better monitor and regulate the activities of some financial advisors, and other professionals, such as lawyers, accountants and notaries, as part of enhancing mechanisms to address tax evasion, tax fraud and corruption. Are there practices, legislation or policies at national or regional levels that could serve as good examples? Are there case studies that could be considered for this report?

Delivering a UN tax convention as envisaged would dramatically change the context for the enablers. In addition to the transformative and comprehensive shift in transparency, which would on its own end much of the scope for the worst abuses, the convention has the scope to deliver broad whistleblower protections also which would greatly empower those seeking to limit the excesses of the 'pinstripe mafia'. A case study which throws light both on the global influence and capture within countries, that continues to threaten trust in governments, relates to Appleby's.[19] See also TJN's briefing on loopholes and solutions.[20]

8 What other issues ought to be addressed by the Independent Expert in this domain, both for her report to the General Assemble, 77th session, and for other activities and initiatives that she may undertake in line with her mandate?

We would be pleased to give this more thought and share suggestions on activities and initiatives that the Independent Expert might explore within her mandate.

[19] Will Fitzgibbon, *'Offshore Magic Circle' Law Firm Has Record of Compliance Failures*, 5 November 2017 <https://www.occrp.org/en/paradisepapers/offshore-magic-circle-law-firm-has-record-of-compliance-failures> [accessed 2 June 2022].

[20] Tax Justice Network, 'Briefing: 10 Measures to Expose Sanctioned Russian Oligarchs' Hidden Assets', *Tax Justice Network*, 2022 <https://taxjustice.net/reports/briefing-10-measures-to-expose-sanctioned-russian-oligarchs-hidden-assets/> [accessed 28 March 2022].