

Ireland's Responsibility for the Impacts of Cross-border Tax Abuse on the Realisation of Children's Economic, Social and Cultural Rights

Submission to the Committee on the Rights of the Child

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This submission is public

I. INTRODUCTION

Ireland is failing to meet its obligations under the Convention on the Rights of the Child (Convention) due to its facilitation of cross-border tax abuse. Cross-border tax abuse refers to practices that aim to reduce or avoid tax payments, for example by shifting corporate profits to low-tax jurisdictions. These practices are particularly harmful for developing countries, which are more dependent on corporate income tax than richer countries.¹ Reduced tax takes undermine the ability of governments to finance the public services required to fulfil their human rights obligations. The effects of cross-border tax abuse for the realisation of human rights have been highlighted by a number of UN experts, including the Special Rapporteur on extreme poverty and human rights.²

Profit shifting is made possible by the interplay of tax policies between countries. Ireland's role as one of the main players in this landscape has been recognised by the European Parliament,³ numerous bodies within the U.S. Congress,⁴ and many esteemed academic commentators.⁵ A recent Working Paper by the National Bureau of Economic

¹ Corporate income tax (CIT) constitutes an average of 15.3% of all tax revenues in Africa, and 15.4% in Latin America and the Caribbean, while wealthy OECD states generate around 9% of their tax revenues from CIT. See OECD Corporate Tax Statistics database <<https://www.oecd.org/tax/beps/corporate-tax-statistics-database.htm>> (last accessed 22 June 2020). Figures are for 2000-2018: see International Monetary Fund, 'IMF Policy Paper: Spillovers in International Corporate Taxation' (9 May 2014) p. 7 <<https://www.imf.org/external/np/pp/eng/2014/050914.pdf>> (last accessed 22 June 2020).

² Special Rapporteur on Extreme Poverty and Human Rights, 'Report of the Special Rapporteur on extreme poverty and human rights', UN Doc A/HRC/26/28 (22 May 2014) (by Magdalena Sepúlveda Carmona) para 24; Philip Alston, 'Tax Policy is Human Rights Policy: The Irish Debate', Keynote Address at Christian Aid conference on The Human Rights Impact of Tax and Fiscal Policy, Dublin (12 February 2015) <https://nanopdf.com/downloadFile/alston-tax-policy-in-word-office-of-the-high-commissioner-on_pdf> (last accessed 30 June 2020); 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, 'Impact of economic reforms and austerity measures on women's human rights' UN Doc A/73/179 (18 July 2018) para 23; Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights, 'Guiding principles on human rights impact assessments of economic reforms' UN Doc A/HRC/40/57 (19 December 2018) para 11.5; Alfred-Maurice de Zayas, Independent Expert on the promotion of a democratic and equitable international order, Statement at the 71st session of the General Assembly (20 October 2016) <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20805&LangID=E>> (last accessed 15 June 2020).

³ European Parliament resolution of 26 March 2019 on financial crimes, tax evasion and tax avoidance (2018/2121(INI)).

⁴ James R White, 'International Taxation: Large U.S. Corporations and Federal Contractors with Subsidiaries in Jurisdictions Listed as Tax Havens or Financial Privacy Jurisdictions' Government Accountability Office, Report to Congressional Requestors GAO-09-157 (December 2008); Offshore Profit Shifting and the U.S. Tax Code—Part 2 (Apple Inc.): *Hearing before the Permanent Subcommittee on Investigations* (S. Hrg. 113-90), U.S. Senate, 113th Cong. (2013) p.78; Jane G Gravelle and Thomas L Hungerford, 'Corporate Tax Reform: Issues for Congress', Congressional Research Service, Report RL34229 (22 September 2017) p. 7.

⁵ See Stephen C. Loomis, 'The Double Irish Sandwich: Reforming Overseas Tax Havens' 43 *St. Mary's Law Journal* (2012) 825; Shane Darcy, "'The Elephant in the Room": Corporate Tax Avoidance & Business and Human Rights' 2 *Business and Human Rights Journal* (2017) 1; Javier Garcia-Bernardo, Jan Fichtner, Frank W Takes and Eelke M Heemskerk, 'Uncovering Offshore Financial Centers: Conduits and Sinks in the Global Corporate Ownership Network' 7 *Scientific Reports* (2017) 6246; Jannick Damgaard, Thomas Elkjaer and Niels Johannesen, 'Some \$12 trillion worldwide is just phantom corporate investment' 55(2)

Research (NBER) found that ‘more than \$616 billion in profits were shifted to tax havens in 2015, close to 40% of multinational profits’, and identified Ireland as ‘the number one shifting destination, accounting for more than \$100 billion alone.’⁶

II. HOW IRELAND’S TAX POLICIES UNDERMINE THE REALISATION OF CHILDREN’S ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN DEVELOPING COUNTRIES

(a) Ireland’s role in encouraging the ‘shifting’ of corporate profits generated in developing countries to Ireland and beyond

Since the 1990s, Irish tax policy has enabled U.S.-headed multinationals to accrue low-tax or tax-free profits from sales made outside the U.S., including in developing countries. Irish tax policy has facilitated various profit-shifting strategies,⁷ all of which essentially involve two stages:

- (i) **Stage 1:** Sales made in non-U.S. countries, including in developing countries, are booked in an Irish company as if they took place in Ireland, depriving those countries of revenue.
- (ii) **Stage 2:** This sales income is normally shifted to a related company registered in Ireland. This company owns the intellectual property (IP) related to the sale: brands, software and other intangibles. The shifted profits are presented as payment for the use of the IP, and the company pays little or no tax on royalties income because of tax-residency rules, tax reliefs and IP allowances provided in Irish tax law.

Many multinationals use Ireland as their base for sales across Europe, the Middle East and Africa, thus shifting profits generated in developing countries to Ireland. These profit-shifting structures have been facilitated and sustained over time by clear Irish policy decisions. These include:

- Opting out of Article 12 of the OECD’s Multilateral Instrument,⁸ designed to prevent corporate profit-shifting. This would have made it harder for

Finance & Development (2018) 50; Alex Cobham, ‘Procuring profit shifting: The State Role in Tax Avoidance’ in Philip Alston and Nikki Reisch (eds) *Tax, Inequality and Human Rights* (OUP 2019) p. 156.

⁶ Thomas R Tørsløv, Ludvig S Wier and Gabriel Zucman, ‘The Missing Profits of Nations’ (NBER Working Paper No. 24701) (June 2018, revised April 2020) pp. 27-28 <<https://www.nber.org/papers/w24701.pdf>> (last accessed 30 June 2020).

⁷ These structures have evolved over time, widely known under the rubrics ‘the Double Irish’, its successor ‘the Single Malt’, and the current ‘Green Jersey’. For detail on their development, see Christian Aid Ireland, ‘“Impossible’ structures: tax outcomes overlooked by the 2015 tax Spillover analysis’ (2017) <<https://www.christianaid.ie/sites/default/files/2018-02/impossible-structures-tax-report.pdf>> (last accessed 30 June 2020); Oxfam Ireland, ‘Mantras and Myths: A true picture of the corporate tax system in Ireland’ (2017) <<https://www.oxfamireland.org/sites/default/files/upload/pdfs/mantras-myths-final.pdf>> (last accessed 30 June 2020).

⁸ OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.

multinationals to avoid taxes on sales made in developing countries by booking them in Ireland,⁹ and therefore would have made Stage 1 more difficult.

- Expanding allowances for the acquisition of IP between companies in the same multinational group:¹⁰ From 2009, the Irish government dramatically increased the types of IP for which acquisition costs could be set against tax. In 2014 it increased to 100% the share of IP-related profits, some of which are generated in developing countries, which could be written off against the cost of acquiring that IP, shrinking the effective tax rate on IP income from an already extremely generous 2.5% to 0%.¹¹ After public criticism, the offset allowance was restored to 80% in October 2017, but the huge amounts of IP that multinationals had moved into Ireland prior to this were explicitly exempted and the relevant multinationals therefore continue to pay 0% tax on IP income.¹²
- Reducing the minimum period over which the cost of IP-related assets may be set against taxable profits, enabling ever greater profits to be shielded from tax in one year.¹³
- Eliminating withholding taxes on most royalty payments out of Ireland, simplifying Stage 2.¹⁴

While international criticism and OECD agreements have led to the termination or restriction of some egregious tax avoidance structures, Irish policy has enabled multinationals to transition to modified structures over the last five years. In particular, the IP capital allowance changes incentivised several multinationals to shift huge amounts of IP into Irish-resident companies. After the Irish government reduced the effective tax on income related to this IP to 0% in 2014, Apple are believed to have moved over US\$240bn of IP to Ireland; this enabled it to shield over €27bn in non-US profits from tax in the first year alone – including profits made in developing countries.¹⁵

⁹ Government of Ireland, 'Reservations and Notifications under the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS' (29 January 2019), p. 31 <<http://www.oecd.org/tax/treaties/beps-mli-position-ireland-instrument-deposit.pdf>> (last accessed 30 June 2020).

¹⁰ Finance Act 2009 (No. 12 of 2009) s 13

¹¹ Finance Act 2014 (No. 37 of 2014) s 40

¹² Finance Act 2017 (No. 41 of 2017) s 25; Seamus Coffey, 'Review of Ireland's Corporation Tax Code presented to the minister of finance and public expenditure and reform by Mr Seamus Coffey' (30 June 2017) <<https://assets.gov.ie/7255/b275ad7f0874433b9d6d0c54c8f84764.pdf>> (last accessed 30 June 2020).

¹³ Finance Act 2010 (No. 5 of 2010) s 43; Finance Act 2011 (No. 6 of 2011) s 37.

¹⁴ Jesse Drucker, 'Man Making Ireland a Tax Avoidance Hub Proves Local Hero', *Bloomberg News* (28 October 2013) <<https://www.bloomberg.com/news/articles/2013-10-28/man-making-ireland-tax-avoidance-hub-globally-proves-local-hero>> (last accessed 30 June 2020); Board of Revenue Commissioners, 'Statement of Practice SP/CT 01-10: Corporation Tax – Treatment of Certain Patent Royalties Paid to Companies Resident Outside the State' <<https://www.revenue.ie/en/tax-professionals/historic-material/statements-of-practice/2010/sp-ct-01-2010.pdf>> (last accessed 30 June 2020).

¹⁵ For the derivation of this figure from Ireland's national accounts, see Seamus Coffey, 'What Apple Did Next' *Economic Incentives* (24 January 2018) <<http://economic-incentives.blogspot.com/2018/01/what->

Microsoft has also used IP-related tax structures to shift taxable profits from developing countries to Ireland. Microsoft's 'regional centre' in Ireland has booked profits from sales in the Middle East and Africa since 2010, and profits from sales in Asia since 2019.¹⁶

(b) How Ireland's tax treaties with developing countries undermine their ability to raise tax revenues from Irish investment

Double tax treaties seek to resolve tax dilemmas for companies and citizens living and working between two countries, or investing in one country's economy from another, by allocating taxing rights between income 'source' (e.g. a developing country where the sale takes place) and 'residence' (Ireland). However, double tax treaties can deprive developing countries of tax revenue that is vital for realising the economic, social and cultural rights of children. They can also create new loopholes for profit-shifting and other forms of cross-border tax abuse. In 2014, the IMF advised that 'developing countries... would be well advised to sign treaties *only with considerable caution*.'¹⁷ A recent IMF policy paper suggests that African countries may lose between 15% and 25% of their entire corporate income tax revenues when they sign tax treaties with 'investment hubs' like Ireland.¹⁸

From Ireland's perspective, double tax treaties can reduce tax burdens on Irish outward investment and make Ireland a more attractive location for multinationals to base their investments and assets. From the perspective of a developing country, however, Ireland is a particularly risky trade partner: its large network of seventy-three tax treaties,¹⁹ its low corporate tax rate, and its generous tax regime mean that tax treaties with Ireland can act as a global 'leaky bathtub', allowing taxpayers to shift income and gains both to a low-tax environment in Ireland, and on to other low-tax jurisdictions.²⁰

[apple-did-next.html](#)> (last accessed 30 June 2020). For Apple's structure of booking foreign sales in Ireland and relocating IP post-2014, see Emma Clancy and Martin Brehm Christensen, 'Exposed: Apple's Golden Delicious Tax Deals: Is Ireland Helping Apple Pay Less Than 1% Tax in the EU?' (report for the GUE/NGL group in European Parliament) (21 June 2018) <<https://emmaclancy.files.wordpress.com/2018/06/apple-tax-structure-and-rate-post-2014-3.pdf>> (last accessed 20 June 2020).

¹⁶ Microsoft Operations Ireland Ltd, Annual Accounts 2019, p. 4; Mark Paul, 'Microsoft moves \$52.8bn of assets and its Asian trading operation to Ireland' *Irish Times* (Dublin, 25 May 2019) <<https://www.irishtimes.com/business/technology/microsoft-moves-52-8bn-of-assets-and-its-asian-trading-operation-to-ireland-1.3903630>> (last accessed 30 June 2020).

¹⁷ International Monetary Fund (n 1) p. 24. Emphasis added.

¹⁸ S. Beer and J. Loeprick, 'The Costs and Benefits of Tax Treaties with Investment Hubs: Findings from Sub-Saharan Africa', IMF Working Paper WP/18/227 (24 October 2018). The paper classifies investment hubs as those economies where the sum of FDI in-stocks and out-stocks is more than double its GDP.

¹⁹ An additional treaty with Ghana (see below) is still awaiting Ghanaian ratification.

²⁰ The analogy is from Michael Keen of the IMF's Fiscal Affairs Division: 'Tax treaties are like a bathtub; a single leaky one is a drain on a country's revenues.' Jim Brumby and Michael Keen, 'Tax Treaties: Boost or Bane for Development?' IMF Blog (16 November 2016) <<https://blogs.imf.org/2016/11/16/tax-treaties-boost-or-bane-for-development/>> (last accessed 30 June 2020).

Ireland is nonetheless expanding its network of double tax treaties, with an explicit focus on developing economies: of the eight treaties currently awaiting final signature and/or ratification, five are with middle-income countries.²¹ In September 2011, the Irish Government launched a new 'Africa Strategy', which committed to supporting Irish trade and Irish businesses operating on the continent.²² Nigeria, Ghana, Mozambique and Botswana were all identified as targets for new tax treaties. As Ireland grants relief in its domestic tax law for most foreign taxes paid by Irish companies, these treaties would reduce these countries' tax take without a commensurate increase in Irish tax take.

Ireland's most recent tax treaty was agreed with Ghana in 2018.²³ This treaty demonstrates how Ireland approaches tax treaties with developing countries:

- As part of its new Africa Strategy, Ireland approached Ghana in 2012 with a view to negotiating a tax treaty.²⁴ A Government Minister subsequently told Dáil Éireann (the lower house of the Irish parliament) that Ghana had approached Ireland.²⁵ He later apologised when campaigners released documents showing that the opposite was true.²⁶

²¹ Azerbaijan, Ghana, Kazakhstan, Kenya, Kosovo and Turkmenistan. See Revenue Commissioners, 'Double taxation treaties' (2020) <<https://www.revenue.ie/en/tax-professionals/tax-agreements/double-taxation-treaties/index.aspx>> (last accessed 30 June 2020)

²² Government of Ireland, 'Ireland and Africa: Our Partnership with a Changing Continent, An Africa Strategy for the Department of Foreign Affairs and Trade' (September 2011) paras 2.5-2.6. See also See Government of Ireland, 'Global Ireland: Ireland's Strategy for Africa to 2025' (2018) p. 11 <<https://www.dfa.ie/media/dfa/publications/Global-Ireland---Irelands-Strategy-for-Africa-to-2025.pdf>> (last accessed 22 June 2020): '[we will...] [e]xpand and enhance Ireland's network of Double Taxation Agreements in Africa...'
<<https://www.dfa.ie/media/irishaid/allwebsitemedia/20newsandpublications/publicationpdfsenglish/africa-strategy.pdf>> (last accessed 22 June 2020).

²³ Convention Between Ireland and the Republic of Ghana for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital Gains (7 February 2018) <<https://www.revenue.ie/en/tax-professionals/documents/double-taxation-treaties/g/ghana.pdf>> (last accessed 29 June 2020).

²⁴ Mike Lewis, 'Irish double tax agreement threatens revenue losses in Ghana' in *Trapped in Illicit Finance: How abusive tax and trade practices harm human rights* (Christian Aid et al., September 2019) p. 24 <<https://www.christianaid.ie/sites/default/files/2019-09/trapped-in-illicit-finance-report-sep2019.pdf>> (last accessed 29 June 2020); Dáil Éireann debate - 7 Nov 2018, Vol. 974 No. 5 (Personal Explanation by Minister of State) <<https://www.oireachtas.ie/en/debates/debate/dail/2018-11-07/28/?highlight%5B0%5D>> (last accessed 22 June 2020).

²⁵ Select Committee on Finance, Public Expenditure and Reform, and Taoiseach Debate - 20 Sep 2018 (Taxation Agreement: Motions) <https://www.oireachtas.ie/ga/debates/debate/select_committee_on_finance_public_expenditure_and_reform_and_taoiseach/2018-09-20/3/> (last accessed 30 June 2020): 'In 2012, officials from the Ministry of Foreign Affairs of the Republic of Ghana raised with the Department of Foreign Affairs and Trade the possibility of negotiating a double tax agreement with Ireland.'; Dáil Éireann debate - 3 Oct 2018, Vol. 972 No. 8 (Taxation Orders 2018: Motion) <<https://www.oireachtas.ie/en/debates/debate/dail/2018-10-03/41/>> (last accessed 22 June 2020): 'In 2012, officials from the Republic of Ghana raised with the Department of Foreign Affairs and Trade the possibility of negotiating a double tax agreement with Ireland.'

²⁶ Dáil Éireann debate Vol. 974 No. 5 (n 24).

- Ireland has been Ghana's largest source of foreign direct investment (FDI) since 2012 and provided one-third of its FDI in 2016.²⁷ In this context, Ireland sought to agree a favourable tax treaty. A Government Minister told Dáil Éireann that '[t]he Ghanaian negotiating team was led by a member of the UN Committee of Experts on International Co-operation in Tax Matters... and was well placed to determine what was or was not in their interests'.²⁸ However, documents released through a freedom of information request show that agreement on the treaty was actually only reached after the Irish ambassador to Ghana went over the heads of the Ghanaian Revenue Authority and Finance Ministry experts negotiating the treaty to lobby the Ghanaian Deputy Minister of Finance directly.²⁹
- A Government Minister told a parliamentary committee examining the Ghana treaty in 2018 that the benefits of double taxation agreements for developing countries are 'well known'.³⁰ This directly contradicted a ministerial briefing note issued by officials in the Department of Foreign Affairs and Trade at the start of the Ghana negotiations, which noted that 'the effect of many double taxation agreements is that capital flows from developing to developed nations'.³¹ The latter point was made again at an Africa Strategy Committee meeting in relation to Ghana.³² The Irish government carried out no impact analysis on the tax treaty or its potential impact on rights in Ghana.³³
- Ireland's treaty with Ghana will have a detrimental effect on Ghana's ability to raise tax revenues. The treaty provisions run contrary to the recommendations of both the IMF and the UN Tax Committee,³⁴ and the treaty lacks any of the protections which the OECD member states agreed in 2015 were necessary to provide 'the minimum level of protection against treaty abuse'.³⁵ The DFAT ministerial briefing had highlighted that seeking to minimise withholding tax 'would clearly not be encouraged in relation to developing nations',³⁶ but the Irish government nonetheless explicitly negotiated to halve Ghanaian withholding taxes on royalties and technical services fees.³⁷

²⁷ Mike Lewis (n 24) p. 24.

²⁸ Dáil Éireann debate Vol. 972 No. 8 (n 25).

²⁹ Mike Lewis (n 24) p. 26.

³⁰ Select Committee on Finance et al. (n 25).

³¹ Prepared by the Africa Section of Ireland's Department of Foreign Affairs and Trade in November 2012 for the implementation committee of the Africa Strategy mentioned above (obtained by Christian Aid Ireland).

³² *ibid.*

³³ Dáil Éireann debate Vol. 972 No. 8 (n 25)..

³⁴ Mike Lewis (n 24) p. 25. See International Monetary Fund (n 1); United Nations Department of Economic & Social Affairs, *Model Double Taxation Convention between Developed and Developing Countries (2017 Update)* ST/ESA/PAD/SER.E/213.

³⁵ Mike Lewis (n 24) p. 25.

³⁶ Prepared by the Africa Section of Ireland's Department of Foreign Affairs and Trade in November 2012 (n 31).

³⁷ Mike Lewis (n 24) p. 24.

- Ghanaian children are especially vulnerable to the effects of tax abuse. As the Committee noted in relation to Ghana, ‘the budget for children’s related expenditure appears to be insufficient to respond to national and local priorities for the protection of children’.³⁸ An estimate for 2013 puts foregone tax revenue for Ghana due to corporate tax abuse at US\$340m.³⁹ According to a tool developed by researchers at the University of St Andrews, a US\$340m increase in Ghanaian government revenue in 2013 could have prevented 170 child deaths.⁴⁰

(c) How Ireland’s ‘Spillover Analysis’ fails to adequately take account of the impact of Irish tax policy on developing countries’ revenue-raising abilities

The Irish government has repeatedly sought to minimise evidence of the potential ‘spillover’ impact on developing countries of its tax policies. In 2014, to its credit, it commissioned an initial ‘Spillover Analysis’ of its tax regime on developing economies. In almost every case, however, the Analysis dismissed any significant negative impact on the ground that the flow of trade and investment between Ireland and developing countries is insignificant, both in absolute terms and in proportion to overall foreign investment into those countries. It concluded that ‘the Irish tax system on its own can hardly lead to significant loss of tax revenue in developing countries. It is a combination of elements involved.’⁴¹

This Analysis used incomplete data and ignored several important economic linkages between Ireland and developing countries:

- It examined an excessively narrow list of just thirteen developing countries.
- Twelve of these countries were among the lowest developing country recipients of Irish FDI, compared to the size of their economies. The Analysis ignored at least thirteen other developing countries which receive more FDI proportionally to

³⁸ Committee on the Rights of the Child, ‘Concluding observations on the combined third to fifth periodic reports of Ghana’ CRC/C/GHA/CO/3-5 (9 June 2015) para 14.

³⁹ Alex Cobham and Petr Jansky, ‘Global Distribution of Revenue Loss from Corporate Tax Avoidance: Re-Estimation and Country Results’ 30 *Journal of International Development* (2018) 206, 231, estimate the losses for Ghana for 2013 to be between US\$340m and US\$390m.

⁴⁰ This figure is based on G-LIST (the Global Lives Improved and Saved Tool), developed at the University of St Andrews <<http://med.st-andrews.ac.uk/glist/>> (last accessed 26 June 2020). The research underpinning this tool is forthcoming in the *Open Economies Review*: S Hall, J Illian, I Makuta, K Mc Nabb, S Murray, B O’Hare, N Bar-Zeev et al, ‘Government Review and Child Maternal Mortality’ (forthcoming) *Open Economies Review* (2020).

⁴¹ IBFD, ‘IBFD Spillover Analysis Possible Effects of the Irish Tax System on Developing Economies’ (July 2015) p. 4 <http://www.budget.gov.ie/Budgets/2016/Documents/IBFD_Irish_Spillover_Analysis_Report_pub.pdf> (last accessed 30 June 2020).

their economies.⁴² For example, Ghana (which, as noted, is a major recipient of Irish FDI) was not included.

- It examined data for just two years (2009 and 2012), i.e. 4% of the available data on Irish investment into developing countries.
- It ignored indirect investment linkages, as well as the many financial flows often used for profit-shifting but not reflected in international investment figures, such as royalties and commissions/service fees.

(d) Why Ireland's opposition to the establishment of a UN tax body undermines the creation of a more equitable global taxation system

A UN mandated body to address cross-border tax abuse and establish a more equitable global taxation system, similar to other multilateral approaches set up tackle global challenges such as climate change, is an important institutional requirement for addressing this issue. While the Group of 77 have long called on the UN to create such a body, developed countries, including Ireland, have insisted that global tax reform negotiations take place at the OECD, where full membership is limited to developed countries.⁴³ Despite the establishment of the Inclusive Framework on Base Erosion and Profit Shifting (BEPS), the agenda, priorities and outcomes of OECD instruments have reflected the priorities of its developed country membership, while developing countries' concerns have either been ignored or delayed.⁴⁴ A collective submission from the Civil

⁴² Christian Aid Ireland, *Global Linkages: re-examining the empirical basis of the 2015 tax Spillover Analysis* (November 2017) pp. 5-6 <<https://www.christianaid.ie/sites/default/files/2018-02/global-linkages-tax-report.pdf>> (last accessed 30 June 2020).

⁴³ See, for example, Statement on Behalf of the Group of 77 and China by Mr. Eliesa Tuiloma, Counsellor, Permanent Mission of Fiji to the United Nations, at the Special Meeting on International Cooperation in Tax Matters (New York, 29 May 2013) <<https://www.g77.org/statement/getstatement.php?id=130529>> (last accessed 25 June 2020); Statement on Behalf of the Group of 77 and China by Carola Iñiguez, Undersecretary of International Organizations of Ecuador, at the ECOSOC Special Meeting on International Cooperation in Tax Matters (New York, 2 April 2017) <<http://www.g77.org/statement/getstatement.php?id=170407b>> (last accessed 25 June 2020); Statement on Behalf of the Group of 77 and China by H.E. Minister Dr. Riyad Mansour (State of Palestine), Chair of the Group of 77, at the 2019 ECOSOC Forum on Financing for Development Follow-Up (New York, 15 April 2019) <<https://www.g77.org/statement/getstatement.php?id=190415c>> (last accessed 26 June 2020). See also the Statement of Mr. Alfred-Maurice de Zayas, Independent Expert on the promotion of a democratic and equitable international order at the Human Rights Council 30th Session (Geneva, 16 September 2015) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16461&>> (last accessed 25 June 2020).

⁴⁴ In 2015, as part of the BEPS' Project, over 60 predominantly developed countries agreed a series of actions designed to tackle corporate profit-shifting. The Inclusive Framework on BEPS was only established in 2016, to allow other countries, including developing countries, to participate in this process. Many have chosen not to do so, however, as it would require them to sign up to the package of actions agreed in 2015 which they had no meaningful part in negotiating. See Report of the Inter-agency Task Force on Financing for Development, *Financing for Sustainable Development Report 2020* (New York: United Nations, 2020) pp. 43-44; and Joint response to OECD public consultation document on the review of Country-by-Country Reporting (BEPS Action 13) (March 2020)

Society Financing for Development Group (CSFDD) to the High Level Panel on International Financial Accountability, Transparency and Integrity (FACTI Panel) recently noted:

*Developing countries and civil society organisations have expressed the need for the creation of a transparent and inclusive intergovernmental tax commission under the auspices of the UN... corporate tax abuse is a form of corruption that hits the poorest hardest. This must be central to the work of the FACTI panel, and not left to an unrepresentative process at the OECD in which challenging poverty is not an objective.*⁴⁵

The CSFDD submission further notes, however, that ‘some OECD member states are very reluctant to move forward the work on tax avoidance within the UN.’⁴⁶ Ireland, which is among these countries, has refused to support the establishment of a UN tax treaty body.⁴⁷

III. IRELAND’S DUTIES UNDER THE CONVENTION TO ADDRESS ITS CONTRIBUTION TO CROSS-BORDER TAX ABUSE

As an absolute minimum, Ireland is required to ‘refrain from acts which would defeat the object and purpose’ of the Convention.⁴⁸ Furthermore, Ireland has a duty to respect, a duty to protect, and a duty to fulfil children’s rights.⁴⁹ These duties apply whenever Ireland is acting within its ‘jurisdiction’, and the Committee has made it clear that this extends beyond the State Party’s ‘territory’.⁵⁰ The authoritative Maastricht Principles on

<https://financialtransparency.org/wp-content/uploads/2020/03/Submission-letter-OECD-consultation-on-CBCR.pdf>> (last accessed 26 June 2020) pp. 3-6.

⁴⁵ Civil Society Financing for Development (CS FFD) Group, ‘Statement at Launch of the FACTI Panel for Achieving the 2030 Agenda’ (3 March 2020) <<https://csoforffd.org/2020/03/03/statement-at-launch-of-the-high-level-panel-on-international-financial-accountability-transparency-and-integrity-for-achieving-the-2030-agenda-facti-panel/>> (last accessed 26 June 2020). See also Civil Society Financing for Development (CS FFD) Group, ‘Civil Society FFD Group Statement at FACTI Panel global townhall’ (28 April 2020) <<https://csoforffd.org/2020/04/28/civil-society-ffd-group-statement-at-facti-panel-global-townhall/>> (last accessed 26 June 2020).

⁴⁶ CSFFD, Statement at Launch of the FACTI Panel, *ibid*.

⁴⁷ See, for example, Dáil Éireann debate – Wednesday, 7 Oct 2015 Vol. 892 No. 1 (Corporate Tax Policy: Motion) <<https://www.oireachtas.ie/en/debates/debate/dail/2015-10-07/28/>> (last accessed 1 July 2020); Dáil Éireann debate – Tuesday, 20 Jan 2018 Vol. 964 No. 4 (Tax Agreements) <<https://www.oireachtas.ie/en/debates/debate/dail/2018-01-30/17/#s18>> (last accessed 25 June 2020).

⁴⁸ Vienna Convention on the Law of Treaties art 18.

⁴⁹ Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) CRC/C/GC/14 para 16 (d); Committee on the Rights of the Child, General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights CRC/C/GC/16 (hereinafter CRC, General comment No. 16) paras 4, 25-29, 41.

⁵⁰ See Convention on the Rights of the Child art 2(1); CRC, General comment No. 16 para 39. The Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, (2012) (hereinafter Maastricht Principles) notes that this approach is reflected across a jurisprudence from bodies such as the International Court of Justice, the European Court of Human Rights, the Human Rights Committee, and the Inter-American Commission: Olivier De Schutter, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon, and Ian Seiderman, ‘Commentary to the

Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights interpret 'jurisdiction' to cover, *inter alia*: 'situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory'; and 'situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law'.⁵¹

The Committee has also explained that States 'must ensure that the best interests of the child are central to the development of legislation and policies that shape business activities and operations, such as those relating to... taxation... and other general economic trade or financial issues.'⁵² As such, when Ireland develops tax policies or negotiates tax treaties, it must respect, protect, and fulfil the rights of children who stand to be affected by these actions.

First, the obligation to respect means that Ireland 'should not directly or indirectly facilitate, aid and abet any infringement of children's rights'.⁵³ This obligation requires State Parties to give full and transparent consideration to how any business-related policy, legislation or administrative acts will impact children's rights,⁵⁴ and to avoid conduct that will foreseeably risk impairing the rights of persons beyond the State's borders.⁵⁵ The Convention requires that '[w]ith regard to economic, social and cultural rights, States Parties shall undertake measures to the *maximum extent of their available resources*...'⁵⁶ By actively facilitating corporate profit-shifting, and by pursuing tax treaties which reduce the resources available to developing countries, Ireland is breaching its obligation to respect.

Ireland's Spillover Analysis also fails to properly account for the impact of its tax policies on developing countries. That analysis' conclusion that these policies are justified on the

Maastricht Principles' 34 Human Rights Quarterly (2012) 1084, 1104–09. See also *Legal Consequences of the Construction of a Wall* (Advisory Opinion) [2004] ICJ Rep 136, paras 109 and 113; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Merits) [2005] ICJ Rep 168, paras 216-217.

⁵¹ Maastricht Principles Section II, 6 princ 9.

⁵² CRC, General Comment No. 16 (n 49) para 15.

⁵³ CRC, General comment No. 16 (n 49) para 26.

⁵⁴ *ibid*.

⁵⁵ Magdalena Sepúlveda Carmona (n 2) para 30. Emphasis added. The Maastricht Principles also explain that 'States must desist from acts or omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. The responsibility of States is engaged where such nullification or impairment is a foreseeable result of their conduct. Uncertainty about potential impacts does not constitute justification for such conduct.' Maastricht Principles, Section II, 7, princ 13.

⁵⁶ Convention on the Rights of the Child art 4, emphasis added. As the Committee has recognised, 'ineffective taxation systems... can limit the resources available for the fulfilment of children's rights': CRC, General comment No. 16 (n 49) para 55.

basis of the relatively limited contribution to developing countries' lost revenues made by Ireland's tax policies is untenable as a matter of international law.⁵⁷

Second, the obligation to protect requires that States 'take all necessary, appropriate and reasonable measures to prevent business enterprises from causing or contributing to abuses of children's rights'.⁵⁸ Instead of *preventing* abuses, Ireland is *enabling* tax abuse, thus hindering the realisation of children's rights. Moreover, the duty to protect rights is relevant when States act through international organisations, for example when deciding whether to support international rights-protecting instruments and bodies. The UN Guiding Principles on Business and Human Rights require that when states act as members of multilateral institutions, they should 'encourage those institutions... to protect against human rights abuse by business enterprises'.⁵⁹ Ireland's consistent opposition to the creation of a UN tax body is inconsistent with its obligation to protect.

Third, the obligation to fulfil requires State Parties to take positive action to create an international environment which enables the fulfilment of economic, social and cultural rights.⁶⁰ The Committee has explained that 'to meet this obligation, States should provide stable and predictable legal and regulatory environments which enable business enterprises to respect children's rights. This includes clear and well-enforced law and standards on... taxation...'⁶¹ Ireland is creating a regulatory environment which enables business enterprises to *prevent* children's rights from being realised.

States must also engage in international cooperation with a view to securing the realisation of children's rights beyond States' territorial boundaries,⁶² particularly in developing countries.⁶³ The Committee has noted that 'international... cooperation for the realization of children's rights can include... measures relating to taxation [and]

⁵⁷ See, by analogy, the rejection by the ICJ in the *Bosnian Genocide* case of a similar defence where the Court noted that 'the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result [...] which the efforts of only one State were insufficient to produce.' *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 para 430.

⁵⁸ CRC, General Comment No. 16 (n 49) para 28.

⁵⁹ Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011) 11, princ 10 (a). The Commentary to the Principles explains that '[c]ollective action through multilateral institutions can help States level the playing field with regard to business respect for human rights, but it should do so by raising the performance of laggards.' *ibid* p. 12.

⁶⁰ Magdalena Sepúlveda Carmona (n 2) para 31; CRC, General Comment No. 16 (n 49) para 29.

⁶¹ CRC *ibid*. See also UN Guiding Principles on Business and Human Rights (2011) (HR/PUB/11/04) princ 3.

⁶² CRC *ibid* para 41. International Covenant on Economic, Social and Cultural Rights art 2(1) also requires that States parties 'take steps ... through international assistance and cooperation' in order to create an environment conducive to the realization the rights recognized in the Covenant. See also Committee on the Rights of the Child, General comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para 6) CRC/GC/2003/527 para 60.

⁶³ Convention on the Rights of the Child arts 4, 17 (b), 22 (2), 24 (4), 28 (3). See also Optional Protocol on the sale of children, child prostitution and child pornography, art 10, and Optional Protocol on the involvement of children in armed conflict, art 10.

combatting tax evasion'.⁶⁴ The importance of international cooperation in combatting tax abuse has been noted by the OECD,⁶⁵ the Managing Director of the World Bank,⁶⁶ the Committee on Economic, Social and Cultural Rights,⁶⁷ and the former Special Rapporteur on extreme poverty and human rights.⁶⁸ However, Ireland has failed to engage in international cooperation through its approach to tax treaty negotiations with developing countries, by opposing the establishment of a UN tax body, and by refusing to ratify Article 12 of the OECD's Multilateral Instrument.

In sum, Ireland has knowingly taken actions which undermine the capacity of developing countries to secure children's Convention rights. For the above reasons, these actions constitute a failure to comply with the Convention. On this basis, the submitting organisations respectfully recommend that the Committee includes the following question in its List of Issues Prior to Reporting:

Please provide information on the measures Ireland is taking to prevent its tax policies having negative effects on the realisation of children's rights extraterritorially, in particular in developing countries.

⁶⁴ CRC, General Comment No. 19 (2016) on public budgeting for the realization of children's rights (art 4) CRC/C/GC/19 para 75.

⁶⁵ OECD, 'Addressing Base Erosion and Profit Shifting' (2013) 45 notes that it may be 'very difficult for any single country, acting alone, to combat BEPS [erosion or tax bases by profit shifting] behaviours.' See also OECD Final Reports of the BEPS project for reform of the international tax system to tackle tax avoidance (October 2015).

⁶⁶ Speech by World Bank Managing Director and COO Sri Mulyani Indrawati at Event on Tax Evasion and Development Finance (17 April 2015)
<<https://www.worldbank.org/en/news/speech/2015/04/17/speech-wb-md-coo-sri-mulyani-event-tax-evasion-development-finance>> (last accessed 16 June 2020).

⁶⁷ Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities E/C.12/GC/24 paras 29, 37.

⁶⁸ Magdalena Sepúlveda Carmona (n 2) para 32.