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# Submission from the Financial Transparency Coalition to the Financial Accountability Transparency and Integrity Panel (FACTI Panel)

November 30th, 2020

This submission is on behalf of the Financial Transparency Coalition, prepared by the Independent Working Group on Illicit Financial Flows. We would also like to refer to our previous submission to the FACTI Panel on the nature and aspects of illicit financial flows (IFFs), where we argued that various tax abuses are not adequately recognized, acknowledged or tackled in the current tax system. Meanwhile, the same abusive structures also facilitate financial crime, making the two issues closely interrelated. We have a vital opportunity to move forward the stalled debate around defining and tackling IFFs, an issue whose importance has never been greater given the ongoing COVID-19 pandemic.

We would like to share both our overarching comments on aligning the purpose of the FACTI Panel with human rights and the Sustainable Development Goals, and specific feedback on the questions for consultation in this process in the following areas: 1) International Architecture; 2) Addressing Enablers; 3) Financial Reporting and Information Exchange – in particular the role of non-state actors.

## Overarching Issues

**We believe and hold that the Panel's work should be grounded in principles of human rights and substantive gender equality**. This means both looking at grounding the very definitions of the different clusters of work in terms of a rights-based international architecture that works towards substantive gender equality, where principles of equality, non-discrimination and dignity are mainstreamed in the international tax and financial crime architecture. We have recently made submissions to international human rights treaty bodies to consider this discrepancy in their work, and to update guidance to states regarding the impact of cross-border tax abuse and financial crime issues on the enjoyment of human rights, including rights of children and women's rights. We are pleased to say that treaty body commissions and special rapporteurs are increasingly considering these proposals as arguments they will use to monitor human rights standards in international financial and tax architectures.

The **current architecture is based on a false assumption that commercial and financial secrecy considerations are more important than human rights and substantive gender equality**. We find that the current structure is falsely justified by promoting economic growth, which should not be a metric of success as it does not consider distributional impacts, extra-territorial obligations of states to not harm the rights of citizens in other countries who suffer from resource outflows that we estimated earlier amount to $416bn for the Global South governments. Instead of the current system, we should instead recognize the primacy of human rights as the key objective of the design of international financial architecture and follow through the guidance that human rights treaty bodies, regional commissions, and CEDAW committee provide for rebuilding an international financial and tax system that promotes rather than trumps rights and substantive gender equality.

**The Panel's work should contribute towards the realisation of the Sustainable Development Goals (SDGs) and the achievement of the Addis Ababa Action Agenda (AAAA).** The sustainable development and the development financing framework both included a commitment to stem out IFFs, even if at its initial stages a working definition was not agreed at the UN level despite international definitions already in use and operationalised at the African level following the work of the High-Level Panel (HLP) on Illicit Financial Flows from Africa. We note the draft indictor for IFFs in the SDG monitoring framework, and hope to reinforce it with independent monitoring and follow-up as civil society in both analysing cases of IFFs and their implications for international norms and standards, as well as promoting a greater understanding of the legal and regulatory gaps that still promote IFFs despite international agreement to stem them out.

**It is vital that financial crime and tax abuses are addressed in the regional context** as the regionalization of the agenda is an important step in the path to addressing tax abuses and financial crime as aspects of IFFs. In the European context we have a regional political body with the capacity of tackling some aspects of IFFs in both the European Union and MONEYVAL as part of OSCE. MONEYVAL rules have been implemented in some secrecy jurisdictions that are not part of the European Union, including the Isle of Man. In Asia-Pacific, there is no political regional body to tackle issues related to tax abuses.[1] Regional institutions tackling financial crime are lacking apart from an implementation focused forum concerning money laundering standards that once again, are not political bodies, but it mainly adopts the FATF recommendations. In Latin America and the Caribbean there is an existing regional tax administration body (CIAT), which supports the work of tax administrations with existing tax norms established by the OECD and the UN, as well as regional proposals based on experiences of LAC countries, while refraining from making political decisions at the regional level. In Africa, the African Tax Administration Forum (ATAF) has existed since 2005, and it is starting to create space for regionally adapted norms, but it still mainly implements OECD rules even though no African country is a member of the OECD.

## Regional experiences of tax abuse and financial crime

**Regional experiences and specific concerns raised in these regional settings to make more adapted, equitable and effective global norms.** We request the Panel to recommend mechanisms and solutions to address IFFs within the UN context (as opposed to other undemocratic Northern economic governance bodies and mechanisms), especially as it recognizes tax-related IFFs as a human rights and sustainable development issue. Civil society has long asked for the establishment of a democratic, intergovernmental tax body under the auspices of the UN. In the absence of a tangible, multilateral process in Asia-Pacific, Latin America and the Caribbean or indeed Africa, low-income and middle-income countries in these regions who are not members of the OECD that only represents high-income countries still run the risk of underrepresentation and ignoring their specific concerns, context and types of IFFs both in areas of financial crime and tax abuses. The FACTI Panel should recognize this.

ADB has committed to establishing a regional hub on domestic resource mobilization and international tax cooperation. ADB reiterated the body's focus would be on developing and low-income countries in Asia and the Pacific, and establish a meaningful channel between Asia-Pacific and bodies like the International Monetary Fund, the World Bank, OECD and regional cooperation forums. Meanwhile, we found that high-income countries in the Asia-Pacific region still maintain a preference for OECD-based norms, for instance, Singapore is inclined towards the completion of the BEPS 2.0 process and its complete implementation, as is Japan (not present at the FACTI regional consultation on 18 November, 2020). There is a concentrated effort on part of developed countries in trying to drive conversations on tax and IFFs away from the UN towards the OECD.

In the **Latin American and the Caribbean context, a few regional and national methods of tackling tax abuse and financial crime have been developed**, despite being counter to recommendations by OECD or FATF. For example, Brazil has different rules considering that taxation of MNCs based on fixed parameter pricing rather than a market-based interpretation arm's length principle. They argue this is necessary given both low number of MNCs and thus no stable market prices, and secondly market prices being prone to tax abuse due to profit shifting and mispricing of trade that takes place in a cross-border fashion. At the same time however, Brazil – in its bid to become an OECD member – has simultaneous discussions regarding aligning itself with the arm's length principle. Brazil, along with many LAC countries, has a list of non-cooperative tax jurisdictions that pose a high risk in terms of money laundering and tax

[1] The Asian Development Bank (ADB) is creating a mechanism to serve as a regional hub for exchanging knowledge and information across its partners and other institutions as part of the effort to promote domestic resource mobilization and international tax cooperation.

abuse. Argentina has recently implemented a one-off tax on the super-rich based on access to greater financial information exchange.

In the **African context, there is a particular concern over implementing mineral resource taxation,** where no international norms exist that can support effective taxation of mineral resources. It is in the context of the African Mining Vision (AMV) as well as the ECOWAS Mining Code that have established minimum standards for revenue mobilisation in the mineral extractive sector. Minimum standards in extractive sectors, however, are not adequate in tackling other tax abuses such as capital gains tax abuses, trade mispricing or corporate tax abuses which depend more on effective creation and implementation of international norms and rules in additional to regional rules and norms. The African Tax Administration Forum (ATAF) as a regional tax co-operation body of tax administrations has mainly focused on capacity building, and adaptation of international standards into the African regional context rather than creation of new standards outside of the mineral extractive industry context.

## Double Tax Treaties

What we found in our research on tax-related IFFs is that they are often enabled by international treaties, such as double tax treaties or even bilateral investment treaties, and they have enabled in some cases to abuse tax laws due to a mismatch where not paying a capital gains tax on sale of minerals, telecoms and other assets in a developing country setting.

A coalition of Irish and international NGOS made to the UN Committee on the Rights of the Child which on November 7, 2020 for the first time ever, approved the inclusion of a question examining the human rights impact of Irish tax policy on children in countries of the Global South. We see real change happening when human rights and especially focus on rights of children are at the heart of tax policy making, and we are monitoring these.

Crucially for the work of this Panel, our submission to UN Committee on the Rights of the Child makes clear that while double tax treaties can resolve tax dilemmas for companies and citizens living and working between two countries, or investing in one country's economy from another, if they are negotiated between countries on an unequal footing, double tax treaties can unfairly deprive developing countries of taxing rights that are vital to reducing aid dependency, protecting their citizens' rights and developing their economies.

As civil society we raised this issue as part of its periodic review process will be assessing the measures that Ireland is engaging in to ensure that Irish tax policy is not undermining the capacity of countries of the Global South to resource their commitments under the Convention. They can also open up new loopholes for profit-shifting and other forms of cross-border tax avoidance and tax abuse. In 2014, IMF tax policy staff advised that "**developing countries…would be well advised to sign treaties only *with considerable caution***."

A recent study by the World Bank and IMF economists suggests that African countries may lose between 15 and 25 per cent of their corporate income tax revenue when they sign tax treaties with investment hubs like Mauritius, Ireland or Switzerland. In 2018, Ireland signed a treaty with Ghana, despite being advised against doing so by the Irish Department of Foreign Affairs, which advised that 'treaties between developed and developing countries can lead to capital flowing from a developing to a developed country'.

The treaty that was signed, although still to be ratified by Ghana, is problematic, and will lead to revenue loss for Ghana. Our first concern is about **Ireland explicitly negotiated to halve Ghanaian withholding taxes (WHT) on royalties and (closely related) technical services fees**, thereby opening Ghana to profit-shifting into and via Irish companies, particularly through royalty payments on IP (a serious vulnerability given the growing use of Ireland as a global low-tax hub for locating internationally-licenced IP, described above).

We are also concerned that **treaty also limits Ghana's ability to tax foreign investors' capital gains from the sale of valuable companies and assets in Ghana**, against the recommendations of IMF and UN tax experts which have warned that single transactions of this kind have individually deprived some developing countries of several billions of dollars of potential tax revenues. This is not exclusively an issue of Irish tax policy, as we also have European countries that have harmful tax policies that create loopholes for abusing tax laws in the developing world.

In 2011, the Argentine government established the Commission for the Evaluation and Review of Agreements to Avoid Double Taxation to analyze and evaluate the DTAAs in force or planned to be entered into, carrying out a periodic monitoring of their tax implications of the same and proposing their renegotiation or maintenance. Argentina denounced its agreements with Austria in 2008, and Switzerland, Chile and Spain in 2012 given they generated manoeuvres to avoid taxes. Tax avoidance due to the DTAA with Spain in 2011 stood at over $60 million, representing more than 8% of the annual collection of personal property tax. Commission sources estimated that tax avoidance through tax engineering with Chile in 2011 represented losses for the Argentine bank of $75 million.

We have also found that **capital gains taxes charged on the increased value of the asset when they are sold are being undermined by provisions in Double Tax Treaties**. One example of this is the case of Ncell, where the leading telecoms company in Nepal was sold from Telia to Axiata. However, the sale took place between holding companies of these two multinationals, where Telia sold its holding company based in St. Kitts and Nevis, which in turn was held by a Norwegian company to a subsidiary of Axiata.

**This raises a question of treaty shopping and benefiting from specific features of jurisdictions as the obvious reason why the holding company is in St. Kitts and Nevis relates to the jurisdiction not charging corporate taxes on foreign earned profits, but then it has no double Tax Treaty with Nepal, so for purposes of abusing capital gains tax laws the company (Telia) considered the ownership of the asset lie at the next level of the corporate ownership chain in Norway.** From the Nepalese standpoint capital gains tax was chargeable, while from Telia's standpoint they argued that on the basis of the Nepal-Norway double tax treaty no tax was due as capital gains tax was not a provision in the article 13.5 of the Nepal-Norway Double Tax Treaty which followed the OECD model tax treaty in this respect.

**We also find that Bilateral Investment Treaties (BIT) are used to raise arbitration cases against taxes borne by multinational corporations in developing countries. This may happen via an unexpected route that raises questions of treaty shopping.** The ultimate tax charge in the case of Ncell, as in other international cases involving capital gains tax disputes, was then borne by the buyer of the asset, Axiata, which lost a case in the Nepalese Supreme Court on the matter of paying the charge. Axiata, however, considered this an unfair charge and utilised the Nepal-UK Bilateral Investment Treaty (despite being a Malaysian headquartered company) as they have a financial subsidiary in the UK that was the part of the company raising the arbitration case. This case is now being processed in the World Bank's investment arbitration tribunal, and were they to rule in favour of Axiata UK, Nepal would lose millions of dollars in tax revenue while Axiata would be allowed to continue operating in Nepal as the owner of the company, thus contradicting the ruling of the highest court in Nepal.

There are numerous examples of capital gains tax abuses in developing countries, many of which do not come to light at all due to secrecy concerning sales of mineral or other corporate assets, and the lack of media, parliamentary or civil society scrutiny on these cases where either a case is not raised by the tax authority of a developing country who wishes not to go through the litigation channel if the charge is not paid, or the revenue authority or ministry of finance is lobbied to overlook the asset sale and treat it as a so-called 'offshore indirect transfer' which we do not recognise as a valid term for the transaction, as this issue despite a toolkit existing between different international bodies does not have international acceptance among governments in the Global South about how these should be taxed due to a lack of an intergovernmental UN tax body where these issues could be debated on the basis of equality, dignity and mutual respect.

## Enablers and Intermediaries of Illicit Financial Flows

The topic of enablers of tax abuse and financial crime is a discussion that has not been adequately addressed within the international level in norm-setting and rule-establishing bodies. In the Global North, some institutions and countries have started to address the issue. We can note that in the United Kingdom, one practice to stem out tax abuse schemes was the law relating to Disclosure of Tax Avoidance Schemes (DOTAS), which has been in place since 2016.

In Ireland there is also a mandatory disclosure scheme concerning those who market tax avoidance schemes obligation on promoters, marketers and users of 'disclosable transactions' to notify the revenue authorities. The conditions for disclosure imply any scheme that may result in a person receiving a tax advantage, or where a tax advantage is one of the main benefits of the scheme or matches specific issues in legislation. The scheme in Ireland also compels those marketing schemes to Irish customers, even if the enablers or tax abuse are situated outside of Ireland. However, Irish companies marketing schemes outside of the country are not required to notify authorities, and Irish authorities do not exchange information on tax avoidance schemes with third countries. Reciprocity is lacking, therefore, both in the case of the UK and Irish schemes that require notification.

The European Council has adopted new rules requiring tax advisors, accountants, and lawyers that design or promote tax planning schemes which could be potentially aggressive. The EC Directive is applicable from July 1, 2020. Member states will be obligated to exchange information every three months, within one month from the end of the quarter in which the information was filed. The first exchanges should therefore be completed by October 31, 2020. These will create obligations at the regional level. However, one of the shortcomings in this case is that the notification of tax abuse schemes does not involve non-EU countries. Another shortcoming is that this directive, and many national laws that pre-date or follow this do not make tax schemes public, nor do they are limited in scope, and they lack a comprehensive definition of tax abuse that could include also third country matters such as specific issues arising in developing nations.

These mechanisms are meant to be deterrents, but we find that as of today it is perfectly legal to market schemes with the main purpose of reducing taxable income, and it is a major concern that these schemes are not regulated internationally beyond the EU. Aiding tax abuse and financial crime should be made illegal, as it is already the case in giving criminal advice concerning money laundering. Sanctions could include fines, reducing access to the financial and banking sector of a country, and banning advisors from giving advice in a certain jurisdiction for a certain amount of time. High-risk lists of professional enablers of tax abuse and financial crime could also be drawn for public procurement purposes, to ban such advisors from participating in bids for public contracts on this basis of for a specific period of time.

A second area of legislation tackling professional enablers of tax abuse and financial crime is the access to judiciary documents concerning court cases concerning tax abuses and financial crime. There is no justification for commercial confidentiality given that these cases have a high public interest for citizens to better understand the functioning of the tax system is equitable and fair for all, rather than some actors being able to abuse tax systems and gain an unfair business advantage, or indeed a personal advantage. Companies convicted of tax evasion, and tax advisers advising them should be on public record so that a better informed public debate can be had concerning the fairness and equity of tax ruling in public debate. This is due to especially the fact that corporate taxation is not an area where rules and norms are fixed, or considered to be fair and equitable in the wider public. Tax abuse and financial crime opportunities are everywhere, and the public has a right to know about actors who are abusing the gaps and discrepancies between mutually incompatible and contradicting tax systems.

Administrative rulings on corporate taxpayers should also be made public, so that the wider public and media would know who has had their tax affairs audited, and as a result of an audit a change in tax circumstances has led to an adjustment, or possibly where the behaviour was considered so abusive that it was considered a tax crime. If this information were published, say on a given day of the year as a matter of full disclosure by the revenue authority, it would improve the public debate concerning tax affairs. Currently, it is the case that tax filings and annual accounts give an indication of the filed taxes of a MNC, but it does not give the real tax affairs after adjustments, inspections or court rulings that have an impact on the actual corporate taxes paid.

## Information Exchange

In cases of tax abuse and financial crime related leaks, whistle-blowers should be considered as having the protection of human rights defenders as ultimately tax abuses and financial crimes lead to multiple human rights abuses from depriving justice from those who abuse power, and making tax systems ineffective at regulating tax abuses – thus depriving revenue. Many reveal tax abuses and financial crimes at a great personal risk, as seen by journalists and bankers who have worked on cases of IFFs. There should be clear provisions in the international human rights defender arena to include tax abuses and financial crimes as human rights abuses, and thus provide protection to those who bring such abuses to light. The opposite is the case as notable tax whistle-blowers like Antoine Deltour have faced court cases in high-risk jurisdiction of Luxembourg noted for abusive and harmful tax rulings and laws, and the journalist, Daphne Caruana Galizia in Malta revealing financial crimes being assassinated.

Companies providing tax advice and auditing taxes and engaging in any tax related work should at a minimum level create responsibility and ethical statements that explicitly prohibit any tax abuse, or so-called tax avoidance as a service they would provide in any case as is the case for any provision of services related to money laundering and financial crime. The lack of action in tackling professional tax abuse providers especially harms honest companies who wish to comply with the societal obligations of paying taxes proportional to their profits in all jurisdictions where they operate without engaging in harmful, abusive and secretive tax practices. Similar ethical rules should apply to tax consultants, lawyers, financial sector enterprises and offshore service providers who represent taxpayers and represent taxpayers in various instances in relation to public bodies and the judiciary.