TAXATION, ILLICIT FINANCIAL FLOWS AND HUMAN RIGHTS

SUBMISSION BY AMNESTY INTERNATIONAL 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

Amnesty International is making the following submission in response to a request for contributions by 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 (hereafter the Independent Expert) with respect to her forthcoming report on Taxation, illicit financial flows and human rights. [1] Specifically, the submission seeks to address questions 2 and 4.

Amnesty International has recently begun to develop work on taxation and human rights following a decision to do so by its Global Assembly in 2021. To that end it is currently developing an internal policy to guide its work grounded in existing and evolving human rights standards, as well as exploring the potential for future research in this area. This work will assist the organization in highlighting ways in which states have not used their maximum available resources including through taxation, to fulfil their human rights obligations. It will also help in underlining the role of tax policies in strengthening the participation of and accountability to rights holders.

THE NATURE, SCOPE AND PURPOSE OF AN INTERNATIONAL TAX REFORM THAT SUPPORTS HUMAN RIGHTS (QUESTION 2)

The most significant reform of the international tax system in decades has been the new global tax deal agreed in October 2021.[2] The deal has the stated aims of ensuring that multinational enterprises (MNEs) pay a fair share of tax wherever they operate and earn profits whilst seeking to bring more stability to international fiscal policy.

If it meets these aims the new global tax deal should enable improved compliance by states with their human rights obligations, in terms of increasing available revenue, whilst also making it harder for multinationals to evade their responsibilities. However, many experts have criticised aspects of the deal and how it has been arrived at.[3] To that end future periodic reviews of the deal by the OECD should seek to strengthen it where it is found to be failing to ensure that MNEs pay their fair share of taxation. especially with respect to low-income states. This is crucial given taxation is a significant source of income for many states for achieving public policy objectives including meeting their human rights obligations.

Specifically, the deal as it currently stands risks perpetuating an imbalance in the allocation of taxing rights between the source of a company's profits, often in the global south, and where it is legally based - which are often countries in the global north.

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[1] https://www.ohchr.org/en/calls-for-input/calls-input/call-contributions-taxation-illicit-financial-flows-and-human-rights

[2] International community strikes a ground-breaking tax deal for the digital age - OECD

[3] Global minimum corporate tax: questions grow over OECD commitment to 'inclusive' reforms - Tax Justice Network

Pillar 1 of the deal, which seeks to reallocate taxing rights to the markets where MNEs carry out business activities and earn profits without having a physical presence in those markets, will only reallocate a small part of the global profits of the largest and most profitable 100 or so multinationals.[4] This is because 20% of the residual profit (profit after the corporation has paid all its capital costs) can be reallocated to countries where the multinational operates and earns profits, but only where that multinational has a minimum profit margin of 10%. Consequently, there is likely to be a low level of profit reallocation, in particular, to those jurisdictions with smaller markets.

Some expert commentators have estimated that this will mean that less than $10 billion of additional global revenue will be generated per year.[5] Most significantly, many digital businesses have no physical presence in a market jurisdiction which can make it subject to taxation, and therefore none of the routine profit will be allocated there.[6] To partially compensate for these deficiencies the African Tax Administration Forum, a regional intergovernmental network that aims at improving tax systems in Africa, has recommended that at least 35% of residual profit should be allocated to market jurisdictions. An even more radical but simpler solution could be to allocate a percentage of all MNEs' global profits to source countries but to date wealthier countries have rejected this.[7]

Even if the 15% global tax rate which is set out in Pillar 2, which has been widely criticised by experts as being too low,[8] is ultimately implemented it could raise an additional $275 billion of global revenue. However, it has been calculated that the G7 countries alone, with just 10% of the world's population, would take more than 60% of this revenue given the current locations of MNEs. Moreover, given that most countries in Latin America and Africa, which have average corporate tax rates of 26 per cent and 27 per cent, respectively in 2020,[9] a global minimum rate of around 15 per cent would do little to reduce incentives for profit-shifting from high tax to low tax jurisdictions.[10]

Other problems with the deal include states being asked to remove unilateral measures such as digital services taxes which have been benefitting developing economies and the fact that extractives and financial services are currently excluded from the deal altogether.

Unless some of these deficiencies are addressed the deal could risk undermining many governments' abilities, particularly in low-income states, to meet their human rights obligations to maximise tax revenue. Consequently, potential reforms could include a higher minimum global tax rate; a bigger reallocation of taxing rights to jurisdictions where sales occur or users are based and abandoning mandatory arbitration for taxation disputes – all of which currently favour wealthier states and MNEs.

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[4] Specifically, multinational enterprises with global sales above EUR 20 billion and profitability above 10% - that can be considered as the winners of globalisation - will be covered by the new rules, with 25% of profit above the 10% threshold to be reallocated to market jurisdictions. International community strikes a ground-breaking tax deal for the digital age - OECD

[5] How to Secure a Fairer Global Tax Deal by José Antonio Ocampo & Tommaso Faccio - Project Syndicate (project-syndicate.org)

[6] Digital Tax Around the World | Digital Economy & Digital Taxes (taxfoundation.org)

[7] How to Secure a Fairer Global Tax Deal by José Antonio Ocampo & Tommaso Faccio - Project Syndicate (project-syndicate.org)

[8] Global minimum corporate tax: questions grow over OECD commitment to 'inclusive' reforms - Tax Justice Network

[9] Corporate Tax Statistics: Third Edition - OECD

[10] How to Secure a Fairer Global Tax Deal by José Antonio Ocampo & Tommaso Faccio - Project Syndicate (project-syndicate.org)

MEASURES AND MECHANISMS TO ENSURE THE INCORPORATION OF HUMAN RIGHTS PRINCIPLES AND PRIORITIES (QUESTION 4)

Any new global tax entity must mainstream human rights through all of its decision making and accompanying processes based on the existing normative framework including a number of key principles as set out below. This should include conducting human rights impact assessments applying rights consistent indicators and benchmarks.

Key Principles

(a) Maximum available resources and progressive realization of rights

Article 2(1) of the UN International Covenant on Economic, Social and Cultural Rights (ICESCR) makes clear that states must devote the "maximum available resources" to ensure the progressive realization of all economic, social and cultural rights as expeditiously and effectively as possible.[11]

It is clear that taxation plays a key role in ensuring that states have the potential resources they need to devote to the realization of rights.[12] In so doing it is critical that the wealthier parts of the population pay fair and reasonable amounts of tax through a progressive tax system and that tax avoidance[13], tax evasion[14] and other illicit financial flows are effectively tackled, in an effort to satisfy, as a matter of priority, minimum essential levels of rights.[15]

In this context it is important to note that if tax systems are regressive and include legal loopholes, solely focusing on tax evasion will not effectively address resource gaps. Therefore, it will be critical for any global tax entity to assess the overall design of tax systems as well as legal tax avoidance to ensure that the wealthy are paying their fair share. This should be done on a contextual country by country approach reflecting the approach of the CESCR and, in so doing, include other significant factors such as debt repayments.

(b) Participation and Transparency

The right to participation is enshrined in numerous international human rights instruments.[16] It includes the right of all people to take part in the conduct of public affairs, a right that covers all aspects of public administration and the formulation and implementation of policy at international, national, regional and local levels.[17] At the national level this should include the participation in fiscal policy design throughout the budget cycle.[18]

For any new global tax entity to be credible it will be vital that there is effective and meaningful participation in its processes including by civil society and where feasible, the wider public. In turn participation will be dependent on full transparency grounded in the right of those engaging with the entity to seek, receive and

[11] International Covenant on Economic, Social and Cultural Rights, art. 2, para. 1. See also the Convention on the Rights of the Child, art. 4, and the Convention on the Rights of Persons with Disabilities, art. 4, para. 2.
[12] UN SR Extreme Poverty and Human Rights Taxation and Human Rights 2014 A/HRC/26/28 - E - A/HRC/26/28 -Desktop (undocs.org) para 25
[13] Tax avoidance is defined as the arrangement of one's financial affairs to minimize tax liability within the law.
[14] Tax evasion is defined as the illegal non-payment or underpayment of tax
[15] E/C.12/2007/1, paras.4-6. See also Committee on Economic, Social and Cultural Rights general comments No. 3 (E/1991/23, annex III), para. 12, No. 12 (E/C.12/1999/5), para. 28, and No. 14 (E/C.12/2000/4), para. 18.
[16] The Universal Declaration of Human Rights (arts. 21 and 27), the International Covenant on Civil and Political Rights (ICCPR) (art. 25), the International Covenant on Economic, Social and Cultural Rights (arts. 13.1 and 15.1), the Convention on the Elimination of All Forms of Discrimination Against Women (arts. 7, 8, 13(c) and 14.2), the International Convention on Elimination of All Forms of Racial Discrimination (art. 5(e)(vi)), the Convention on the Rights of the Child (arts. 12 and 31), the Convention on the Rights of Persons with Disabilities (arts. 3(c), 4.3, 9, 29 and 30), the International Convention on the Rights of All Migrant Workers and Members of their Families (arts. 41 and 42.2), the United Nations Declaration on the Right to Development (arts. 1.1, 2 and 8.2) and the United Nations Declaration on the Rights of Indigenous Peoples (arts. 5, 18, 19 and 41).
[17] See Human Rights Committee general comment No. 25 (CCPR/C/21/Rev.1/Add.7).
[18] Carmona, 'Report of the Special Rapporteur on extreme poverty and human rights A/HRC/26/28' (n 148).

impart information.[19] To promote transparency it is important that as much tax information as possible is available in the public domain including with respect to corporate actors based on country-by country reporting on accessible open-source websites.

Owing to the asymmetries of power there will be a need to analyse and address barriers to participation for marginalised groups or people who are generally less represented in decision-making, particularly those living in poverty and implement specific measures accordingly to ensure equal access and opportunities to participate.

The entity could be guided by the work of the Global Initiative for Fiscal Transparency (GIFT), a global network that facilitates dialogue between civil society, government, the private sector, and other stakeholders and which has drafted guiding principles on public participation in the budget process which have been acknowledged in 2012 by the United Nations General Assembly.[20] These have now been condensed into principles on fiscal transparency, participation, and accountability and are a useful resource on public participation.[21]

(c) Accountability

Given the strong role that taxation plays in the social contract between people and the state at the national level this focus on good governance should also be reflected at the international level. [22] Consequently, there must be robust independent accountability mechanisms with respect to the decisions taken by the global tax entity. These should include an accessible and effective complaints mechanism.

To ensure effective accountability throughout the decision-making process it will be important to elaborate rights consistent indicators for monitoring impact based on disaggregated data (see further below).

In order to have any meaningful accountability, people must have access to information and the right to public participation (see above). In this respect accountability is facilitated by maximum transparency including country-by-country tax reporting, open registers for beneficial owners (those who owns or controls 25% or more of the shares or voting rights in the company) combined with eliminating structures that hide ownership such as nominee registered stocks, publishing annual income tax details (including tax free income) of all citizens and companies etc subject to any legitimate right to privacy concerns.

(d) Equality and Non-Discrimination

The obligation to guarantee the exercise of human rights without discrimination is a fundamental pillar of all of the main human rights treaties.[23] Accordingly, the right to equality and non-discrimination must be respected during the entire decision making process of the global entity ensuring that there is no direct or indirect discrimination on the basis of race, gender, disability, disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence or economic and social status.

To ensure its decisions do not discriminate, the entity should evaluate the differential impact of existing and proposed policies on different groups, in particular on those who suffer from structural discrimination including gender and intersectional impact. Both CEDAW and the Beijing Platform for Action have explicitly made taxation issues matters of substantive gender equality.[24] This includes the obligation of states with

[19] Universal Declaration of Human Rights, art. 19; International Covenant on Civil and Political Rights, art. 19.
[20] 'Resolution Adopted by the General Assembly on 21 December 2012 Promoting Transparency, Participation and Accountability in Fiscal Policies A/RES/67/218' (2012).
[21] 'The High-Level Principles on Fiscal Transparency, Participation & Accountability' (2014).
[22] See OECD, Governance, Taxation and Accountability: Issues and Practices, 2008, p.13.

[23] The preamble to the Charter of the United Nations and Arts. 1, para. 3, and 55; Universal Declaration of Human Rights, art. 2, para. 1; International Covenant on Economic, Social and Cultural Rights, art. 2; International Covenant on Civil and Political Rights, arts. 2 and 26; International Convention on the Elimination of All Forms of Racial Discrimination, art. 1; Convention on the Elimination of All Forms of Discrimination against Women, art. 1; and Convention on the Rights of Persons with Disabilities, art. 2.
[24] See particularly CEDAW, arts. 3-5, 11, 13, and 15; Platform for Action, paras. 58(a)- (d), 150, 155, 165(f), (I), (p), 179(f), 205(c), 245-349. Also see Geder-Tax-Report-Fin-WEB.pdf (globaltaxjustice.org)

financial secrecy laws such as Switzerland to assess their extraterritorial impact on women's substantive equality.[25]

Impact assessments and monitoring – indicators, targets and benchmarks

It will be crucial that the entity apply rights consistent indicators (quantitative and qualitative), targets and benchmarks based on disaggregated data to monitor the impact of its decisions and measures.

One relevant source would be the Office of the United Nations High Commissioner for Human rights, which has developed indicators for a number of human rights including both civil and political rights as well as economic, social and cultural rights.[26] These were compiled after extensive research and consultation and validation. Treaty bodies, including the CESCR and the Human Rights Committee, have also revised their guidelines for State party reporting and requires states to collect disaggregated statistics and indicators for the two treaties.[27]

Another important source will be the Independent Expert's own Guiding Principles on human rights impact assessments of economic reforms.[28]

[25] Concluding observations, Switzerland, U.N. Doc. CEDAW/C/CHE/CO/4-5 (2016), paras. 40-41; "Blok v. Netherlands", Communication No. 36/2012, U.N. Doc. CEDAW/C/57/D/36/2012 (Mar. 24, 2014); Report of the Inquiry Concerning Canada, U.N. Doc. CEDAW/C/OP.8/CAN/1 (Mar. 30, 2015); Concluding observations, Switzerland, U.N. Doc. CEDAW/C/CHE/CO/4-5 (2016), paras. 40-41.

[26] Human_rights_indicators_en.pdf (ohchr.org)

[27] 'Human Rights Indicators: A Guide to Measurement and Implementation'. Human_rights_indicators_en.pdf (ohchr.org)

[28] 'Guiding principles on human rights impact assessments of economic reforms A/HRC/40/57'.