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Tax Abuses, Poverty and Human Rights

A report of the International Bar Association's
Human Rights Institute Task Force
on Illicit Financial Flows, Poverty and Human Rights

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October 2013

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Biographies of the Task Force

Professor Stephen B Cohen

Since 1980, Professor Cohen has taught courses at the Georgetown University Law Center in his two principal areas of expertise: tax and international human rights. He served as Corporate Secretary of the Southern Africa Enterprise Development Fund, established by the United States Government to encourage private-sector development in Southern Africa. He was also Deputy Assistant Secretary of State for Human Rights from 1978 to 1980 and has been a consultant to the Department of State. His writings include a casebook on federal income taxation and various articles on tax and corporate law and on national security and foreign policy. He has also taught at Harvard, Stanford, the University of Wisconsin, the University of Cape Town, South Africa, and Heidelberg University, Germany.

Lloyd Lipsett (Rapporteur)

Lloyd is an international lawyer with 15 years of specialisation in human rights, democratic development, the rule of law and corporate social responsibility.

He has developed a unique niche in the field of human rights impact and compliance assessment related to business and trade: he is working with the United Nations to undertake a human rights impact assessment of Vanuatu's accession to the World Trade Organization that includes an analysis of issues related to Vanuatu's status as a tax haven; he has worked with Foreign Affairs and International Trade Canada to develop the methodology for the annual human rights reporting process to Parliament with respect to the Canada–Colombia Free Trade Agreement; he was the Senior Reviewer and Human Rights Expert for the human rights assessment of Goldcorp's Marlin Mine in Guatemala; he has undertaken a human rights compliance assessment of the North American operations of BHP Billiton's Diamond & Special Product Group; and he worked on the five case studies that tested Rights & Democracy's community-based human rights impact assessment methodology in Argentina, China, the Democratic Republic of Congo, Peru and the Philippines.

Lloyd's international human rights expertise has been shaped by his work with public and private companies, multilateral agencies, government departments and agencies, non-governmental organisations and First Nations councils. From 2003 to 2008 he acted as Senior Assistant to the President of Rights & Democracy and participated in all aspects of the organisation's international and Canadian mandates. This included annual reporting to Parliament, Foreign Affairs and International Trade Canada and the Canadian International Development Agency, as well as negotiating partnerships with the United Nations Office of the High Commissioner for Human Rights, the Commonwealth Human Rights Unit and the Danish Institute for Human Rights on shared programming priorities. He also worked closely with the Canadian Human Rights Commission, as well as the various provincial human rights commissions, on issues related to Canada's commitment to international human rights.

Lloyd began his law career as a corporate litigator at McMillan Binch in Toronto. His formal education is from Queen's University in philosophy and politics; and then from McGill University in law. He is a member in good standing of the Law Society of Upper Canada.

Sternford Moyo

Sternford Moyo is currently Co-Chair of the International Bar Association's Human Rights Institute (IBAHRI), Council Member of the International Bar Association's (IBA) Public and Professional Interest Division (PPID) and sits on the IBA Council. He is former President of both the Law Society of Zimbabwe and the Southern African Development Community Lawyers' Association.

Sternford is the Senior Partner and Chairman of the firm Scanlen & Holderness, which he joined in 1981. He provides overall leadership to the firm, in addition to taking special responsibility for the commercial and corporate law department. While Sternford's primary areas of practice are mining, commercial and corporate law, he has assisted in complex litigation of constitutional matters and the intimidation and harassment of lawyers. He has also advised financial institutions and loan underwriters in most of the large infrastructure projects to have taken place in post-independent Zimbabwe, in areas such as forestry, energy, water supply and telecoms.

During the early part of his career, Sternford taught corporate, commercial and constitutional law. He successfully completed the Media Law Advocates Training Programme run by the University of Oxford. He graduated with a distinction and was named by Butterworths as one of the most outstanding postgraduate law students in 1981.

Professor Robin Palmer

Robin Palmer is Director of the Institute for Professional Legal Training (IPLT), which is affiliated to the University of KwaZulu-Natal, Durban, South Africa, and a practising advocate (barrister). From 1992 he was Director of the Law Clinic and a Senior Lecturer at the University of Natal (later the University of KwaZulu-Natal), leaving formal employment with the university as an Associate Professor in 2009. He concurrently practised as an advocate (barrister) at the KwaZulu-Natal Bar, where he has been involved in numerous high-profile cases, including as defence counsel in the ‘*Trust Feed*’ trial, in which the existence of apartheid hit squads was conclusively proven. Since 2006, he has been Lead Specialist Prosecutor of the *Life* case, where international brokers, local hospital groups and surgeons are being prosecuted for illegal organ trafficking. Robin has also completed various training courses and consultancies for the United Nations Development Programme (UNDP), the United Nations Office on Drugs and Crime (UNODC), the Open Society Foundations (OSF), the Open Society Initiative for Southern Africa (OSISA), the Commonwealth, the United States Agency for International Development (USAID), the German International Cooperation (GIZ), the Department for International Development (DFID), the South Africa Legal Aid Board and others from 1995 to the present, including anti-corruption initiatives, justice reform, legal aid, anti-terrorism, constitutional development and good governance projects in various African and East European countries, and was lead consultant in the recently completed UNODC expert group meeting on private/public security cooperation in Vienna. He initiated, and has been running, a postgraduate diploma course in forensic investigation at the University of KwaZulu-Natal since 2000, and is currently specialising in transnational and international criminal law, corruption issues and legal sector reform. He has authored and co-authored six textbooks, in law, writing, reasoning and research skills, and has published newspaper and journal articles in diverse fields.

His current specialisation is combating Grand Corruption in Africa, and he has initiated, in cooperation with OSISA, an anti-corruption task team to research, develop and implement selected anti-corruption programmes and strategies, including targeted litigation.

Professor Thomas Pogge (Chair)

Having received his PhD in philosophy from Harvard, Thomas Pogge has published widely on Kant and on moral and political philosophy. He is Leitner Professor of Philosophy and International Affairs at Yale, Professorial Fellow at the Australian National University, Research Director at the Oslo University Centre for the Study of Mind in Nature (CSMN) and a member of the Norwegian Academy of Science. His recent publications (see <http://pantheon.yale.edu/~tp4>) include: *Politics as Usual* (Polity 2010); *Kant, Rawls, and Global Justice* (Chinese), (Shanghai Translation Press 2010); *Hacer Justicia a la Humanidad*, (Fondo de Cultura Económica (FCE) 2009); *World Poverty and Human Rights* (2nd edn, Polity 2008); *Global Justice and Global Ethics*, co-edited, (Paragon House 2008); *The Health Impact Fund*, co-authored with Aidan Hollis (2008); *John Rawls: His Life and Theory of Justice* (Oxford 2007); and *Freedom from Poverty as a Human Right*, edited, (Oxford & United Nations Educational, Scientific and Cultural Organization (UNESCO) 2007). Supported by the Australian Research Council, the BUPA Foundation and the European Commission, Thomas' current work is focused on a team effort towards developing a complement to the pharmaceutical patent regime that would improve access to advanced medicines for the poor worldwide (www.healthimpactfund.org).

Shirley Pouget (Facilitator)

Shirley is a Programme Lawyer at the IBAHRI and acts as the Task Force Facilitator. Since September 2010, she has conducted extensive preliminary researches on issues related to poverty, human rights and financial flows, out of which she developed the idea of convening a Task Force to assess linkages between these interconnected concepts. Shirley developed the project in the last semester of 2010–2011 and sought funding in early 2012. She is responsible for the overall management of the Task Force. At the IBAHRI she also manages a wide range of projects which relate

to human rights in the administration of justice, including, inter alia: undertaking fact-finding missions and sending trial observers to countries where the rule of law has deteriorated (Syria and Thailand); pioneering advocacy programmes to support the establishment of international justice mechanisms where individuals face serious human rights violations and rule of law projects where the independence of the judiciary has been eroded (Myanmar (Burma)).

Before joining the IBAHRI, Shirley worked as a cabinet member of Andre Vallini, President of the Isère council, France (Conseil général de l'Isère) and Senator, mainly advising on French justice reform and criminal draft legislation.

Professor Celia Wells

Celia Wells joined the University of Bristol as Professor of Criminal Law in January 2009. She was appointed Head of the Law School in 2010. She was awarded the OBE for services to legal education in 2006 and was President of the Society of Legal Scholars of Great Britain and Ireland in 2006–2007.

Celia's research is mainly in criminal law, with a particular specialism in corporate criminal liability. She is the author of *Corporations and Criminal Responsibility* (2nd edn, Oxford University Press (OUP) 2001) and of *Reconstructing Criminal Law* (with Nicola Lacey and Oliver Quick, 4th edn, Cambridge University Press 2010). She has provided expert advice on corporate criminal responsibility to a number of national and international bodies including: the Organisation for Economic Co-operation and Development (OECD) Bribery Convention Working Group; Specialist Adviser to the House of Commons Select Committee Inquiry into the Draft Corporate Manslaughter Bill (2005); the International Commission of Jurists' Expert Legal Panel on Corporate Complicity in International Crimes (2006); and as expert witness to the Parliamentary Joint Scrutiny Committee on the draft Bribery Bill 2009, resulting in a sharpening of the corporate offence (now Bribery Act 2010, section 7).

List of Acronyms and Abbreviations

ATAF	African Tax Administration Forum
BEPS	Base erosion and profit-shifting
CIAT	Inter-American Center of Tax Administrations
DTA	Double Taxation Agreement
EITI	Extractive Industries Transparency Initiative
ESCR	Economic, social and cultural rights
FAO	Food and Agricultural Organization of the United Nations
FATCA	United States Foreign Account Tax Compliance Act
FATF	Financial Action Task Force
G8	Group of Eight
G20	Group of Twenty
Global Forum	OECD Global Forum on Transparency and Exchange of Information for Tax Purposes
IBAHRI	International Bar Association's Human Rights Institute
IFAD	International Fund for Agricultural Development
ILO	International Labour Organization
IMF	International Monetary Fund
MNE	Multinational enterprise
NGO	Non-governmental organisation
OECD	Organisation for Co-operation and Development
OHCHR	United Nations Office of the High Commissioner for Human Rights

SADC	Southern African Development Community
Task Force	IBAHRI Task Force on Illicit Financial Flows, Poverty and Human Rights
TIEA	Tax Information Exchange Agreement
TIWB	Tax Inspectors Without Borders
UNICEF	United Nations International Children's Emergency Fund
WFP	United Nations World Food Programme

Executive Summary

The tax practices of multinational enterprises and wealthy individuals are being increasingly questioned and scrutinised. Tax havens and bank secrecy are under attack. Tax abuses are in the media spotlight and on the international political agenda. But why are tax abuses becoming so important?

First, there is the immense magnitude of the issue. The best estimates tell us that tax abuses are the most significant illicit financial flow out of the developing world, eclipsing the amount of official development aid that is invested in those countries. There is a growing understanding that countering tax abuses and improving tax enforcement in developing countries should be a key focus for international efforts to combat poverty and contribute to sustainable development. In developed countries as well, there is a strong impetus to confront tax abuses in order to shore up domestic revenues in the aftermath of recent financial crises.

Secondly, there is an important ethical dimension to the issue. Many politicians, advocacy groups and prominent individuals are questioning the fairness and morality of sophisticated tax planning strategies that result in individuals and corporations not paying a fair share of tax – and perhaps not paying any tax at all. Especially in a context of persistent poverty and rising inequality between and within nations, the fact that tax strategies that produce unfair results may be technically legal is no longer a sufficient justification for their continued use. Wealthy individuals and multinational enterprises face increased risks of public censure if their tax practices are seen to be abusive.

This leads to a number of important legal and policy questions related to tax abuses: Where does one draw the line between legal tax avoidance and illegal tax evasion? What types of tax structures and transactions have the greatest impact on the revenues of developing and developed countries? What are the most effective reforms required to confront tax abuses? What are the responsibilities of states and business enterprises to implement those reforms? What is the role of lawyers and the legal profession to confront the challenge of tax abuses?

The International Bar Association's Human Rights Institute (IBAHRI) has formed the Task Force on Illicit Financial Flows, Poverty and Human Rights to reflect upon these questions from the perspective of international human rights law. The Task Force's mandate is rooted in an IBAHRI Council Resolution that links extreme and endemic forms of poverty with potential violations of human rights. For this reason, the Task Force has given a particular focus on the tax abuses that have negative impacts on developing countries. This report of the Task Force is based upon interviews with a wide range of stakeholders from diverse perspectives and consultations, in particular in the SADC region, Brazil and Jersey.

The Task Force found that tax abuses have considerable negative impacts on the enjoyment of human rights. Simply put, tax abuses deprive governments of the resources required to provide the programmes that give effect to economic, social and cultural rights, and to create and strengthen the institutions that uphold civil and political rights. Actions of states that encourage or facilitate tax abuses, or that deliberately frustrate the efforts of other states to counter tax abuses, could constitute a violation of their international human rights obligations, particularly with respect to economic, social and cultural rights.

In the context of the developing world, the tax abuses of greatest concern of the Task Force included: transfer pricing and other cross-border intra-group transactions; the negotiation of tax holidays and incentives; the taxation of natural resources; and the use of offshore investment accounts. Secrecy jurisdictions are also a concern because of their role in facilitating tax abuses. From the perspective of the Task Force, the international standards that promote greater transparency and more effective exchange of information for tax purposes need to be further developed. There has been some important progress at the international level in recent months and momentum is gaining towards a multilateral system of automatic exchange of information – which will put tax authorities in a better position to counter tax abuses.

A human rights analysis can contribute to the link that is increasingly being made between domestic resource mobilisation and sustainable development. As we approach the final milestone of the United Nations (UN) Millennium Development Goals in 2015, the international community has begun a new

global conversation about what are the best partnerships and vectors for effective poverty alleviation and sustainable development. In particular, countering tax evasion should be part of the strategy for developing countries to diminish their dependence on foreign assistance, combat poverty and fulfil their international human rights obligations.

The Task Force's human rights analysis begins by making a link between human rights and extreme poverty. For instance, the UN Human Rights Council has recently adopted Guiding Principles on Extreme Poverty and Human Rights that describe how poverty is connected as a cause or consequence of violations of 14 different human rights and all the key human rights principles – ranging from the right to food, the right to health, the right to education and the right to social security, to the principle of transparency.

Considering the negative impact that tax abuses have on poverty and human rights, the state has a number of obligations to counter tax abuses. These flow from states' obligation to use the maximum available resources to progressively realise human rights – including the obligation to confront tax abuses as part of an overall plan to strengthen financial and tax governance.

Furthermore, states have the obligation to ensure coherence between corporate, fiscal, tax and human rights laws and policies, both at the domestic and international levels. This includes the corollary obligations to avoid corporate, fiscal or tax measures that have retrogressive impacts on human rights. The obligation to do no harm with respect to economic, social and cultural rights should be understood to include an obligation for states to assess and address the domestic and international impacts of corporate, fiscal and tax policies on human rights.

States have an obligation of international cooperation and technical assistance to support the realisation of human rights. This should be understood to extend into international cooperation in the field of taxation. Notably, states that contribute to the momentum towards greater transparency and effective exchange of information – including with developing countries – are supporting human rights. Conversely, those that cling to the last vestiges of secrecy and thwart the emergence of effective information exchange are contributing to further infringements of human rights.

Business enterprises also have the responsibility to respect human rights through their corporate structures and throughout their operations. They can demonstrate that they respect human rights when they have appropriate policies and due diligence procedures to ensure that they are not having negative impacts on human rights. Multinational enterprises, as well as their advisers and financiers, need to understand that their tax planning strategies have potential negative impacts on human rights. Conversely, greater transparency and corporate social responsibility in relation to tax practices has the potential for significant contributions to sustainable development and positive impacts on human rights.

Lawyers have a special role in addressing tax abuses. As business enterprises, law firms also have a responsibility to respect human rights according to the UN Guiding Principles on Business and Human Rights: they should take due diligence measures to identify, prevent, mitigate and account for their impacts on human rights. Merely complying with tax law is not enough when this results in the violation of human rights. Responsibility for human rights includes situations where lawyers are associated with third parties' actions that violate human rights – including by their clients. In such situations, lawyers should use their influence and leverage to encourage their client to not engage in that conduct.

Both states and businesses should provide better access to remedies. Currently, to address the negative impacts of tax abuses on poverty and human rights, the most effective remedies remain in the realm of domestic tax authorities. Consequently, it is important to strengthen good fiscal and tax governance and enforcement capacity in developing countries. Transparency and access to information are important human rights principles that support more effective remedies for tax abuses, especially in relation to the movement towards more effective and automatic exchange of tax information between authorities, as well as greater disclosure of information of the financial and non-financial impacts that business enterprises are having on a country-by-country basis.

At present, there are few human rights mechanisms that can deal effectively with tax abuses. However, several UN mechanisms certainly have the mandate and potential to articulate the links between tax abuses, poverty and human rights on an authoritative basis. Further attention and debate on tax abuses from a human rights perspective is important for developing more coherent international standards and good practices for states, multinational enterprises and their advisers and financiers. In the short term, human rights can also make a valuable contribution by drawing further public and political attention to this fundamentally important issue.

Introduction

The International Bar Association’s Human Rights Institute (IBAHRI) has created a Task Force on Illicit Financial Flows, Poverty and Human Rights (the ‘Task Force’) with a mandate to conduct research and consultations with a focus on the impacts of tax abuses on human rights. The Task Force’s mandate is framed by the IBAHRI Council’s Resolution on Poverty and Human Rights; and, therefore, specific attention has been given to the impacts on developing countries where chronic, endemic and extreme forms of poverty are most prevalent, and where there is a pressing need to build more effective taxation regimes and strengthen domestic capacities to confront tax abuses.¹

Tax abuses are considered to be a very significant part of the illicit financial flows out of the developing world, depriving governments, communities and citizens of substantial resources that could be invested in policies and programmes to eradicate poverty, reduce inequality and fulfil human rights. For example, one recent report estimated that developing countries lost US\$5.86tn to illicit financial flows from 2001 to 2010 and that corporate tax abuses such as transfer mispricing accounted for 80 per cent of those outflows.²

For the purposes of this report, tax abuses include the tax practices that are contrary to the letter or spirit of domestic and international tax laws and policies. They include tax evasion, tax fraud and other illegal practices – including the tax losses resulting from other illicit financial flows such as bribery, corruption and money laundering. The term ‘tax abuse’ also includes tax practices that may be legal, strictly speaking, but are currently under scrutiny because they avoid a ‘fair share’ of the tax burden and have negative impacts on the tax revenues and economies of developing countries.

This report explains the interconnectedness of tax abuses, poverty and human rights. The Task Force’s analysis of tax abuses, based on international

1 The Task Force acknowledges that tax abuses have important negative impacts on poverty and inequality in developed countries as well; however, the main focus for this research project was on the impacts in developing countries.

2 Global Financial Integrity, ‘Illicit Financial Flows from Developing Countries: 2001–2010’, see: <http://iff.gfintegrity.org/iff2012/2012report.html>.

human rights standards and principles, is intended to provide a better understanding of the roles and responsibilities of states, business enterprises and other actors for addressing the negative impacts of tax abuse on global poverty and human rights.

I. The challenge of tax abuses, poverty and human rights

During the course of the Task Force's research and consultation, tax abuses have frequently been in the spotlight, grabbing the attention of the media and the public. At a time when the global economy struggles to recover from recent financial crises, politicians and policy-makers are making tax issues a priority as they are confronted by tough decisions about austerity measures, spending cuts and the need to find revenues to maintain social programmes. High-profile investigative reports, leaks of offshore banking information and civil society campaigns have called into question the tax practices of wealthy individuals and multinational enterprises.

It appears that the moment is ripe for a renewed public debate about the role of tax in society and the global economy:

- What are the boundaries between legitimate tax planning, illegitimate tax avoidance and illegal tax evasion?
- Is there a legitimate role for secrecy jurisdictions in the context of an interconnected global economy?
- What international laws, policies and mechanisms are required to address tax abuses in the 21st century?
- How do tax abuses prevent developing countries from raising sufficient resources to alleviate poverty and meet the needs of their citizens?
- How are human rights relevant to these tax matters?

This report presents the findings of the Task Force in relation to these questions. In general, stakeholders noted that tax abuses have not often been approached from a human rights perspective; however, there are indications that this

conversation about human rights and tax is beginning.³ Some stakeholders felt that human rights can provide a useful frame of reference for greater engagement by citizens in the complex and technical issues related to tax. Others stressed the importance of clarifying the human rights responsibilities of states, business enterprises and other actors to encourage improved domestic tax policies and strengthened international cooperation efforts to confront tax abuses. Given the international dimension of many tax abuses, stakeholders stressed that a new global policy debate is needed to define obligations at the state and supra-state level to address the current imbalances of information, income and power. Tax has the potential to be an instrument to confront these imbalances and inequalities. So do human rights.

Tax abuses in the global spotlight

During the course of the Task Force's mandate, the following events and reports caught the attention of the Task Force and stakeholders.

In July 2013, the G20 endorsed an Action Plan on Base Erosion and Profit Shifting (BEPS) that had been prepared by the OECD. The Action Plan states that 'fundamental changes are needed to effectively prevent double non-taxation, as well as cases of no or low taxation associated with practices that artificially segregate taxable income from the activities that generate it'.⁴ The Action Plan proposes a series of 15 actions that will address different issues associated with BEPS over the next two years, including the development of 'a multilateral instrument designed to provide an innovative approach to international tax matters'.⁵ The Action Plan has been heralded by some as a 'once-in-a century' change, while

3 Recently, some tax justice and human rights organisations have started to make the link between tax abuses and human rights. For instance, the Business and Human Rights Resource Centre has created a section on its website dedicated to 'tax avoidance' (see: www.business-humanrights.org/Documents/Taxavoidance) and the Tax Justice Network in Germany has recently published a briefing paper on 'Taxes and Human Rights' (see: www.rightingfinance.org/wp-content/uploads/2013/02/Read-full-document.pdf).

4 OECD, Action Plan on Base Erosion and Profit Shifting (2013), at 13, accessed at: www.oecd.org/ctp/BEPSActionPlan.pdf.

5 *Ibid* at 24.

others state that the proposed actions do not go far enough.⁶ Among the concerns expressed are that the Action Plan does not require full country-by-country reporting by multinational enterprises,⁷ and that it does not signal a move towards unitary taxation.⁸

Tax abuses are an increasingly important subject of discussion by the G8 and G20;⁹ and there is recognition that ending bank secrecy and improving information exchange are key aspects of confronting tax abuses. Indeed, tax was at the top of the agenda of the G8 meeting in Northern Ireland on 17–18 June 2013 and many of the G8 leaders' pledges related to confronting tax abuses in the Lough Erne Declaration.¹⁰ Thus, tax abuses continue to gain importance on the global political agenda. While these are positive developments, many of the G8 pledges do not have clear implementation deadlines. Therefore, there is a role for media, NGOs, religious leaders and taxpayers to continue to demand attention to – and action about – these issues.¹¹

In April 2013, the International Consortium of Investigative Journalists published 'Secrecy for Sale: Inside the Global Offshore

6 *The Guardian*, 'OECD Tax Proposals Offer G20 "Once in a Century" Chance to Fix Creaking System' (19 July 2013), accessed at: www.guardian.co.uk/business/2013/jul/19/oecd-g20-tax-reform-proposals.

7 Global Financial Integrity, 'New OECD Report on Tax Avoidance Lags Behind Global Transparency Movement' (19 July 2013), accessed at: www.gfintegrity.org/content/view/full/626/70.

8 See n 6 above.

9 The G8 and G20 are considered to be among the most influential multilateral groupings for setting the global political and economic agenda. For a chronology of G7/G8/G20 statements about tax matters, see Appendix III of the OECD's 'Information Brief about the Global Forum on Transparency and Exchange of Information for Tax Purposes', 16 April 2012, accessed at: www.oecd.org/tax/transparency.

10 The Lough Erne Declaration contains the following demands: (1) tax authorities across the world should automatically share information to fight the scourge of tax evasion; (2) countries should change rules that let companies shift their profits across borders to avoid taxes, and multinationals should report to tax authorities what tax they pay where; (3) companies should know who really owns them and tax collectors and law enforcers should be able to obtain this information easily; (4) developing countries should have the information and capacity to collect the taxes owed them – and other countries have a duty to help them; and (5) extractive companies should report payments to all governments – and governments should publish income from such companies. In addition, the Lough Erne G8 Leaders' Communiqué contains a number of more specific details about these commitments on tax (paras 23–26); tax and development (paras 27–29); transparency of companies and legal arrangements (paras 30–31); and extractives (paras 34–42). See: www.gov.uk/government/uploads/system/uploads/attachment_data/file/207543/180613_LOUGH_ERNE_DECLARATION.pdf.

11 As one example, the Archbishop of Canterbury, Justin Welby, called for increased action by the G8 to 'curb tax havens and feed the poor' in the following video address: www.archbishopofcanterbury.org/articles.php/5073/watch-archbishops-if-campaign-message-to-churches.

Money Maze’, a report with information about the extent of secrecy jurisdictions around the world. The report shows how ‘the mega-rich use complex offshore structures to gain tax advantages and anonymity not available to average people’. It details how ‘banks have provided their customers with secrecy-cloaked companies in offshore hideaways, and how an industry of accountants, middlemen and other operatives has helped offshore patrons shroud their identities and business interests’. This report underscores the mounting international media interest in, and cooperation about, tax abuses. It also demonstrates the vulnerability of offshore account holders to embarrassing leaks of their banking information to the public and tax authorities.¹²

In January 2013, Wegelin & Co, the oldest Swiss private bank, announced that it is ceasing operations after more than two and a half centuries following a guilty plea to charges of helping wealthy Americans evade taxes through secret accounts. The American authorities have current investigations into a number of other Swiss banks related to allegations that they have also promoted similar practices to avoid taxes. This case is significant in that it illustrates an aggressive trend towards the elimination of banking secrecy, using a number of levers including enforcement actions against banks.

On 1 January 2013, the US Foreign Accounts Tax Compliance Act (FATCA) came into force. Passed in 2010 by the US Congress, this Act requires all foreign financial institutions to find out who among their clients might be US citizens or ‘US Persons’ and send details of their account balances and transactions to the US Internal Revenue

12 Over the course of the Task Force’s research, there have been a number of other highly publicised leaks of client information from banks in international financial centres such as Jersey and Switzerland to revenue authorities abroad, leading to investigations of potential tax evasion and raising further questions about bank secrecy. See, for example, the November 2012 leak of information from HSBC in Jersey to the UK revenue authority; the November 2012 acquittal of a journalist who had leaked information to the International Monetary Fund about Greek citizens with Swiss bank accounts; and the indictment and prosecution of German tax officials by Switzerland for purchasing information about German citizens with Swiss bank accounts.

Service. FATCA's goal is to catch US tax evaders with offshore accounts. This legislation adds momentum to the global movement towards automatic exchange of tax information and further erodes offshore bank secrecy. Other governments are beginning to enact similar legislation to comply with and extend FATCA's requirements – including between some countries in Europe, as well as between the UK and its Crown Dependencies in the Channel Islands and some of its overseas territories in the Caribbean.

In December 2012, a UK House of Commons report examined the 'immoral' tax practices of Starbucks, Google and Amazon and criticised the lax enforcement of the revenue authority (Her Majesty's Revenue and Customs (HMRC)) with respect to abusive corporate tax structures. A public outcry ensued, including protests at Starbucks shops in the UK. Starbucks responded to these pressures by announcing voluntary payments of £20m to HMRC. This case illustrates the rising importance of tax planning as a matter of corporate social responsibility and business ethics, and conversely the reputational risks associated with alleged tax abuses.

Reports continue to highlight the negative impacts of individual and corporate tax abuses on developing countries. For instance, a report by Global Financial Integrity states that the developing world lost US\$859bn in illicit outflows in 2010.¹³ Cumulatively from 2001 to 2010, developing countries lost US\$5.86tn to illicit outflows. These outflows stem from crime, corruption, tax evasion and other illicit activity; and trade mispricing was found to account for an average of 80 per cent of cumulative illicit flows from developing countries over the period 2001–2010.¹⁴ This report illustrates the magnitude of the impact of illicit financial flows on developing countries (ie, these outflows from developing countries significantly exceed the amount

13 See n 2 above.

14 *Ibid.* Trade mispricing is discussed further in Chapter One, section 1.1.2 below.

flowing in through international development assistance),¹⁵ as well as the significance of tax abuses relative to other illicit financial flows.

To confront the ‘natural resource curse’ (whereby resource-rich developing countries fail to realise adequate economic and social benefits from resource extraction), new legal and policy initiatives that require greater transparency about revenues from natural resource projects are being implemented. These include regulations under the Dodd-Frank Act in the United States, the European Union Accounting and Transparency Directive, as well as the protocols developed under the multi-stakeholder Extractive Industries Transparency Initiative. In particular, these initiatives contain specialised reporting regimes for extractive industry companies. They are increasing the momentum towards country-by-country reporting of payments by business enterprises to governments, a key component in giving the public and tax authorities the information needed to confront cross-border tax abuses, corruption and other illicit financial flows.¹⁶

As a result of a call from the G20 in 2009, the OECD has restructured the Global Forum on Transparency and Exchange of Information for Tax Purposes (the ‘Global Forum’) to ensure that international standards on exchange of information are effectively implemented through a peer review process. The Global Forum currently comprises 120 jurisdictions, including all the international financial centres. Through its peer review process, it provides recommendations and supports reforms aimed at ending bank secrecy, increasing the transparency of legal entities and expanding the network of information exchange agreements. The first series

15 If we use the figure of US\$859bn in illicit financial flows for 2010, multiplied by the 80 per cent estimate of the amount of tax abuses, we would have US\$687.2bn dollars lost to developing countries through tax abuses. This is over five times (5.327) the amount of overseas development assistance that the OECD reported for 2010. See: www.oecd.org/dac/stats/50yearsofficialdevelopmentassistance.htm.

16 At the G8 meeting in Northern Ireland in June 2013, Canada also announced that it plans to create new rules for transparency and reporting of revenues by extractive industry companies. This is significant as Canada is the world’s leading mining jurisdiction. In addition, the G8 leaders pledged in the Lough Erne Declaration that: ‘Extractive companies should report payments to all governments – and governments should publish income from such companies.’

of ‘Phase 2’ peer reviews has recently been launched. These are significant in that they mark a shift towards the assessment of the actual information exchange practices of the members of the Global Forum, in addition to the domestic legislative and administrative frameworks for exchange of information that were assessed in the ‘Phase 1’ peer reviews.

An August 2012 UK House of Commons report suggested a new approach for overseas development assistance that will focus on building the capacity of developing countries’ revenue authorities to address tax abuses and to mobilise domestic resources and reduce dependency on foreign aid.¹⁷ This report underscores the importance of tax matters for developing countries. Helping developing countries to improve their domestic revenue capacity through improved tax policy and enforcement is likely to become an important component of the ‘post-2015 agenda’ as the United Nations seeks to refocus global efforts to eliminate poverty upon the expiry of the Millennium Development Goals.¹⁸

II. The mandate of the Task Force on Illicit Financial Flows, Poverty and Human Rights

IBAHRI Task Force mandate

The IBAHRI convened the Task Force on Illicit Financial Flows, Poverty and Human Rights to analyse how illicit financial flows – and specifically tax abuses – have a negative impact on poverty and the progressive realisation of economic, social and cultural rights. The Task Force will provide recommendations for governments and legal professionals for enhancing international tax cooperation, fashioning public policy on taxation for

17 UK House of Commons International Development Committee, ‘Tax in Developing Countries: Increasing Resources for Development’, August 2012, see: www.publications.parliament.uk/pa/cm201213/cmselect/cmintdev/130/13003.htm.

18 Christian Aid has recently published a briefing note on ‘Tax and the Post-2015 Agenda’, accessed at: www.christianaid.org.uk/images/tax-and-the-post-2015-agenda.pdf.

developing countries, and enabling citizens to benefit from improved public services for food, health, education and other basic human needs. The Task Force was set up under the authority of the IBAHRI Council Resolution on Poverty and Human Rights.

IBAHRI Council Resolution on Poverty and Human Rights

On 27 May 2010, the IBAHRI Council passed the Resolution on Poverty and Human Rights, recognising ‘severe, endemic and chronic poverty’ as a violation of human rights, and committing the IBAHRI to acting as a bridge to lead all lawyers to an appreciation of the importance of the issues of economic, social and cultural rights, and to the realisation that many of these rights are justiciable and suitable for legal attention. The Council further resolved that the IBAHRI would take active steps to facilitate the implementation of this policy. The creation of the Task Force is one of the projects undertaken to implement this Resolution.

The following are the key provisions of the IBAHRI Council’s Resolution that constitute the basic conceptual framework for the Task Force’s mandate:

- *Recognising* that poverty is a chronic global problem,
- *Recognising further* that the manifestations of poverty are addressed by international instruments such as the *Universal Declaration of Human Rights*, the *Declaration on the Rights of Indigenous Peoples*, the *United Nations Convention against Corruption* and the *International Covenant on Economic, Social and Cultural Rights* and in regional instruments such as the *African Charter on Human and Peoples’ Rights*,
- *Noting* that despite the conceptual and jurisprudential difficulties in classifying poverty itself as a breach of human rights and in implementing the international instruments relating to economic rights, the United Nations Committee on Economic, Social and Cultural Rights has stated that there are immediate obligations to take steps towards the full realisation of the rights in the Covenant, and a duty not to discriminate in the fulfilment of economic, social and cultural rights,

- *Realising* that while it may be difficult to establish that each case of poverty is in itself a violation of a fundamental right, it is nevertheless accompanied by violations of fundamental rights and is an affront to human dignity, and is a persistent danger to global peace, security and economic equity within and amongst nations, despite the technological advances and economic growth in many countries created by expanding trade and production opportunities.

The full text of the IBAHRI Council's Resolution on Poverty and Human Rights is included in Appendix A.

The Task Force's terms of reference

The Task Force's terms of reference are:

1. To investigate linkages between illicit financial flows, human rights and poverty and in particular to examine the extent to which illicit financial flows and commercial tax evasion impact on poverty and subsequently affect the implementation and enforcement of economic, social and cultural rights.
2. To analyse human rights norms and international regulations applicable to tax matters.
3. To examine any relevant related matters, including the responsibilities of all stakeholders.
4. To write and publish a book containing the findings of the Task Force, with recommendations.

The Task Force's goals and objectives

The Task Force's goals and objectives are:

1. To publish an innovative report containing findings and a set of recommendations on the interaction between illicit financial flows, poverty and human rights.

2. To widely disseminate the report with the view of pushing the issue of tax evasion and human rights onto global policy agendas, and sustaining discussion thereafter.
3. To incite multi-level policy changes in the area of tax evasion and economic, social and cultural rights adjudication to help end global poverty.

The Task Force's membership

- The Task Force is comprised of the following experts on taxation, poverty and human rights:
- Professor Stephen B Cohen, Professor of Law, Georgetown University, US
- Task Force Rapporteur: Lloyd Lipsett, international lawyer, Canada
- Sternford Moyo, IBAHRI Co-Chair; Senior Partner, Scanlen & Holderness, Zimbabwe
- Professor Robin Palmer, Director of the Institute for Professional Legal Training (IPLT), University of KwaZulu-Natal, South Africa
- Professor Thomas Pogge, Leitner Professor of Philosophy and International Affairs, Yale University, US (Task Force Chair)
- Task Force Facilitators: Shirley Pouget, IBAHRI Programme Lawyer, UK
- Professor Celia Wells, Head of Bristol University Law School, UK

Further details about the Task Force are included on pages XI–XV and are also available online at: www.ibanet.org//Human_Rights_Institute//TaskForce_IllicitFinancialFlows_Poverty_HumanRights.aspx.

III. The Task Force's research and consultation methodology

The Task Force's mandate was to understand the roles and responsibilities of all stakeholders regarding tax abuses, poverty and human rights.

The research methodology emphasised a series of mutually reinforcing consultations in order to provide an informed and balanced analysis. These activities included:

Task Force members met in person in London in March 2012 and in Dublin in October 2012, with other plenary meetings held via teleconference from time to time. These plenary meetings provided opportunities for Task Force members to debate key methodological, legal and policy issues.

The Task Force Rapporteur undertook desk research with the support of the Task Force Facilitator. The desk research covered a wide range of topics related to poverty, development, tax policy, tax abuses and human rights.

The Task Force Rapporteur interviewed tax and revenue authorities from developed and developing countries; officials of multilateral organisations concerned with tax cooperation, development and human rights; corporate and tax lawyers; representatives of multinational corporations; and civil society organisations. A list of interviewees is included in Appendix B.¹⁹

A questionnaire was developed as a starting point for interviews and consultation meetings with different stakeholders. It was also circulated to the membership of the IBA to canvas opinions from the legal profession about key themes related to the Task Force's research. Over 40 detailed written responses were provided to the Task Force.²⁰ A copy of the questionnaire is included in Appendix C.

A number of in-country consultations were organised to obtain further information and input from lawyers and other stakeholders with direct experience of the issues relevant to the Task Force's research. A consultation meeting for Latin America was held in São Paulo, Brazil in June 2012, with side meetings in Rio de Janeiro and Brasilia. A consultation meeting for

19 The interviews were conducted on the understanding that participants' opinions would not be attributed in the publication. Therefore, a generic reference is made to 'stakeholder(s)' when identifying the opinions collected through the interview process.

20 A detailed response on behalf of the IFC (International Financial Centre) Forum led to discussions that resulted in the Task Force's mission to Jersey.

the SADC region was held in Swaziland in August 2012, with side meetings in South Africa and Zimbabwe. A mission to Jersey was also organised in January 2013 for the purpose of interviews with government officials, lawyers, representatives of financial institutions and other stakeholders. Summaries of the Brazil, SADC and Jersey missions are included in Appendix D.

Finally, a number of research papers and expert opinions were commissioned from lawyers, law students and interns from the IBAHRI.²¹

IV. Scope and limitations of the report

This report traces the linkages between tax abuses, poverty and human rights. Each is a vast and complex subject, with its own body of literature, myriad experts and organisations, and wide array of opinions. It is not possible to examine in detail all the issues that the Task Force encountered through the research and consultation process. For instance, there is enough material and opinion on the difference between ‘tax evasion’ and ‘tax avoidance’ for a doctoral dissertation.²² Moreover, since we cannot comprehensively discuss all countries and corporations, we focus on global issues and general trends as illustrated by specific examples.

As mentioned above, the primary focus of the Task Force has been on providing an analysis of the international human rights standards that are relevant to tax abuses and poverty. When it comes to related issues, the Task Force has tried to provide a general description of different options and opinions, and to provide references for additional information. In this regard, the Task Force’s objective is to provide a framework for further reflection, discussion and action.

The Task Force’s analytical framework is informed by the international human rights instruments developed through the United Nations. While a thorough analysis of regional and national human rights instruments is beyond the scope of this report, they are mentioned if relevant or noteworthy.

21 The Task Force would like to gratefully acknowledge the contributions of James Fowkes, Jacqueline Greene, Tienmu Ma, Esther Shubert and David Quentin to the Task Force’s research.

22 For instance, a recent Interpretation Statement by the New Zealand Inland Revenue Department on tax avoidance is 135 pages long, including flow charts and examples illustrating how the approach is worked through. See: ‘IS 13/01 – Tax Avoidance and the Interpretation of Sections BG 1 and GA 1 of the Income Tax Act 2007’, accessed at: www.ird.govt.nz/technical-tax/interpretations/2013.

Given the genesis of the Task Force project in the IBAHRI Council's Resolution on Poverty and Human Rights, the focus of this report is on the impact of tax abuses in developing countries, since the most extreme and chronic forms of poverty are generally encountered in these countries. It is acknowledged that tax abuses also have serious impacts on poverty and inequality in developed countries; and the human rights analysis included in this report should also be of relevance to the examination of tax abuses in developed countries.

V. Structure of the report

Following this introduction, the Task Force report consists of three chapters.

Chapter One: Tax abuses and secrecy jurisdictions

Chapter One provides an overview of tax abuses and secrecy jurisdictions. It includes two sections: section 1.1 examines definitional issues related to tax evasion and tax avoidance and settles upon the term 'tax abuses' to cover the types of illegal and illicit tax behaviour that have the most serious negative impacts on poverty and human rights, particularly in developing countries. Section 1.2 illustrates how bank secrecy facilitates tax abuses with case studies of Switzerland, Singapore and Jersey.

Chapter Two: Poverty human rights, and tax abuses

Chapter Two analyses the impact of tax abuses on poverty and human rights. It contains four sections: section 2.1 explains why improved tax governance is critical to the goals of eradicating poverty and of diminishing the dependency of developing countries on foreign aid. Section 2.2 discusses poverty as both a cause and a consequence of violations of human rights. Section 2.3 examines the responsibilities of different actors – states, business enterprises and their professional advisers – to address tax abuses and their negative impacts on poverty and human rights. Section 2.4 details the remedies available to address tax abuses.

Chapter Three: Conclusions and recommendations

Chapter Three completes the report with the Task Force's conclusions and recommendations. Given the mandate and membership of the International Bar Association, the report includes specific recommendations, not only for states and business enterprises, but also for the legal profession, including bar associations and law firms.

Chapter One: Tax Abuses and Secrecy Jurisdictions

This chapter provides an overview of tax abuses and secrecy jurisdictions. It includes two sections: section 1.1 provides an overview of tax abuses that have significant negative impacts on poverty and human rights, particularly in developing countries. Section 1.2 examines the concerns that secrecy jurisdictions facilitate tax abuses with case studies of Switzerland, Singapore and Jersey.

1.1 Tax abuses

Tax abuses are part of the broader problem of illicit financial flows. Recent reports estimate that corporate tax abuses such as transfer mispricing comprise 80 per cent of illicit financial flows out of developing countries.²³ While the Task Force has concentrated its attention on tax abuses, it also wishes to acknowledge the interconnections between tax abuses and other illicit financial flows.

The economic impacts of tax abuses are potentially much larger than just the revenue lost to the tax authorities. For example, if a multinational enterprise shifts US\$10m in profits out of a developing country, the tax impact to the revenue authority might be US\$2m (assuming a 20 per cent effective tax rate). There is also the possibility that a corresponding – and potentially larger – economic impact may occur as a result of the US\$10m that flows abroad and is not reinvested locally. Therefore, when thinking about tax abuses, it is important to consider both the potential tax loss for the revenue authority and the potential lost capital for the local economy.²⁴

²³ See n 2 above.

²⁴ It is difficult to quantify the exact economic impact of the potential underlying outflow of capital. The full US\$10m would not likely be invested locally on the assumption that some proportion would have flowed out of the country legitimately (eg, as dividend payments). Furthermore, some of the illicit outflow may be reinvested into the developing country from headquarters or other sibling corporations. The point is simply that the impact on the developing country's economy is potentially larger than the amount of the taxes that is lost to the revenue authority. In some cases, however, the shifting of profits may occur as a result of tax reporting manipulation without a corresponding real flow of assets out of the country.

Other types of illicit financial flows (eg, corruption, bribery, proceeds of crime, money laundering, etc) have the potential to produce tax abuse. As one tax authority stated: ‘not all tax evasion is a proceed of corruption; but, almost all corruption will have an element of tax evasion.’ Furthermore, the perpetrators of illicit financial flows will have a strong incentive to hide their activities from the authorities, including from the tax authorities, creating a dubious demand for secrecy jurisdictions.

Therefore, while this report will focus on different aspects of tax abuses, the Task Force is conscious that this is part of a broader and interconnected series of issues related to illicit financial flows.

1.1.1 Task Force findings

The Task Force confronted a number of definitional issues and debates about whether certain tax behaviour constitutes illegal tax evasion, legitimate tax avoidance, or conduct in the grey areas between evasion and avoidance – such as aggressive tax planning. As stated by one tax lawyer, ‘the difference between tax avoidance and tax evasion is a tricky question and even specialists can’t agree upon the difference’.

The Task Force therefore settled upon the term ‘tax abuses’ to describe the tax behaviour that: (a) was of greatest concern to stakeholders interviewed; and (b) potentially has the most significant impacts on the ability of developing countries to reduce poverty and satisfy basic human rights recognised by the International Covenant on Economic, Social and Cultural Rights.²⁵ Tax abuses include the tax practices that are contrary to domestic and international tax laws and policies.²⁶ They include tax evasion, tax fraud

25 The suggestion to use the terminology of ‘tax abuses’ was part of a submission to the Task Force by tax barrister, David Quentin. Mr Quentin argues for a ‘development-specific definition of abusive tax behaviour’ because the distinction between avoidance and evasion may be largely irrelevant in many developing countries, because the local tax authority is too under-resourced or does not have the necessary internal political support to do anything about it either way. He argues that the ‘definitional dilemma as between tax avoidance and tax evasion can in effect be side-stepped altogether in the context of a development-specific definition of tax abuse which only applies with reference to an evidence-based list of specified vulnerable jurisdictions. Abusive tax behaviour can be defined by reference to conduct in those countries, rather than requiring to conform to a universally applicable conception of what constitutes tax avoidance and/or tax evasion’. A copy of Mr Quentin’s submission is included as Appendix F.

26 In this regard, it should be noted that many governments have passed statutory ‘anti-abuse’ or ‘anti-avoidance’ rules to try to combat general and specific forms of tax abuses. See, for example, the UK’s anti-abuse rule at: www.hmrc.gov.uk/avoidance/gaar.htm.

and other illegal practices – including the tax losses resulting from other illicit financial flows such as bribery, corruption and money laundering.

Throughout the consultations, many stakeholders – and lawyers in particular – stressed that taxes must be clearly defined by the law. This is an important component of the rule of law and tax justice. If taxes must be based on the law, then it follows that if certain tax behaviour is considered abusive or potentially abusive, the legislator can always change the relevant tax laws, regulations and policies.

This focus on the rule of law and the role of the legislator corresponded, for some observers, with the principle that states have the primary obligation to protect human rights. Therefore, if human rights are affected by tax abuses, it is the responsibility of the state authorities to review and change tax laws, minimise opportunities for tax abuses and improve enforcement.

Stakeholders largely agreed that there is a legitimate scope for tax planning and tax avoidance by business enterprises and individuals. As one tax lawyer stated, ‘in accordance with the law, shouldn’t I be able to order my affairs to the maximum advantage?’ Agreement with the general principles of the rule of law, however, did not stop other stakeholders from civil society from raising concerns with the fairness and unnecessary complexity of current tax laws.

In this regard, numerous concerns were expressed about the relative power of wealthy individuals and multinational enterprises to avoid taxes by shaping the tax laws (or tax incentives and tax holidays) in their favour and/or by engaging lawyers and other advisers to craft sophisticated structures to avoid the application of the law. As one corporate lawyer stated, ‘tax lawyers are incredibly smart individuals who play 18 dimensional chess with tax codes’. Another tax lawyer drew the conclusion that ‘tax authorities will always be half a step behind the tax planners’.

These concerns were particularly strong in the context of developing countries where the capacity of tax authorities may be comparatively weak and there is less ‘equality of arms’ between the tax authority and sophisticated taxpayers. Related concerns were raised about the potential for straightforward bribery, corruption and undue influence in securing tax exemptions and advantages for certain business sectors and elites.

The concerns of stakeholders about the potential for tax abuses increased relative to the complexity and opacity of the tax avoidance strategies used, especially when they involved offshore secrecy jurisdictions. Concerns were expressed about the perceived unfairness of the results of tax avoidance strategies whereby profitable multinational business enterprises or wealthy individuals end up paying little or no taxes anywhere. Moreover, in the Task Force's consultation meetings in the SADC region and Latin America, numerous concerns were expressed about the perceived unfairness of natural resource taxation where little economic benefit flows to the communities or regions where the natural resources are exploited. Similarly, concerns were cited about the media reports of multinational enterprises (eg, Google, Starbucks and Amazon) paying very low taxes in developed countries such as the United Kingdom as a result of their tax avoidance strategies.

On the one hand, stakeholders from civil society and government were careful not to suggest that anyone should pay more taxes than strictly required by law. On the other hand, representatives of corporations and international financial centres acknowledged that some tax contributions are a requirement of society and that everyone should pay some tax somewhere. For individuals, the requirement to pay a 'fair share' of taxes was mostly framed in relation to morality, equity and democratic theory. For business enterprises, the requirement to pay a 'fair share' was framed in relation to principles of corporate social responsibility, business ethics and sustainable development. In both cases, for many stakeholders, there appears to be an underlying dissatisfaction with current domestic and international tax laws and a desire to change them.

During the Task Force's research and consultation process, certain categories of tax behaviour were repeatedly emphasised by stakeholders as potentially abusive and as priorities for further action by the international community. These included:

- Corporate profit-shifting, especially transfer mispricing.
- Lobbying by businesses and elites for tax holidays and exemptions.
- Inadequate taxation of natural resources.
- The use of offshore investment accounts.

The remainder of this chapter will provide a brief overview of the perspectives of stakeholders about these tax abuses and the potential way forward in addressing them.

1.1.2 Corporate profit-shifting

Corporate profit-shifting refers to techniques that transfer profits to low-tax jurisdictions.²⁷

The OECD refers to this species of tax abuse as ‘base erosion and profit shifting’ (BEPS):

‘Broadly speaking corporate tax planning strategies aim at moving profits to where they are taxed at lower rates and expenses to where they are relieved at higher rates. These strategies typically ensure: (i) minimisation of taxation in a foreign operating or source country, (ii) low or no withholding tax at source, (iii) low or no taxation at the level of the recipient, as well as (iv) no current taxation of the low taxed profits (achieved via the first three steps) at the level of the ultimate parent. The result is a tendency to associate more profit with legal constructs and intangible rights and obligations, thus reducing the share of profits associated with substantive operations involving the interaction of people with one another.

While these corporate tax planning strategies may be technically legal and rely on carefully planned interactions of a variety of tax rules and principles, the overall effect of this type of tax planning is to erode the corporate tax base of many countries in a manner that is not intended by domestic policy.²⁸

27 It should be noted that there are numerous other profit-shifting practices that are also potentially abusive. In a recent report, the OECD enumerates ‘key pressure areas’ related to BEPS: international mismatches in entity and instrument characterisation including hybrid mismatch arrangements and arbitrage; application of treaty concepts to profits derived from the delivery of digital goods and services; the tax treatment of related party debt-financing, captive insurance and other inter-group financial transactions; transfer pricing, in particular in relation to the shifting of risks and intangibles, the artificial splitting of ownership of assets between legal entities within a group, and transactions between such entities that would rarely take place between independents; the effectiveness of anti-avoidance measures, in particular General Anti-Avoidance Rules (GAARs), Controlled Foreign Company (CFC) regimes and thin capitalisation rules; and the availability of preferential regimes for certain activities.

28 OECD, ‘OECD Work on Base Erosion and Profit Shifting’ (2013), 2, accessed at: www.oecd.org/ctp/TheOECDworkonBEPS.pdf. See also OECD, ‘Base Erosion and Profit Shifting’ (2013), accessed at: www.keepeek.com/Digital-Asset-Management/oecd/taxation/addressing-base-erosion-and-profit-shifting_9789264192744-en.

One of the main mechanisms for corporate profit-shifting is ‘transfer mispricing’.²⁹ Transfer mispricing was highlighted by many stakeholders as one of the most pressing international tax abuses, particularly given estimates that intra-group transactions within multinational enterprises consist of upwards of 60 per cent of global economic activity,³⁰ and that mispricing accounted for 80 per cent of illicit financial flows out of developing countries over the last decade (ie, US\$4.688tn of the estimated US\$5.86tn in total illicit financial flows).³¹

Transfer prices are related to cross-border payments from one part of a multinational enterprise for goods or services provided by another part of the same multinational enterprise. These transactions between different parts of a multinational enterprise, however, are not subject to the same market forces shaping relations between two independent companies. Furthermore, in many jurisdictions, there is an assumption that sibling or subsidiary corporations are separate and independent legal entities even if they do not behave like independent companies.

The current standard for multinational enterprises to find an appropriate transfer price of goods, intangibles and services among related enterprises is the ‘arm’s length principle’. This is set out in Article 9 of the OECD Model Tax Convention on Income and Capital and the United Nations Model Double Taxation Convention between Developed and Developing Countries, and described in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (the ‘Transfer Pricing Guidelines’), as revised in 2010.³² If the price allocated to an intra-group transaction reflects an arm’s length price that would be paid on the open market, it should not be problematic. Intra-group transactions that do not reflect the arm’s length

29 ‘Transfer pricing is not, in itself, illegal or necessarily abusive. What is illegal or abusive is transfer mispricing, also known as transfer pricing manipulation or abusive transfer pricing. Transfer mispricing is a form of a more general phenomenon known as trade mispricing, which includes trade between unrelated or apparently unrelated parties – an example is re-invoicing.’ Tax Justice Network, ‘Transfer Pricing Page’ www.taxjustice.net/cms/front_content.php?idcat=139.

30 *Ibid.*

31 Financial Transparency Coalition, ‘Transfer Pricing’, see: www.financialtransparency.org/issues/trade-mispricing.

32 OECD Transfer Pricing Guidelines, accessed at: www.oecd.org/ctp/transfer-pricing/transfer-pricing-guidelines.htm.

principle can be challenged by the tax authorities – hence the term ‘transfer mispricing’.³³

The OECD and other stakeholders point out that some of the fundamental problems related to transfer mispricing (and other profit-shifting strategies) stem from gaps in the historical development of the international legal framework for taxation:

‘Corporation tax is levied at a domestic level. The interaction of domestic tax systems sometimes leads to an overlap, which means that an item of income can be taxed by more than one jurisdiction thus resulting in double taxation. The interaction can also leave gaps, which result in an item of income not being taxed anywhere thus resulting in so-called “double non-taxation”. Corporations have urged bilateral and multilateral co-operation among countries to address differences in tax rules that result in double taxation. Domestic and international rules to address double taxation, many of which originated with principles developed in the past by the League of Nations in the 1920s, aim at addressing these overlaps so as to minimise trade distortions and impediments to sustainable economic growth. In contrast, corporations often exploit differences in domestic tax rules and international standards that provide opportunities to eliminate or significantly reduce taxation.’³⁴

The OECD notes that corporate profit-shifting strategies ‘take advantage of a combination of features of tax systems which have been put in place by home and host countries. Accordingly, it may be impossible for any single country, acting alone, to fully address the issue. Furthermore, unilateral and uncoordinated action by governments responding in isolation could result in the risk of double – and possibly multiple – taxation for business’.

33 The Tax Justice Network provides the following example to explain the difference between transactions that follow the arm’s length principle and those that do not: ‘If two unrelated companies trade with each other, a market price for the transaction will generally result. This is known as “arms-length” trading, because it is the product of genuine negotiation in a market. This arm’s length price is usually considered to be acceptable for tax purposes. But when two related companies trade with each other, they may wish to artificially distort the price at which the trade is recorded, to minimise the overall tax bill. This might, for example, help it record as much of its profit as possible in a tax haven with low or zero taxes.’ See: www.taxjustice.net/cms/front_content.php?idcat=139.

34 ‘OECD Work on Base Erosion and Profit Shifting’ (2013), 2. See also Brett Wells and Cym Lowell, ‘Tax Base Erosion and Homeless Income: Collection at Source is the Linchpin’ (2011) 65 Tax Law Review 535, accessed at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1888397.

Most stakeholders agreed that corporate profit-shifting is a pressing global issue that requires multilateral collaboration and reform of some aspects of the international tax system. They noted that corporate profit-shifting is a challenge for both developed and developing countries.

One of the current challenges is that not all countries have the capacity to establish transfer pricing rules and to enforce them. As one corporate stakeholder stated: ‘The real problem is that developing countries need reasonably sophisticated and non-corrupt tax officials. Multinational corporations are not necessarily saints, but they will respond to systematic enforcement.’ On the other hand, tax experts noted that the rules and models have evolved significantly in industrialised countries. Transactions with affiliated entities are usually scrutinised carefully by the tax authorities, and there can be significant penalties if the transaction does not reflect the arm’s length principle. Transfer pricing studies are undertaken to support the arm’s length principle and to show due diligence. As more countries implement transfer pricing rules, there is an incentive for companies to have global transfer pricing studies that can be used to support and document transactions for the purpose of compliance with multiple tax authorities.

Current actions taken by the OECD focus on strengthening the arm’s length principle by implementing and updating the Transfer Pricing Guidelines.³⁵ Included in these efforts is an attempt to simplify the Guidelines, particularly for application by authorities in developing countries. Furthermore, the OECD has established a Global Forum on Transfer Pricing in order to facilitate international cooperation on transfer pricing and related issues.³⁶ The OECD has also developed a directory of over 400 aggressive tax planning schemes to allow tax authorities to share information about potentially abusive tax strategies and practices.

In its report to the G20 in early 2013, the OECD recommended the development of a comprehensive action plan to address base erosion and profit-shifting. It delivered the Action Plan on Base Erosion and Profit

35 This includes: new guidance on comparability and profit methods in 2010 (Chapters I to III); a new chapter on business restructuring in 2010 (Chapter IX); new guidance on the attribution of profits to permanent establishments, incorporated into Art 7 of the Model Tax Convention on Income and Capital and the Guidelines in 2010; a revision of the Guidelines with respect to intangible assets, and an attempt to simplify the Guidelines, particularly for application by authorities in developing countries.

36 Over 300 transfer pricing experts from 90 governments attended the first meeting in March 2012.

Shifting (BEPS) (the ‘Action Plan’) in July 2013 and the G20 endorsed it. The Action Plan states that ‘fundamental changes are needed to effectively prevent double non-taxation, as well as cases of no or low taxation associated with practices that artificially segregate taxable income from the activities that generate it’.³⁷ The Action Plan also acknowledges that new international standards must be designed to ensure the coherence of corporate income taxation at the international level; a realignment of taxation and relevant substance is needed to restore the intended effects and benefits of international standards, which may not have kept pace with changing business models and technological developments; and the actions implemented to counter BEPS cannot succeed without further transparency, nor without certainty and predictability for business.³⁸

The Action Plan proposes a series of 15 actions that will address different issues associated with BEPS over the next two years, including the development of ‘a multilateral instrument designed to provide an innovative approach to international tax matters’.³⁹

Action Plan on Base Erosion and Profit Shifting

ACTION 1: Address the tax challenges of the digital economy

ACTION 2: Neutralise the effects of hybrid mismatch arrangements

ACTION 3: Strengthen CFC (Controlled Foreign Company) rules

ACTION 4: Limit base erosion via interest deductions and other financial payments

ACTION 5: Counter harmful tax practices more effectively, taking into account transparency and substance

ACTION 6: Prevent treaty abuse

37 OECD, Action Plan on Base Erosion and Profit Shifting (2013) at 13, accessed at: www.oecd.org/ctp/BEPSActionPlan.pdf.

38 *Ibid* at 13–14.

39 *Ibid* at 24.

ACTION 7: Prevent the artificial avoidance of PE (permanent establishment) status

ACTIONS 8, 9 and 10: Assure that transfer pricing outcomes are in line with value creation

ACTION 11: Establish methodologies to collect and analyse data on BEPS and the actions to address it

ACTION 12: Require taxpayers to disclose their aggressive tax planning arrangements

ACTION 13: Re-examine transfer pricing documentation

ACTION 14: Make dispute resolution mechanisms more effective

ACTION 15: Develop a multilateral instrument

It is expected that the Action Plan will largely be completed in a two-year period, recognising that some actions will be addressed faster as work has already been advanced, while others might require longer-term work.⁴⁰

The Action Plan has been heralded by some as a ‘once-in-a century’ change, while others state that the proposed actions do not go far enough.⁴¹ Among the concerns expressed are that the Action Plan does not require full country-by-country reporting by multinational enterprises,⁴² and that it does not signal a move towards unitary taxation.⁴³

The Financial Transparency Coalition (previously the Task Force on Financial Integrity and Economic Development) proposes a requirement that ‘parties conducting a sale of goods or services in a cross-border transaction sign a statement in the commercial invoice certifying that no trade mispricing in an attempt to avoid duties or taxes has taken place and

40 *Ibid* at 24–25 and Annex A.

41 See n 6 above.

42 See n 7 above.

43 See n 6 above.

that the transaction is priced using the OECD arms-length principle'.⁴⁴ It notes that 'instituting procedures that curtail the practice of trade mispricing will enable governments in poor countries to collect a fair amount of tax revenue from multinational corporations operating in their territories'.⁴⁵ Some of the actions in the OECD Action Plan are aligned with this approach, such as the requirement for taxpayers to disclose their aggressive tax planning arrangements, and the need to re-examine transfer pricing documentation.⁴⁶

The Tax Justice Network notes that the arm's length principle is very hard to implement, even with the best intentions; that there is great scope for misunderstanding and for deliberate mispricing; and that enforcement and compliance costs are very high. It therefore favours an alternative approach: combined reporting with formulary apportionment and unitary taxation. The aim of unitary taxation is to tax portions of a multinational company's income without reference to how that enterprise is organised internally. This approach is supported by country-by-country reporting of financial and tax information (rather than group-wide reporting whereby profits and tax payments are reported on an aggregated global basis).⁴⁷

The Tax Justice Network states that this approach:

'would prioritise the economic substance of a multinational and its transactions, instead of prioritising the legal form in which a multinational organises itself and its transactions. ... Multinational companies would have far less need to set themselves up as highly complex, tax-driven multi-jurisdictional structures, and would simplify their corporate structures, creating major efficiencies. Billions could be saved on tax enforcement. ... Developing countries should have a particular interest in this approach.'⁴⁸

A number of stakeholders from different perspectives were supportive of the idea of a unitary taxation system and formulary apportionment to reduce the possibility of transfer mispricing and profit-shifting. They noted that

44 Information about the Financial Transparency Coalition's work on trade mispricing can be found on its website: www.financialtaskforce.org/issues/trade-mispricing.

45 *Ibid.*

46 OECD Action Plan, Actions 12 and 13.

47 Tax Justice Network, 'Transfer Pricing Page', see: www.taxjustice.net/cms/front_content.php?idcat=139.

48 *Ibid.*

this sort of system is used already at a subnational level (eg, in the US and Canada), whereby profits are apportioned between states or provinces based on factors such as the amount of sales, the number of employees and/or the value of the assets/infrastructure located in each jurisdiction. Stakeholders also noted that formulary apportionment would also confront some of the problems created by tax havens, as these jurisdictions would likely be apportioned less profits based on the above-noted factors.

At the same time, some tax practitioners urged caution: 'Formulary apportionment and unitary taxation would likely benefit the developing world, but is not a panacea.' Questions were raised about what factors would be used to apportion the profits and about the need to agree upon the relative weighting between these factors. These factors are not inherently different from transfer pricing. Furthermore, there would be difficult negotiations to get states to agree upon a system of formulary apportionment. For instance, developed countries are not likely to stop placing high value on intangible assets like patents and technology. Upon the release of the OECD Action Plan, it was noted that member nations regarded proposals for unitary taxation as 'unfeasible'.⁴⁹

Christian Aid raises concerns that current transfer pricing mechanisms are responsible for a significant shift in taxing rights away from those countries where they are most important for poverty eradication: 'the central, and unsurprising, finding is that the complexity of the system, coupled with a lack of capacity and expertise in developing countries, leaves the latter open to abuse.'⁵⁰ Noting the existence of different approaches to the problem of transfer pricing, it provides a number of recommendations for addressing the capacity of developing countries:

'Firstly, developing countries need auditors with expertise in transfer pricing to identify where the allocation of taxing rights is inappropriate.

49 See n 6 above.

50 David McNair, Rebecca Dottey and Alex Cobham, 'Transfer Pricing, and the Taxing Rights of Developing Countries', see: www.christianaid.org.uk/images/CA_OP_Taxing_Rights.pdf.

Secondly, where disputes arise, developing countries need assistance in pursuing these disputes through the courts. Here transfer pricing legislation is essential. Such legislation needs to include information powers setting out what information and documentation is required from the [multinational corporation]. However, legal assistance from transfer pricing lawyers would go some way in reducing the power asymmetry in taxing rights between developing countries, and taxpayers and developed countries. Some have suggested establishing a group of international tax lawyers who would be on hand to assist developing countries when required.

Thirdly, increased disclosure through country-by-country reporting of [multinational corporations]' activities would provide revenue authorities with some information with which to target their auditing resources to where the inappropriate allocation of profits is most likely.

Fourthly, regional cooperation between revenue authorities in identifying appropriate comparables would assist revenue authorities in making appropriate assessments of transfer prices.

Finally, effective tax information exchange between jurisdictions which include developing countries is crucial in providing a tax authority with access to information regarding a company's operations in other jurisdictions.'

Finally, the UK House of Commons International Development Committee has taken note of the problem of 'transfer pricing abuse' and suggests that the UK's development agency, the Department for International Development (DFID) should stress – in its dealings with revenue authorities in developing countries – the importance of requiring related party transactions to be declared on annual tax returns.⁵¹

51 House of Commons International Development Committee, 'Report on Tax in Developing Countries', available at: www.publications.parliament.uk/pa/cm201213/cmselect/cmintdev/130/13002.htm.

The SABMiller case study

This text box summarises a case study undertaken by ActionAid about the tax practices of SABMiller plc, a multinational beverage company that operates the Accra Brewery Company Ltd in Ghana.⁵² It serves to illustrate a number of the tax avoidance strategies that multinational corporations use to shift profits out of developing countries. David Quentin, a tax barrister, provided a submission to the Task Force based on the ActionAid case study and other commentaries. His full submission is included in Appendix E.

SABMiller subsidiary Accra Brewery is Ghana's second-largest beer producer, pumping out £29m (Gh¢69m) worth of beer a year. Yet in the past two years it has had an operating loss, and it paid corporation tax in only one of the four years from 2007 to 2010.

Marta, a local woman who operates a food and beverage stand next to the brewery, pays more in income tax than her neighbour that is part of a multibillion pound global business.

There are a number of strategies whereby Accra Brewery manages to pay less tax on its profits than its neighbour Marta.⁵³

'THE SWISS ROLE'

In total, 4.6 per cent of Accra Brewery's turnover is paid to another company related to SABMiller called Bevman Services AG in the Swiss canton of Zug, purportedly as a fee in respect of management services.

52 ActionAid, 'Calling Time' (2010), accessed at: www.actionaid.org.uk/doc_lib/calling_time_on_tax_avoidance.pdf.

53 These strategies were subsequently commented on by Roberto Schatan, former senior adviser at the OECD's Centre for Tax Policy and Administration, in the journal *Tax Notes International*. See: Roberto Schatan, 'Tax-Minimizing Strategies and the Arm's-Length Principle', *Tax Notes International*, 9 January 2012, 121. None of the strategies will come as any surprise to anyone who is familiar with group tax planning by multinational groups. Indeed, three of them appear to correspond to the three most important tools for shifting profits out of the tax net of an operating company's jurisdiction, as identified in the World Bank's 2012 report on illicit financial flows, those three tools being transfer mispricing, the offshoring of intangible assets, and thin capitalisation. See Clemens Fuest and Nadine Riedel, 'Tax Evasion and Tax Avoidance: The Role of International Profit Shifting' in Peter Reuter (ed), *Draining Development? Controlling Flows of Illicit Funds from Developing Countries* (International Bank for Reconstruction and Development/World Bank 2012), 126.

However, ActionAid's findings suggest that Bevman is not providing services of any significance and therefore that the purported fee for services is simply a contrivance to siphon off profits generated in Ghana and avoid local taxation.

'GOING DUTCH'

Owing to the favourable tax treatment of royalty income in the Netherlands, and the jurisdiction's extensive tax treaty network, Netherlands-resident companies are a mainstay of international tax planning for royalty income. Accra Brewery deducts against its taxable profits royalties payable to a Rotterdam-based group company for the rights to use the brand name under which it sells beer, 'Stone Strong Lager'.

This may be perfectly legitimate, provided the Ghanaian company that developed the brand (presumably Accra Brewery) was paid an arm's length price for the trademark; however, if the Ghanaian company was not paid an arm's length price, then this is an example of transfer mispricing. Moreover, this results in a permanent legitimate deduction of royalties by means of a single questionable prior transaction. If the tax authorities did not have the wherewithal to challenge the initial transfer of intellectual property out of Ghana at a non-arm's length price, the fiscal damage to Ghana may be permanent, ongoing and legally defensible.

'THINNING ON TOP'

ActionAid found that Accra Brewery owed money to a related company in Mauritius in an amount exceeding its equity capital by a factor of seven. In other words, Accra Brewery was 'thinly capitalised' and therefore making interest payments on debt exceeding amounts it would be able to borrow on the open market if it were a standalone company.

While this could be treated as a particular kind of transfer mispricing, many tax systems have special rules restricting the deductibility of interest for tax purposes in circumstances where the borrower is thinly capitalised, and Ghana's is one such system. Accra Brewery was deducting the entirety of its intra-group interest payments from its taxable profits, a situation described as 'clearly contrary to Ghana's anti-avoidance legislation'.

In the face of mounting awareness and pressure about the impacts of transfer pricing and related issues, the G8 has recently committed to further cooperation on this matter and support to the OECD in accelerating its work on base erosion and profit-shifting:

'We welcome the OECD work on addressing Base Erosion and Profit Shifting (BEPS) by multinational enterprises and emphasise the importance of the OECD developing an ambitious and comprehensive action plan for the Finance Ministers and Central Bank Governors of the G20 in July. We look forward to the OECD recommendations and commit to take the necessary individual and collective action. We agree to work together to address base erosion and profit-shifting, and to ensure that international and our own tax rules do not allow or encourage any multinational enterprises to reduce overall taxes paid by artificially shifting profits to low-tax jurisdictions. The ongoing OECD work will involve continued engagement with all stakeholders, including developing countries.'⁵⁴

The final point about the involvement of developing countries in the work of the OECD is important in ensuring that effective actions are taken and the capacity for better tax governance is built in the countries that need it the most. Part of the effort to support developing countries is to provide relevant and comparable price information across jurisdictions. A lack of data on comparable transactions is a significant issue for effective tax collection, particularly in developing countries. In this regard, the G8 requested that

54 Lough Erne G8 Leaders' Communiqué, 2013, para 24.

the OECD find ways to address the concerns expressed by developing countries on the quality and availability of the information on comparable transactions that is needed to administer transfer pricing effectively.⁵⁵

Some of the proposed actions in the recent OECD Action Plan on Base Erosion and Profit Shifting are designed to provide better information to tax authorities. For instance, in Action 12 (‘Require taxpayers to disclose their aggressive tax planning arrangements’), it is stated that:

‘A key issue in the administration of transfer pricing rules is the asymmetry of information between taxpayers and tax administrations. This potentially undermines the administration of the arm’s length principle and enhances opportunities for BEPS. In many countries, tax administrations have little capability of developing a “big picture” view of a taxpayer’s global value chain. In addition, divergences between approaches to transfer pricing documentation requirements leads to significant administrative costs for businesses. In this respect, it is important that adequate information about the relevant functions performed by other members of the MNE [Multinational Enterprises] group in respect of intra-group services and other transactions is made available to the tax administration.’⁵⁶

1.1.3 Tax holidays and incentives

Tax holidays and incentives are not in principle abusive. Indeed, tax incentives can be a powerful tool for governments to promote certain types of desirable taxpayer behaviour, whether for individuals or business enterprises. Stakeholders provided examples of how tax incentives can strengthen environmental, social and human rights results: for example, tax rebates for investment in green technologies; for a tax-free education fund for a child’s post-secondary education; or for a tax-deferred retirement savings fund that strengthens old-age security.

Furthermore, there may be sound policy reasons for certain tax holidays or incentives: in the context of foreign investment, a tax holiday or incentive may attract the initial investment (that arguably may have been made

55 *Ibid* para 29.

56 OECD Action Plan, 22.

elsewhere) and, afterwards, the initially foregone tax revenues may be made up by direct and indirect taxes that the investment generates. As one stakeholder noted, ‘tax holidays are a reality for jurisdictions that are competing against one another’.

However, it is not always clear whether tax holidays and incentives result in a benefit for society and the economy as a whole, or whether they benefit a particular business enterprise or group of elites at the expense of other taxpayers and citizens. Furthermore, providing too many tax holidays and incentives risks eroding the link between taxpayers and the political system. Tax holidays and incentives may result in a perverse form of ‘representation without taxation’, which undermines fundamental democratic principles. As one stakeholder stated, ‘when corporations and elites negotiate ways out of taxation, you begin to have corruption at an institutional level that undermines democracy’.

These ‘sweetheart deals’ are seen to be objectionable in terms of fairness, as well as efficiency: they are unfair to other taxpayers who may not have the bargaining power to negotiate such advantageous terms; and it also hurts overall efficiency in that a less efficient company can undersell a more efficient competitor merely because it managed to obtain more favourable tax treatment. They may also harm another country and its population where a foreign investment would otherwise have taken place but for the tax holiday or incentive. Once again, this may harm efficiency as a less efficient location ends up being preferred merely because lower taxes can be obtained there.

Throughout the Task Force’s consultation process in Latin America and the SADC region, concerns about tax holidays and incentives were raised by stakeholders – particularly in the context of foreign investment agreements. On the one hand, local stakeholders acknowledged the intense pressure that countries (and subnational jurisdictions) are under to provide incentives to attract foreign investment; on the other hand, there is a potential for resentment and opposition if multinational enterprises do not pay their fair share of taxes and do not provide meaningful benefits to the local economy. Where the terms of a foreign investment agreement are perceived to be unfair, there may be popular and political pressure to renegotiate the

agreement or, in extreme cases, to nationalise a business. Furthermore, stakeholders often noted that the negotiation of tax holidays and incentives is fertile ground for bribery and corruption.

Some tax experts and international development practitioners emphasised the need to look beyond tax holidays for specific companies to the broader issue of foreign investment and free trade agreements that create preferential tax treatment for certain industries and which are difficult to roll back. Increasingly, the negotiation of foreign investment contracts (as well as the bilateral trade agreements that enable foreign investment and protect foreign investors) is a subject of attention from a human rights perspective.⁵⁷ For example, during the course of the Task Force research, economic sanctions were being lifted in Myanmar (Burma) and a new investment law was being developed that provided for tax concessions and holidays to attract foreign investment. Civil society representatives raised concerns about the potential for corruption in negotiating these tax concessions, as well as the fear that less money will actually contribute to development and more money will flow into the offshore accounts of members of the regime with a very poor human rights record.⁵⁸

Transparency of tax incentives for investment has been identified by the OECD Task Force on Tax and Development as a key issue for developing countries, recognising that tax incentives for investment may not always achieve their stated goals and may have the potential to damage the revenue prospects of developing countries.⁵⁹

In a report to the G20 Development Working Group, the International Monetary Fund (IMF), the OECD, the United Nations (UN) and the World Bank stated that 'tax breaks aimed at foreign direct investment (largely to Multinational Enterprises (MNEs) domiciled in G20 countries) are an

57 See the discussion in Chapter Two, section 2.3 below.

58 In May 2013, the 'Burma Responsible Investment Reporting Requirement' came into force in the US to encourage transparency about new investments in the country. Human rights organisations continue to urge greater due diligence by foreign investors in order to avoid adverse impacts on human rights.

59 The OECD Task Force on Tax and Development is currently conducting a series of country reviews that are expected to cover the transparency of policy objectives, expected costs and intended benefits, as well as the transparency and clarity of the qualification rules, and the processes for qualification. They will incorporate country-specific policy recommendations, and their findings will feed into the development of the OECD's Policy Framework for Investment, a key element of the OECD's Development Strategy. They will also inform the development of Principles to Enhance the Transparency and Governance of Tax Incentives for Investment in Developing Countries.

especially significant form of tax expenditure in many developing countries, in many cases significantly undermining their tax revenue base'.⁶⁰

The African Tax Administration Forum raises similar concerns:

'Revenues foregone by tax incentives for investment – such as tax holidays, partial profit exemptions, free trade zones, etc – tend to exceed by a wide margin the revenue costs expected before the concession is put in place. In particular, countries frequently underestimate the tax planning opportunities and ploys used by multinational companies through which they often manage to extend the coverage of their initial tax reliefs to non-targeted activities and profits. Increased reliance on other taxes and the need for tax base protection measures place additional strains on the tax system. At the same time, competition amongst countries to attract mobile investment creates pressure for continued use of targeted tax incentives.'⁶¹

Developing countries may believe that resisting multinational enterprises' demands for tax breaks will drive the investment in question elsewhere: 'This sort of bargaining can result in a "race to the bottom", in which countries in a region are made collectively worse off, to the benefit of the multinational investors. Studies also suggest that tax-driven investment does not provide a stable source of investment in the recipient country.'⁶²

The African Tax Administration Forum questions whether the use of tax incentives is a cost-effective way of overcoming investment impediments:

'In general, it is better to focus on the actual impediments to investment and aim to address these directly. Addressing non-tax impediments [eg, lack of infrastructure] may be a more effective policy than seeking to match the tax incentives provided by other countries, especially if the latter prompts a race towards widespread exemptions and a de facto zero-tax regime. In providing an attractive tax system for investors, African governments should aim for transparency, certainty and predictability of tax treatment,

60 'Supporting the Development of More Effective Tax Systems: A Report to the G20 Development Working Group by the IMF, OECD, UN and WB' (2011), 24, accessed at: www.oecd.org/ctp/48993634.pdf.

61 African Tax Administration Forum, 'Good Tax Governance in Africa' (2012), 10.

62 See n 60 above, 24.

and take steps to limit compliance costs (for example, through taxpayer education and streamlined payments), before exempting international investors from all or part of their fiscal obligations.’⁶³

It is suggested that addressing this problem requires a closer partnership between developing countries, developed countries and business enterprises. ‘Developed countries should encourage and support developing countries in their efforts to resist pressure to grant such mutually damaging tax breaks. Developing countries themselves may be able to mitigate the damage to their revenue bases by stronger regional cooperation.’⁶⁴

Since tax exemptions are often granted through special agreements negotiated without the involvement of tax authorities, they can undermine the ability of those authorities to object to exemptions granted by other branches of the government (eg, through an investment contract concluded between the executive and a foreign enterprise). It is therefore suggested that: ‘G20 countries should encourage their resident companies to ensure that, if tax exemptions are to be granted, the tax authorities of the developing countries are fully involved in the negotiation and design of these exemptions.’⁶⁵

As stated in the report to the G20 Development Working Group, identifying, quantifying and publicising tax expenditures is a key element of fiscal transparency and a powerful tool for avoiding and scaling back preferences that do not generate some offsetting social benefit. ‘For developing countries, tax expenditure analyses can be an extremely important first step in assessing the costs and benefits of tax incentives. Even the mere publication of exemptions and identity of groups of beneficiaries, without the cost estimates of a full tax expenditure analysis, could transform the ability of citizens and civil society to engage in the debate.’⁶⁶

63 See n 61 above, 10.

64 See n 60 above, 24.

65 *Ibid* 25. The African Tax Administration Forum also states that, ‘some degree of cooperation amongst countries is required to prevent a counterproductive race to the bottom in effective tax rates on profit. This applies especially to countries linked by free-trade arrangements and which, thus, are likely to be in the most direct competition for mobile capital. Arguably, with some form of regional collaboration, the priority of policy makers should be to limit the most damaging tax preferences such as tax holidays and export incentives. A monitoring framework and computerised system to exchange information would be necessary to implement this type of agreement’. See n 61 above, 10.

66 See n 60 above, 23. The production of such analyses is a core element of both the IMF’s *Manual on Fiscal Transparency* and the OECD’s *Best Practices for Budget Transparency*. Several G20 countries routinely produce such analyses as do some developing countries.

A number of stakeholders from civil society organisations noted that it is currently difficult to know what is contained in foreign investment contracts because of their confidentiality. Confidentiality is generally justified based on a need to protect commercially sensitive or competitive information. However, some corporate stakeholders noted that there would be nothing that is commercially sensitive if all contracts were made public. ‘Contract transparency is fine provided there is a level playing field.’

1.1.4 Taxation of natural resources

The taxation of natural resources was a frequent topic in the consultation meetings in the SADC region and Latin America. Many concerns expressed by stakeholders from diverse perspectives related to the negative historical experiences with extractive projects in developing countries. Natural resource development tended to have a negative association with corruption, inequality and conflict. One lawyer spoke about ‘a legacy of harms to development and economic, social and cultural rights. Civil and political rights are also affected as natural resource development can undermine governance’. Some stakeholders with experience with extractive industry projects cautioned against generalising about natural resource development, as different countries have different experiences. For example, Botswana was mentioned as a country that has used its diamond wealth to uplift the population in terms of education, social services and infrastructure.

Although many stakeholders acknowledged that the extractive industry has made progress in its commitments to corporate social responsibility, sustainable development and human rights, concerns about current practices persisted. For instance, while the Task Force was in South Africa, there was a violent incident between striking workers and security forces that drew media, stakeholder and political attention to the adequacy of workers’ wages and benefits to the community near a mining operation. While in Zimbabwe, conversation frequently focused on the diamond industry and whether its development would benefit the population or whether diamonds would contribute to conflict and corruption.

These discussions of the extractive industry were often focused on environmental, social and human rights issues that went beyond taxation.

However, it was clear that local stakeholders from developing countries have expectations that the development of natural resources must produce benefits to the country and community where the resource is physically located – through jobs, business opportunities, royalties and taxes.

When dealing with natural resources, the tax abuses of concern were not significantly different from those discussed elsewhere in this chapter: the main concerns related to corporate profit-shifting strategies and the negotiation of tax holidays and concessions in mining agreements. The specific focus and attention to the taxation of natural resources relates to the fact that these natural resources are geographically fixed: for numerous stakeholders, this implies that there should be less reason for their domestic government to offer tax or other concessions, as the natural resources cannot be relocated elsewhere – as could be done with a factory, for instance.

In developing countries that may lack other economic opportunities, the natural resources available are considered a national endowment that must benefit the population as a whole, rather than profit foreign interests. As many natural resources are non-renewable, local stakeholders expressed the view that their governments had a heightened responsibility to ensure that the country and community obtain benefits – including through taxation and royalties – ‘because once the resource has been extracted, it is gone’.

Some of the concerns expressed by local stakeholders were linked to the fact that commodity prices had increased dramatically over past years and many natural resource companies had been enjoying spectacular profits. In the SADC region and in Latin America, examples were given of governments trying to renegotiate mining contracts because they had previously locked in financial provisions at a rate that was perceived to be too low in relation to the global commodity price. Some tax authorities and experts underlined the need for better comparative information about mining returns between developed and developing countries, so that governments in developing countries understand what can be negotiated.

For extractive industry representatives, one of the key challenges is to find a way to devise a tax regime that provides enough certainty to the investors making a very large capital investment but that also has the flexibility to adjust to the inevitable fluctuations in commodity prices over the lifespan

of a project. For instance, different formulas can be designed that relate to prevailing world market prices. ‘These issues ebb and flow depending on the commodity cycle, and tend to come to the fore during a commodity boom.’ Another corporate stakeholder stated: ‘it’s important to match the tax regime to the realities of the industry. Extractive industries are inherently capital intensive up front. It takes billions of investment to convert a resource that is without value in the ground into something with value.’

Similarly, some corporate representatives and lawyers said there is a case to be made for stabilisation clauses in investment contracts for the extractive industry, but also acknowledged that not every financial provision should be stabilised.⁶⁷ Stabilisation clauses are a widely used risk-management device in investment contracts, but are coming under increased attention because they may affect a state’s action to implement its international human rights obligations.⁶⁸ Furthermore, it was acknowledged that it is important to find ways to give governments and local populations a benefit at an earlier stage, before the mine is producing (and royalties can be charged and/or the company is making profits that can be taxed).

Another important challenge is developing royalty or revenue streams that flow to the community level. Many countries have a vertical revenue system, which means that revenues go to the central government first and may not necessarily be redistributed into local communities or build the capacity of local governments. ‘Therefore, you might have islands of poverty and deprivation within a rising sea of mineral wealth at the national level.’ As a result, some extractive industry companies are trying to work with local authorities to localise benefits and broaden the positive impacts of community investments and infrastructure.

Moreover, extractive industry representatives repeated that there is no easy answer to the question of what is a fair amount. ‘It depends on the country, the commodity and the risks for the investors.’ It was noted that the top

67 In this regard, the IBA’s Mining Law Committee has created a Model Mining Development Agreement (the ‘MMDA’) to address the contractual relationship between host states and mining investors. The MMDA is a non-prescriptive, web-based, widely available resource that can lead to informed, transparent and equitable negotiations and contractual outcomes. It includes a variety of model provisions on taxation in section 7.0 of the MMDA. See: www.mmdaproject.org.

68 See, for example, IFC and UN Special Representative of the Secretary-General on Business and Human Rights, ‘Stabilization Clauses and Human Rights’ (27 May 2009), accessed at: www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES&CACHEID=9feb5b00488555eab8c4fa6a6515bb18.

priority for extractive companies is stability: companies would rather have a higher rate that was guaranteed for a long period, rather than a low rate that was susceptible to change. Once again, it was stated that the 'key is the entrenchment of the rule of law'. However, there may be a limit to what governments can negotiate in terms of higher tax rates – particularly in a downturn in commodity prices. There are an increasing number of recent examples of mining projects being slowed or cancelled for economic reasons, potentially increasing pressures on governments to offer a competitive taxation regime.

In a study prepared for the Commonwealth Secretariat and the International Council on Mining and Metals (ICMM), it is stated that governments are well-advised to try and maximise their revenues from mining over the long term.⁶⁹ The design of a tax regime and the appropriate level of taxation involve making assumptions about the future that may prove to be incorrect. Therefore, periodic and collaborative reassessments of those assumptions are needed to ensure that consent might remain in place over time. 'This way of addressing the problem shifts the emphasis to the process through which consent is brought about and somewhat away from the substance.'⁷⁰

The study also argues that minerals taxation systems should be less complex in lower-income countries: 'simplicity in a tax system makes it easier to calculate the amounts of tax that are due and also to audit the amounts paid, whether nationally or with international support (eg via [Extractive Industry Transparency Initiative]-type arrangements); and general administrative capacity is often low in low-income mineral-dependent economies.'⁷¹

Some governments have relied on special arrangements and bilaterally negotiated agreements to secure investments and government revenues. This report concludes that special fiscal terms are not justified per se and that the case for special tax regimes for mining is not clear cut:

69 Commonwealth Secretariat and ICMM, 'Mineral Taxation Regimes: A Review of Issues and Challenges in their Design and Application/The Challenge of Mineral Wealth: Using Resource Endowments to Foster Sustainable Development' (February 2009), 11, accessed at: www.icmm.com/document/520.

70 *Ibid.*

71 *Ibid* 12.

‘[I]t is both feasible and preferable for mining companies to be subject to a country’s general tax system, incorporating a few mining specific features that address some of its special characteristics (eg special allowances). Putting taxpayers on equal footings can provide greater certainty and stability and increase incentives for governments to improve tax administration and fiscal policymaking more generally.’⁷²

The report argues clearly in favour of increasing transparency of the taxation of mineral extraction, as well as increasing transparency of the use of mining revenue to support socio-economic development:

‘Increasing transparency is a necessary step to raise awareness of the financial contributions that the mining sector makes. Transparency alone does not foster consensus on the allocation of revenues, nor does it ensure these are disbursed effectively. However initiatives such as the [Extractive Industry Transparency Initiative] contribute to laying the groundwork on which effective institutions and processes can be built. The mining industry and others should actively endorse and contribute to these initiatives. They should also agree to make public not only the revenue streams but also the underlying fiscal terms.’⁷³

The Natural Resource Charter is a set of principles (12 ‘Precepts’) for governments and societies on how best to harness the opportunities created by extractive resources for development.⁷⁴

Precept 3 on ‘Better Fiscal Regimes and Contracting’ states that ‘fiscal policies and contractual terms should ensure that the country gets full benefit from the resource, subject to attracting the investment necessary to realize that benefit. The long-term nature of resource extraction requires policies and contracts that are robust to changing and uncertain circumstances’.

72 *Ibid.*

73 *Ibid* 13.

74 The Natural Resource Charter provides 12 Precepts to inform and improve natural resource management. According to its website (<http://naturalresourcecharter.org/content/about/history>), the Charter will help to ‘ensure that the opportunities provided by new discoveries and commodity booms will never again be missed. ... It is a common framework for addressing the challenges of natural resource management. It is also a tool for citizens. It has the potential to be an international convention in the making, but one that will be built by a participatory process guided by academic research’.

Precept 3 continues by describing different alternatives for a well-designed fiscal regime that allow the government to share in profitability and to have some minimum revenue stream in all production periods:

- One option is a regime that contains both a royalty levied on a value or physical basis linked to production and a charge linked with profitability. The latter may be achieved through corporate or entity income tax, perhaps at a special resource sector rate and possibly supplemented with additional taxes linked to particularly high returns.⁷⁵
- An alternative is the use of production-sharing arrangements in which output is 'shared' between the investor and the government. Production-sharing arrangements can be designed to provide a minimum revenue stream in all production periods by limiting the rate of cost recovery. They can also provide a form of progressive income taxation through the use of 'R' factors and other devices altering the sharing of output between the investor and the government.⁷⁶

The Natural Resource Charter also underlines the importance of transparency: 'Governments and investors are generally better served if there are clear rules applicable to all investors in similar circumstances. Transparency and uniform rules help ensure that operators know that treatment is non-discriminatory, reduce opportunities for corruption, and may reduce the demand by individual investors for special treatment.'⁷⁷

The African Tax Administration Forum also raises concerns about the taxation of natural resources:

'Vast natural resources – in particular, oil, gas and minerals – are already an essential revenue source for many African countries. However, there is evidence that African countries receive less revenue from natural resources than many other countries in the world. Several factors contribute to explain this situation, though it is difficult to obtain a clear picture. Contracts are often subject to strong confidentiality clauses by the multinational companies, governments, investors and the banks involved. Generally, there

75 *Ibid.*

76 *Ibid.*

77 *Ibid.*

is more than corruption involved. Governments argue that they cannot make all details of the extractive industries public and that they have limited influence on the companies. Countries compete for the scarce managerial and technical skills needed for resource extraction. Yet, shortages of legal and negotiation skills play a major role in driving down tax revenues from natural resources. Given the challenges, the IMF and the World Bank should assist African countries to build capacity to be able to (re-)negotiate contracts for taxing extractive industries.⁷⁸

At the 2013 G8 meeting in Lough Erne, Northern Ireland, a number of commitments were made that are relevant to the better governance of the revenues generated from resource extraction.⁷⁹ The main focus is on increasing transparency and reporting requirements, which will generate additional (and comparative) information that can support better tax policies, informed discussions and accountability about natural resource taxation in developing countries.

1.1.5 Offshore investment accounts

In the Task Force's research and consultation process, offshore investment accounts were a significant topic of discussion with stakeholders. They are considered to be one of the main mechanisms for tax abuses as they allow for wealthy individuals and companies to avoid domestic taxation on the principal and investment income that is transferred and held offshore. They are said to be a major contributor to the tax gap in developing countries. They are also of concern for developed countries, particularly in this current era of attempted recovery from the recent financial crises.

As will be discussed in the subsequent section on secrecy jurisdictions, the term 'offshore' often conjures images of Caribbean islands, but it should be understood to also include a number of prominent jurisdictions in developed countries. For instance, tax experts and civil society organisations cited concerns about jurisdictions such as Switzerland, Singapore, the City of London, Delaware or Miami more often than more stereotypical tax havens.

⁷⁸ See n 61 above, 11.

⁷⁹ See n 54 above, paras 34–42.

Furthermore, the ‘term offshore refers not so much to the actual physical location of private assets or liabilities, but to nominal, hyper-portable, multi-jurisdictional, often quite temporary locations of networks of legal and quasi-legal entities and arrangements that manage and control private wealth’.⁸⁰ In other words, ‘offshore’ refers not only to the jurisdictions that receive the transfer of money outside a taxpayer’s home jurisdiction, but also includes the legal structures, financial products and professional services that facilitate the shifting and shielding of wealth abroad.

It is not surprising that accurate information about offshore accounts is hard to obtain and that ‘estimates of the tax gap caused by offshore accounts are difficult to produce and may be unreliable’.⁸¹ By nature of the secrecy involved, it is ‘an exercise in night vision’.⁸² However, recent leaks of information by whistleblowers and investigative journalists are contributing to further understanding of the offshore phenomenon and raising the concerns of the public and tax authorities.

The International Consortium of Investigative Journalists Report

The International Consortium of Investigative Journalists (ICIJ) has released a report entitled ‘Secrecy for Sale: Inside the Global Offshore Money Maze’.

According to the ICIJ website, the report is based upon a cache of 2.5 million files and ‘has cracked open the secrets of more than 120,000 offshore companies and trusts, exposing hidden dealings of politicians, con men and the mega-rich the world over’.

The leaked files provide facts and figures – cash transfers, incorporation dates, links between companies and individuals –

80 James S Henry, ‘Price of Offshore Revisited’ (Tax Justice Network 2012) at 9, accessed at: www.taxjustice.net/cms/upload/pdf/Price_of_Offshore_Revisited_120722.pdf.

81 Stephen B Cohen, ‘Does Switzerland’s Tax Haven for Offshore Accounts Violate Internationally Recognized Human Rights?’ (Georgetown 2013) at 2, accessed at: <http://academicstand.org/wp-content/uploads/2013/03/Cohen-Presentation-SROP.pdf>.

82 See n 81 above, 3.

that illustrate how offshore financial secrecy has spread aggressively around the globe, allowing the wealthy and the well-connected to dodge taxes and fuelling corruption and economic woes in rich and poor nations alike.

The records detail the offshore holdings of people and companies in more than 170 countries and territories.

The hoard of documents represents the biggest stockpile of inside information about the offshore system ever obtained by a media organisation. The total size of the files, measured in gigabytes, is more than 160 times larger than the leak of US State Department documents by Wikileaks in 2010.

The Task Force reviewed a number of estimates about the magnitude of the ‘offshore’ phenomenon, focusing in particular on the impacts on developing countries. According to a more conservative OECD estimate, tax revenues lost each year by offshore tax evasion, including offshore accounts, may approximate all official worldwide development assistance, on the order of US\$120bn a year.⁸³

A different estimate produced by the Tax Justice Network suggests that the total offshore wealth held by citizens or residents of the developing world is two or three times more than previously thought and that the lost tax revenue may consequently be much greater: ‘Since the 1970s, with assistance from international private banking industry, it appears that private elites in [139 low and middle income countries] had accumulated \$7.3 – 9.3 trillion of unrecorded offshore wealth... while public sectors were borrowing themselves into bankruptcy.’⁸⁴

This same report by the Tax Justice Network estimates that, including the wealth from developed countries, the total amount of accumulated offshore wealth is between US\$21tn and US\$32tn.

83 See Cohen, n 81 at p 2.

84 *Ibid* 5–6.

‘Assuming, conservatively, that global offshore financial wealth of \$21tn earns a total return of just 3 per cent a year, and would have faced an average marginal tax rate of 30 per cent in the home country, this unrecorded wealth might have generated tax revenues of \$189 billion per year, more than twice the \$86 billion that OECD countries as a whole are now spending on all overseas development assistance.’⁸⁵

Furthermore, it appears that the tax gap created by offshore accounts is a much larger problem for developing countries than for developed countries, relatively speaking. It is estimated that only about two per cent of North American private wealth and eight per cent of European wealth is invested offshore, compared with more than 25 per cent of Latin American and 33 per cent of Middle Eastern and African private wealth.⁸⁶ The reason for the greater impact of offshore accounts on developing countries is explained in the following manner:

‘In many such economies, the bulk of the individual income tax base is often comprised of a concentrated group of well-off individuals. Domestic financial institutions are also often relatively undeveloped. It is commonplace for the wealthy to hold investments through offshore accounts... Thus, the taxation of offshore wealth should be of greater relative importance to Latin America, the Middle East, and Africa, than to the United States and Canada or the major European economies.’⁸⁷

While the exact amount of wealth and resources that are held in offshore accounts may be impossible to quantify,⁸⁸ the key points to be retained are: first, its impact on developing countries is significant; and, secondly, its magnitude is growing. ‘In the last 30 years a sophisticated transnational private infrastructure of service providers has grown up to deliver these services on an unprecedented scale.’⁸⁹ Furthermore:

‘The capacity to make, hold, and manage investments through offshore financial institutions has increased dramatically in recent

85 *Ibid* 41.

86 *Ibid* 2.

87 Itai Grinberg, ‘The Battle Over Taxing Offshore Accounts’ (2012) 60 UCLA L Rev 304 318.

88 For a discussion of the methodologies used for the ‘Old Estimates’ and ‘New Estimates’, see n 81 above, 14–36.

89 *Ibid* 10.

years, while the cost of such services has plummeted. Individuals now find it substantially easier to underreport or fail to report investment earnings through the use of offshore accounts, and experience suggests that such accounts may also be used to help evade tax on income earned domestically by closely held businesses.⁹⁰

From the Task Force's consultations and research, offshore investment accounts have a couple of important implications from a human rights standpoint. First, the use of offshore investment accounts tends to implicate the private wealth of individuals and closely held corporations more than large multinational enterprises. (The concerns with multinational enterprises relate more to the tax abuses described above, such as transfer mispricing, negotiation of tax holidays and the non- or under-taxation of resource extraction.) As discussed subsequently in this report, states are the primary duty-bearers with respect to the protection and promotion of human rights. Business enterprises also have the responsibility to respect human rights. However, the duties of individuals with respect to human rights are not clear. While the Task Force's human rights analysis may strengthen the moral and tax morale reasons for individuals refraining from tax abuses, including the use of offshore accounts, the foundation for this premise in international human rights law is not established. In other words, it is worth pointing out to the individuals who have hidden their wealth in offshore accounts that their actions have a negative impact on human rights; however, there the fear of being exposed as a 'tax cheat' may be more dissuasive to such individuals.

The second implication is therefore that it is important to focus on the role of other actors to address the negative impacts of offshore accounts on poverty and human rights. As discussed below, this includes the obligations of states, individually and collectively, to confront the tax abuses associated with offshore accounts. It also includes the responsibilities of the offshore banking industry, including the accountants, lawyers and other professional service providers that support that industry:

90 *Ibid* 308.

‘Investing and securing large amounts of private wealth across borders is complex, requiring specialized skills in tax, financial planning, banking, entity structuring, and estate planning. This is not something that most wealthy people undertake on their own... [A] global services industry of law firms, accountants, insurance companies, and especially private banks has grown up to cater to this cross-border market.’⁹¹

1.1.6 Conclusions

This discussion of tax abuses provides a brief overview of the types of tax structures and issues that were highlighted during the Task Force’s research and consultation process. It also points out some of the current actions and approaches to confronting these tax abuses. While this discussion is by no means exhaustive, it points to areas where tax abuses have important implications for anti-poverty and development efforts. As will be outlined in subsequent sections of this report, these tax abuses also present risks of negative impacts on human rights. Consequently, as states and business enterprises begin to understand their tax practices as a prioritised human rights issue, these are the types of tax abuses that should be prioritized for greater due diligence and international cooperation efforts.

1.2 Secrecy jurisdictions

1.2.1 Task Force findings⁹²

It is impossible to study the issue of tax abuses without being confronted with the role of secrecy jurisdictions. As discussed above, secrecy jurisdictions are in the media spotlight after a variety of investigative reports and leaked information that implicated them in ‘a global offshore money maze’ that facilitates tax abuses and illicit financial flows. Secrecy jurisdictions are also at the centre of the political agenda of multilateral organisations such as the G8, the G20 and the OECD. They solicit strong and often conflicting opinions by different stakeholders.

91 *Ibid* 12–13. For a further discussion of the offshore wealth managed by private banks, see also 31–34.

92 The Task Force would like to acknowledge the research assistance of Jacqueline Greene for this section of the report, particularly for the case studies on Switzerland and Singapore.

Secrecy jurisdictions are referred to by a variety of other terms, including ‘tax havens’, ‘international financial centres’ and ‘offshore’. A table is included in Appendix F that provides further information about the definitions and characteristics of tax havens, international financial centres and secrecy jurisdictions. Generally, the different terms attempt to describe the degree to which different jurisdictions offer a low (or zero) tax rate, secrecy about banking and other information, or a combination of both.

For the purpose of this report, the Task Force has chosen to use the term ‘secrecy jurisdiction’ as an umbrella term that focuses attention on the lack of transparency about financial matters, beneficial ownership and other information that is needed to effectively confront tax abuses (and other illicit financial flows). This also reflects the opinion of numerous stakeholders from different perspectives that the priority should be to address secrecy rather than tax competition. Some degree of tax competition is considered to be a legitimate policy matter for sovereign governments, whereas it is seen to be more difficult to argue about the legitimacy of bank secrecy.

Proponents of secrecy jurisdictions claim that the advantage is not secrecy, but rather the tax-neutral platform for investors from different jurisdictions to come together and make investments. In this regard, they act as a safeguard against double taxation. Moreover, some of these stakeholders highlighted that many of the investments facilitated by secrecy jurisdictions are made into developing countries. In this light, secrecy jurisdictions are portrayed as an essential ‘lubricant to the wheels of the global economy’.

Other stakeholders consulted by the Task Force had harsh views about secrecy jurisdictions. One civil society representative put it as follows: ‘Secrecy jurisdictions sell secrecy to their clients. The same opaque system facilitates tax abuses and corrupt flows.’ Others highlighted that secrecy jurisdictions tend to be characterised by weak administration and control of foreign corporations. They asserted that secrecy jurisdictions make no valuable contribution to the global economy and that ‘they serve the purpose of double non-taxation rather than that of avoiding double taxation’.

A major concern expressed by international development experts is that, through the intermediary of secrecy jurisdictions, the developing world has become a net creditor to the developed world. The outflow of capital (which is estimated to exceed the inflows of development assistance) is a major harm. A related point is that secrecy jurisdictions contribute to corporate profit-shifting out of developing countries, which results in minimal taxation where physical activities are taking place. As one stakeholder said, 'it is ridiculous that you lose money where you do business and then make money where you don't'.

A number of civil society representatives and tax experts stressed an important point that secrecy jurisdictions are not just the stereotypical tax havens on a tropical island; there are many powerful countries that qualify directly as secrecy jurisdictions or indirectly through a subnational jurisdiction. Therefore, consistency was urged in examining secrecy jurisdictions: 'the City of London, Switzerland and Delaware may be less compliant with international standards than the Cayman Islands or Bermuda'; and, 'any definition of secrecy jurisdictions has to have Delaware up there along with Luxembourg'. Furthermore, it was asserted that 'most large countries are associated with a tax haven: Canada has Barbados, China has Hong Kong, Russia has Cyprus, and the UK has the Channel Islands'.

Stakeholders with different points of view acknowledged that work is being done to address different aspects of bank secrecy at the international level through organisations such as the OECD and the European Union (EU). In addition, various aspects of secrecy were addressed at the 2013 G8 meeting in Lough Erne, Northern Ireland, including exchange of information and transparency of companies and legal arrangements.⁹³ Some were optimistic about the current momentum towards greater transparency and exchange of information for tax purposes. As one stakeholder put it, 'bank secrecy is all but a dead letter'. However, others were more sceptical about the current progress on information exchange. They pointed out that the number of information exchange requests and the amount of information being actually exchanged is still quite negligible. This was contrasted by the amount of taxpayer information that has become available through leaks, whistleblowers and investigative journalists.

93 See n 54 above, paras 26 and 30.

Regardless of the divergent opinions about the pace of the move towards greater exchange of information, it was acknowledged that secrecy jurisdictions must make changes to their legal frameworks and practices in order to conform to the international standards such as those being promoted by the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes through its peer review process.

Assuming a reasonable trajectory of incremental change at the international level, this raises questions about the viability and sustainability of some secrecy jurisdictions in the longer term. Many of the smaller secrecy jurisdictions are heavily dependent on the financial sector, so the forthcoming adjustments could have a major impact on the economies and the livelihoods of significant portions of the population. Self-interest and self-preservation naturally create incentives for these jurisdictions to resist the development of further international standards.

For a number of civil society representatives, the potential negative impacts to secrecy jurisdictions are far outweighed by the net benefits to the world. However, even for those who were adamant that secrecy jurisdictions should be ‘abolished’, there was a recognition that there will need to be a transition period and support for those jurisdictions to develop other areas of economic activity (eg, tourism). In this regard, it was underlined that international financial institutions previously encouraged some of these jurisdictions to develop their financial industries and that this led them down the path to becoming secrecy jurisdictions.

1.2.2 Examples of secrecy jurisdictions

The following section of the report provides a number of examples of secrecy jurisdictions: Switzerland, the most famous secrecy jurisdiction which is currently the focus of major international pressures to end its bank secrecy; Singapore, a very successful modern secrecy jurisdiction that may prove to be more resistant to current international pressures; and Jersey, a significant secrecy jurisdiction located in the Channel Islands that is adapting to new international standards in an attempt to maintain its reputation and business.

SWITZERLAND: SECRECY IN DECLINE?*Switzerland at a glance*

- Estimated cross-border investments: US\$2tn.
- Ranking on the Financial Secrecy Index (2011):⁹⁴ 1.
- Key features: banking secrecy laws that make it a criminal offence to divulge information.⁹⁵
- Number of exchange of information agreements:⁹⁶ 29 in force, two approved by Parliament, seven signed and five initialled.
- Signed and ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR): yes (18 June 1992).
- Contributions to overseas development assistance (2011):⁹⁷ US\$1.681bn.

Switzerland is not only a classic secrecy jurisdiction, it is the first secrecy jurisdiction. The primary attraction of Switzerland for those seeking financial advantage is the country's well-developed and deeply rooted secrecy laws and strong, stable legal frameworks.

Swiss legal structures guard financial information fiercely. Under the Swiss Constitution's right to privacy, mentioned above, financial income and assets are protected as a part of 'private family life'. As a result, all communications with a bank are protected under Swiss laws, even where an individual only

94 'The Financial Secrecy Index is a tool for understanding global financial secrecy, corruption and illicit financial flows. By ranking secrecy jurisdictions according to both their secrecy, and the scale of their activities, it allows a politically neutral ranking of the biggest players. The index was launched on October 4, 2011.' Available online at: www.financialsecrecyindex.com.

95 Tax Justice Network, 'Mapping Financial Secrecy: Report on Switzerland' (2011) 4, accessed at: www.secrecyjurisdictions.com/PDF/Switzerland.pdf. See also Josephine Moulds, 'Private Banking's Cosy World Under Siege' (21 July 2012), *The Guardian*, available online at: www.theguardian.co.uk/business/2012/jul/22/private-banks-swiss-accounts-coutts-tax.

96 According to the Swiss Government website, these Double Taxation Agreements (DTAs) contain the administrative assistance clause in accordance with the internationally applicable standard (Article 26 of the OECD Model Convention). In addition, 'over 90 other DTAs are listed, which presumably do not meet the internationally applicable standards. See: www.sif.admin.ch/themen/00502/00740/?lang=en.

97 See: www.deza.admin.ch/en/Home/About_SDC/Facts_and_figures/SDC_expenditures.

speaks with a bank and never opens an account. Under the Swiss Bank Act, 'solely the client can authorise the bank to disclose information' and the Swiss Criminal Code recognises a criminal offence if banks release any information, even after a client has so authorised. Even after a client closes an account, secrecy remains legally protected indefinitely. Violation of bank-client confidentiality carries stiff penalties, punishable by 'a prison sentence of up to three years or by a fine of up to 250,000 Swiss Francs' even where the relationship with the client has ended.⁹⁸ Criminal consequences for violation of banking secrecy in Switzerland are rooted in Article 273 of the Swiss Criminal Code and Article 47 of the Bank Act.⁹⁹

In the past, Switzerland's Double Taxation Agreements (DTAs) did not include exchange of information clauses with other states with only a few exceptions (eg, the Swiss DTA with the US). Switzerland justified the exclusion of exchange of information clauses by stating that the clause would not be effective so long as third-party countries were not bound by a similar provision. The assets in question would simply be shifted to another jurisdiction to find shelter, defeating the purpose of the clause. As a result, Switzerland (along with Austria, Belgium and Luxembourg) made a reservation on the OECD Model Convention's Article 26. However, in March 2009, the Federal Council agreed to include Article 26 in new DTAs and to revise existing agreements accordingly. On 1 October 2010, an ordinance on executing administrative assistance in accordance with DTAs was implemented.

In the wake of the OECD standards, shifting public opinion about bank secrecy, and particularly in light of the global financial crisis,¹⁰⁰ Switzerland has been subject to massive international pressure to relax its strict secrecy laws. Switzerland responded by making limited concessions to powerful countries, such as the US and EU Member States, while mandating reciprocal agreements. Switzerland has also ignored pressure from less powerful, developing countries.¹⁰¹

98 Jaclyn H Schottenstein, 'Is Bank Secrecy Still Bankable?: A Critical Review of Bank Secrecy Law, Tax Evasion and UBS' (Entrepreneurial Bus Law J, vol 5:1) 352 at 259.

99 *Ibid.*

100 Jean-Rodolphe W Fiechter, 'Exchange of Tax Information: The End of Banking Secrecy in Switzerland and Singapore?' (International Tax Journal, November–December 2010) 55 at 57. See also Jek Aun Long and Danny Tan, 'The Growth of the Private Wealth Management Industry in Singapore and Hong Kong', Capital Markets Law Journal, vol 6, no 1, 104 at 105.

101 See Tax Justice Network, n 95 above, 2.

However, as the financial crisis progressed, the ‘UBS affair’ erupted. The Union Bank of Switzerland AG (UBS) has for years used Swiss secrecy laws to protect US banking clients from US taxation. UBS bankers travelled frequently to the US to promote Swiss secrecy to potential US banking clients. In 2008, the Internal Revenue Service (IRS) petitioned a US federal district court to serve a summons on UBS, demanding the disclosure of unreported UBS accounts in Switzerland held by US citizens.¹⁰² UBS failed to respond to that summons. In February 2009, the US Department of Justice (DoJ) sued UBS, trying to force the bank into disclosing identities of over 50,000 US account holders who were collectively hiding US\$14.8bn of assets in Swiss bank accounts.

After several months of negotiations (during which the Swiss Government changed its position on its reservation to Article 26 of the OECD Model Convention),¹⁰³ UBS and the DoJ reached an out-of-court settlement in August 2009. The agreement obligated UBS to produce account information on up to 10,000 US account holders suspected of tax evasion.¹⁰⁴ This settlement also resulted in a revised tax treaty between the United States and Switzerland that established greater exchange of tax information.¹⁰⁵

The US has since adopted a strategy of targeting the banks themselves, instead of the Swiss Government alone. After the 2009 UBS settlement, the DoJ began pursuing Switzerland’s oldest private bank, Wegelin & Co. UBS is Wegelin’s correspondent bank in the US, and Wegelin is accused of opening accounts for those fleeing UBS after the 2009 settlement. The US claims Wegelin provided assistance to Americans moving their assets out of UBS, allowing them to hide more than US\$1.2bn in accounts protected by secrecy laws. In January 2013, Wegelin announced that it would cease operations after more than two and a half centuries following a guilty plea to the US authorities. The DoJ’s ongoing investigation is now focused on 11 additional Swiss financial firms. Settlement discussions could result in Swiss private banks handing over account data on thousands of US residents.¹⁰⁶

102 Laura Szarmach, ‘Piercing the Veil of Bank Secrecy? Assessing the United States’ Settlement in the UBS Case’ (2010) 43 *Cornell Int’l LJ* 409, 410.

103 See Fiechter, n 100 above, 57.

104 Eric M Victorson, ‘*United States v UBS AG*: Has the United States Successfully Cracked the Valut to Swiss Banking Secrecy?’ *Cardozo J of Int’l & Comp Law*, vol 19, 815 at 817. See also n 102 above, 410–412.

105 See n 102 above, 410–411. See also Victorson, n 104 above 817. See also Tax Justice Network, n 95 above, 5.

106 *Ibid*. See also Linnley Browning, ‘US Indicts Wegelin Bank for Helping Americans Avoid Tax’ (3 February 2012) Reuters, available online at: www.reuters.com/article/2012/02/03/us-usa-tax-swiss-indictment-idUSTRE81203M20120203.

However, some stakeholders claim that Swiss banking secrecy remains largely intact. Critics assert that Swiss compliance is only ‘window dressing’, while many countries continue to struggle in an effort to gain access to tax revenues as the financial crisis persists. Of particular concern is the UK’s agreement with Switzerland that provides for anonymous withholding.¹⁰⁷ Under the UK deal, residents with undeclared assets in Swiss banks are able to make a one-time payment on their total assets while maintaining their anonymity. The Swiss will follow the one-time payment with a withholding tax on any future investment income and capital gains held in Switzerland.¹⁰⁸ Ultimately, due to the differential between UK tax rates and the withholding tax to be levied by the Swiss, many asset holders will likely maintain or even move assets to Switzerland; it will, in effect, be legal to hide assets from the UK Government under this agreement and the UK will ignore past financial crimes.¹⁰⁹

Greece and Austria arranged similar agreements with Switzerland, while Italy continues to negotiate. Germany was negotiating a similar deal with Switzerland, but the Upper House (*Bundesrat*) refused to ratify the agreement.

Another concern about these agreements is that they offer taxpayers ‘a wide escape hatch’. Under the UK agreements, investors are permitted to move their Swiss accounts out of Switzerland prior to 31 May of the year when the withholding agreement enters into force, without being subject to withholding of any kind or the one-time penalty tax:

‘Reportedly, with the negotiation of the anonymous withholding treaties, there have been huge outflows from Switzerland to Singapore branches of Swiss banks. Singapore, like Switzerland, has stringent banking secrecy laws, which criminalize the disclosure of information about offshore accounts. Thus, the escape hatch may have reduced the number of offshore accounts under direct Swiss jurisdiction without imposing much of a penalty on Swiss banks.’¹¹⁰

107 See Tax Justice Network, n 95 above, 2, 5.

108 See Moulds, n 95 above.

109 *Ibid.*

110 See Cohen, n 81 above, 6.

Concerns have been raised that, ‘[t]he Swiss agreements represent a major blow to multilateral automatic information reporting. Bilateral anonymous withholding agreements are incompatible with a broadly multilateral automatic information exchange system’.¹¹¹

SINGAPORE: THE NEW SWITZERLAND?

Singapore at a glance

- Estimated cross-border investments: US\$1.2tn.
- Ranking on the Financial Secrecy Index (2011): 6.
- Key features: strategic location on trade routes; savvy promotion of financial services as an integral part of the economy; a new hub for business and finance in Asia.
- Number of exchange of information agreements: 74 DTAs and one Tax Information Exchange Agreement (TEIA).
- Ratification of ICESCR: no.
- Contributions to overseas development assistance: unknown.¹¹²

Singapore is ‘arguably the world’s fastest-growing centre for private wealth management’ and offers a wide array of secrecy and tax facilities.¹¹³ PricewaterhouseCoopers predicted in a June 2011 report that Singapore would become the ‘world’s top wealth management centre by 2013, followed by Switzerland and Hong Kong’.¹¹⁴

According to some stakeholders, Singapore is where business is moving as bank secrecy is eroded in Switzerland. Singapore is very similar to

111 *Ibid* at 6–7.

112 Singapore contributes to overseas development assistance primarily through technical assistance provided by the Singapore Cooperation Programme (SCP). Details about its activities are available on the SCP website; however, information about the amount of contribution is not readily available.

113 Tax Justice Network, ‘Report on Singapore’ at 1, 4, available online at: www.secrecyjurisdictions.com/PDF/Singapore.pdf.

114 *Ibid*.

Switzerland in that it is a stable, wealthy, commodities trading centre with a low tax regime. It is important in its region, has a highly skilled workforce, and is a centre for commodities trading and intellectual property. However, stakeholders have raised concerns that Singapore may hold off longer than Switzerland in terms of erosion of bank secrecy, as ‘there are less levers to use against it’.

Starting in the 1970s, Singapore transformed itself from a manufacturing-intensive economy to a service economy.¹¹⁵ Singapore’s government instituted financial liberalisation in the 1990s and then reinforced secrecy in 2001 after nudges from top officials in major Swiss banks, including UBS and Credit Suisse.¹¹⁶ By the end of 2010, Singapore was home to over 700 local and foreign financial institutions, including 38 offshore banks.

Observers note that much of Singapore’s rapid expansion in the secrecy industry is due not to new assets flowing into Singapore, but rather to handling assets located elsewhere, ‘held via Singapore offshore trusts and other secrecy facilities’.¹¹⁷ Furthermore, Singapore’s secrecy regime is tied closely to Swiss banks. In fact, the Government of Singapore is the biggest shareholder in UBS, Switzerland’s largest bank.¹¹⁸

Singaporean banks operate under a policy of strict confidentiality that finds its roots in section 47 of Singapore’s Banking Act of 1970, which was revised in 1985.¹¹⁹ Section 47 provided a ‘blanket prohibition... against disclosure of customer information by a bank or any of its officers to any other person except as expressly provided in the Banking Act’.¹²⁰

Singapore’s transformation into a secrecy jurisdiction was facilitated by a favourable regulatory and taxation regime. Today, Singapore’s competitive tax regime has no estate duty, and has one of the lowest personal and corporate tax rates in Asia.¹²¹ Singapore also achieved a rapidly growing sector in trust establishment by creating tax exemption schemes.¹²²

115 See Long and Tan, n 100 above, 107.

116 See Tax Justice Network n 113 above, 1.

117 *Ibid.*

118 *Ibid.*

119 See Fiechter, n 100 above, 56.

120 See Long and Tan, n 100 above, 114.

121 *Ibid* 111.

122 *Ibid* 113.

Finally, the Tax Justice Network notes that Singaporean information-sharing agreements with other countries still manage to protect those using Singapore's secrecy for their advantage: the court system is sympathetic to the financial sector, averting efforts by other jurisdictions to gain access to information about assets flowing through Singapore. Further, the large number of treaties Singapore has established with other countries has allowed it to become a 'major turntable for so-called "round-tripping" into and out of India and other countries, in competition with other centres like Mauritius'.¹²³

Singapore did not make a reservation to Article 26 of the OECD Model Convention. However, Singapore acted shrewdly when it introduced a 'domestic interest' clause in its DTAs. As a result, Singapore does not exchange information on taxes levied by any other jurisdiction, or any information to which Singaporean tax authorities do not have access.¹²⁴ Of course, Singaporean authorities are prevented from having access to an immense body of information due to the bank secrecy laws Singapore has implemented. As a result, Singapore has managed to circumvent raising any red flags by taking reservations and has managed to achieve 'compliance' with OECD standards at the same time.

The financial crisis has not forced all secrecy jurisdictions to change their ways, however. Asia has remained relatively unscathed by the financial crisis and has enjoyed relative stability in comparison to the US and the EU.¹²⁵ Singapore has been a savvy actor from the first moment it joined the ranks of secrecy jurisdictions. In 2009 when it was placed on the OECD 'grey list', Singapore reacted more quickly than Switzerland and announced immediately that it intended to endorse OECD standards.¹²⁶ Following these events, Singapore passed and brought into force its Income Tax (Amendment) Act (the 'Exchange of Information Act' or the 'EoI Act'). The EoI Act implemented OECD standards for the exchange of information for tax purposes upon request. Some of the adjustments incorporated into

123 'Round-tripping' occurs where, for example, an investor wants to invest locally in his home country but wants a financial advantage for his investment in comparison with others in his country vying for the same market. That investor moves his money offshore to a secrecy jurisdiction, taking advantage of all of the protections secrecy jurisdictions offer and obscuring the true ownership and source of the money. Then, the investor 'round-trips' the money back into his home country, and takes advantage of tax breaks available only for foreign direct investment.

124 *Ibid* 56–57.

125 See Long and Tan, n 100 above, 106.

126 See Fiechter, n 100 above, 57. See also See Long and Tan, n 100 above, 114–116.

the act included a new definition of ‘limited liability partnership’, a change in the tax framework of public–private partnerships; a new section on ‘exemption of income of approved persons arising from funds managed by a fund manager in Singapore’, and other changes.¹²⁷

Because of Singapore’s stability during the economic crisis and intelligent manoeuvring around the language and politics of battles against secrecy, huge outflows left Switzerland and went directly into Singapore, often within the same financial institutions. In fact, as Singaporean secrecy practices flourished and the private wealth management sector grew, an increasing number of Swiss and other international banks ‘set up shop’ in Singapore. These banks included major Swiss and international players, such as the Julius Baer Group and Lombard Odier Darier Hentsch & Cie, Citibank, Morgan Stanley, UBS and Credit Suisse, among others.¹²⁸

Singapore was one of the first countries to complete Phase 2 of the OECD Global Forum Peer Review. Phase 2 report was released in April 2013 and concluded that:

‘Singapore’s exchange of information practice is in line with the international standard for transparency and exchange of information for tax purposes. Singapore’s legal framework and its practical implementation ensure that ownership, accounting and bank information is generally available to the standard. Singapore also has all the required access powers to obtain the requested information. These access powers, nevertheless, cannot be used in respect of all its EOI agreements. Singapore should therefore update and develop its EOI network to ensure it has agreements (regardless of their form) for exchange of information to the standard with all relevant partners. Singapore has in place appropriate organisational processes and resources to ensure effective exchange of information. This has been confirmed by its partners acknowledging Singapore as an important and reliable EOI partner.’¹²⁹

127 Library of Congress, ‘Singapore: Two Bills Passed Amending Income Tax Act’ (9 December 2009), available online at: www.loc.gov/lawweb/servlet/lloc_news?disp3_1205401724_text.

128 See Long and Tan, n 100 above, 107.

129 See: www.eoi-tax.org/jurisdictions/SG.

JERSEY: A RESPONSIBLE SECRECY JURISDICTION?*Jersey at a glance*¹³⁰

- Estimated cross-border investments: US\$750bn.
- Ranking on the Financial Secrecy Index (2011):¹³¹ 7.
- Key feature: there are no bank secrecy laws and no criminal offences, whether statutory or otherwise, giving rise to bank secrecy. Confidentiality of banking information mirrors the UK and the common law position.¹³²
- Number of double taxation and exchange of information agreements: Jersey has signed and ratified 29 TIEAs and is in the process of negotiating 16 others. It has signed and/or ratified five DTAs and is negotiating six others.
- Ratified the ICESCR: by virtue of ratification by the UK in 1976.
- Contribution to overseas development assistance (2011):¹³³ £8,462,702.

Jersey is a small island with a population of approximately 100,000 and an area of 120 square kilometres. It is a UK ‘Crown Dependency’ with autonomy and self-governance in internal matters including finance and taxation, but which is still dependent upon the UK for international relations and defence. Located in the English Channel, it is placed strategically with respect to important financial centres in Europe, in particular the City of London. It plays an important role in providing liquidity to the UK financial market.¹³⁴

130 The Task Force would like to acknowledge the contribution of Anthony Dessain, a member of the IBA and lawyer in Jersey, who recommended the Task Force’s mission to Jersey. Mr Dessain provided a detailed response to the Task Force’s questionnaire and facilitated a number of interviews with lawyers, representatives of the government and the financial services industry. These were supplemented with other interviews with representatives of civil society organisations with knowledge and interest in Jersey throughout the course of the Task Force consultation.

131 The head of Jersey Finance criticised the Financial Secrecy Index and its ranking exercise as ‘nonsensical’: www.telegraph.co.uk/finance/personalfinance/expat-money/8806246/Jersey-slams-financial-secrecy-index-as-nonsensical.html.

132 See: www.financialsecrecyindex.com/2011results.html.

133 *Jersey Overseas Aid Commission Annual Report 2011*, accessed at: www.jerseyoverseasaid.org.je/The-Commission/Annual-Reports.

134 According to the ‘Foot Review’, Jersey provided US\$218bn to the City of London during the peak of the financial crisis in Q2 of 2009.

Jersey refers to itself as an international financial centre with significant expertise in the banking, finance and trust sectors – and associated legal and accounting services. As a small jurisdiction with few other viable industries, Jersey is extremely concerned about the reputation, integrity and strength of its financial services sector. This sector currently accounts for nearly 25 per cent of employment and 50 per cent of the economy.

Jersey is ‘tax neutral’ with a zero tax rate for most industries and a ten per cent tax rate for the financial services sector.

Jersey has separated the mandates of its regulator (the Jersey Financial Services Commission) from its promoter (Jersey Finance). The regulator claims to have a strong mandate, expertise, investigative power and a track record of enforcement. In particular, the Jersey Financial Services Commission claims to have a large number of enforcement cases compared to its peers and relative to the size of the island. Representatives of the regulator state that information flows between domestic and foreign authorities in a meaningful way.

While having a very strict attitude towards privacy rights and client confidentiality, Jersey insiders maintain that there is knowledge and due diligence of beneficial ownership behind the ‘veil of secrecy’. These insiders claim that illicit funds are less likely to go to Jersey, where there is due diligence about beneficial ownership; rather they will likely go to larger financial centres where there is more anonymity and less attention to the ‘tax haven’ issue.¹³⁵

Stakeholders associated with the government and financial services sector stress that Jersey is compliant with all international standards and point to a number of third-party assessments and reports by multilateral institutions and UK authorities.¹³⁶ Client confidence in the system requires privacy and confidentiality; public confidence requires external reviews, due diligence processes and enforcement actions (with outcomes).

Stakeholders interviewed stressed that international financial centres such as Jersey are ‘enablers’ for the global financial system. They facilitate the

¹³⁵ The Sharman investigative report is held out to corroborate this claim.

¹³⁶ The 2008 IMF assessment; the Edwards Report; the Foot Review; the 2009 OECD assessment; the 2010 Global Forum on Transparency and Exchange of Information for Tax Purposes assessment; the 2011 Financial Stability Board assessment; and the World Bank report.

‘upstreaming’ of liquidity into financial markets and the grouping of funds that can be invested in developing countries.

Jersey has a particular expertise and history associated with trusts. Trust experts claim that tax avoidance is less of a driver than it was in the past. Currently, the main drivers are for succession planning and philanthropy. Philanthropic trusts can invest significant resources in developing countries (claimed anecdotally to be several times greater in magnitude than Jersey’s overseas development assistance (ODA)). At the same time, the investment in a philanthropic trust reduces the amount of taxes that are payable on those assets.

Governmental authorities, business representatives and lawyers in Jersey acknowledge that standards and practices have evolved from the past and will continue to evolve into the future. They have to deal with some legacy issues of the past; and this may mean the need to jettison some types of business in order to continue to position itself on the leading edge of international standards. There has been a ‘tsunami of new regulations and requirements’ after the financial crisis.

Jersey appears to pay considerable attention to ensuring its legal and regulatory system meets or exceeds current international standards, while at the same time insisting on a level playing field for all jurisdictions in a competitive global economy. Jersey has been willing to cooperate with international efforts such as TIEAs and DTAs; and there is a realisation from a number of stakeholders that automatic exchange of information is on the horizon. Indeed, Jersey and the other Channel Islands have recently entered into an agreement with the UK to meet the exchange of information standards required under Foreign Account Tax Compliance Act (FACTA) legislation, as discussed below. This move was applauded by the OECD in a letter to Jersey’s Chief Minister dated 29 July 2013.

In terms of its international cooperation efforts, Jersey officials point to some high-profile cases of enforcement related to illicit financial flows from the developing world: proceeds of corruption from the Mayor of São Paulo; proceeds of corruption from Nigeria; and extradition proceedings against corrupt officials in Kenya. These enforcement proceedings have involved freezing of assets and repatriation of stolen funds. Jersey is also cooperating

at the international level to identify and recover illicitly obtained assets – for instance in relation to Arab Spring jurisdictions. Officials claim that these cases have had a significant deterrent effect in diverting ‘undesirable money’ away from Jersey.

As mentioned above, most stakeholders interviewed in Jersey were insistent that there be a level playing field and respect for the rule of law at the international level. They had a strong concern about sweeping generalisations about international financial centres and the financial services industry. They felt that Jersey is a ‘soft target’ where an isolated incident reinforces a negative perception of the whole island, whereas the exact same incident in the City of London will be blamed on the individual firm.

Some of the stakeholders interviewed had a partial understanding of international human rights. The focus tends to be on property and privacy rights, rather than economic, social and cultural rights. Global poverty and international cooperation for development tend to be viewed as matters of charity and philanthropy rather than as human rights issues. At the same time, there seems to be agreement that policy coherence is desirable between human rights and other laws (tax, corporate, finance) and that international cooperation to promote human rights and fight poverty are important objectives for both principled and pragmatic reasons.

Jersey appears to be determined to address its critics and potential threats to its reputation. Cooperation and trying to maintain a favourable reputation is perhaps relatively more important to Jersey than other jurisdictions with a more diversified economy. At the same time, the critics remarked that it would be surprising if Jersey were to push the envelope and hasten any radical reform of the global financial system that would threaten its prosperity and privilege. In the meantime, Jersey must continue to adapt to the changing international legal and policy environment. As a small jurisdiction, it can be nimble and continue to position itself as a responsible international financial centre.

1.2.3 Current initiatives to combat secrecy jurisdictions

Early attempts to track illicit financial flows were developed in the 1980s through an ‘expensive follow-the-money strategy’ in an effort to fight narcotics trafficking. Later, these same tools were used to combat terrorism by following

financial flows. These strategies led to the recognition of the crime of money laundering, which targeted financial institutions and intermediaries.¹³⁷ As criticism of offshore banking grew in light of terrorism and narcotics trafficking and the scope of what constituted illicit financial flows broadened, efforts against banking secrecy emerged with the goal of public naming and shaming. This goal was formulated with the intention of diminishing the attractiveness of these jurisdictions for investors and financiers, thereby pressuring them to utilise non-secrecy jurisdictions for their financial practices. The shaming also aspired to pressure secrecy jurisdictions into cooperating with other states.¹³⁸ Actions against secrecy have evolved from following dirty money to a general emphasis on states' abilities to gain access to protected and hidden information about assets held in tax havens and secrecy jurisdictions.

INTERNATIONAL COOPERATION THROUGH THE FINANCIAL ACTION TASK FORCE AND THE OECD

In 1989, the G7 countries first formally addressed illicit financial flows when they created the Financial Action Task Force (FATF) to advise on methods to eliminate illicit financial flows in the form of money laundering. The FATF is an intergovernmental body that works to mobilise action against financial criminals and their assets. The FATF's objectives include 'developing policy and promoting effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and new and emerging threats to the integrity of the international financial system'. FATF recommendations are considered the international standard for fighting money laundering and terrorism finance and proliferation.¹³⁹ The FATF's mandate was initially set to expire in 2012, and has since been renewed until 2020.¹⁴⁰

137 John Christensen, 'Africa's Bane: Tax Havens, Capital Flight and the Corruption Interface' (2009) Working Paper, Real Instituto Elcano, 8.

138 *Ibid.*

139 *Ibid.* See also Hedda Leikvang, 'Piercing the Veil of Secrecy: Securing Effective Exchange of Information to Remedy the Harmful Effects of Tax Havens' (2011) 45 *Vanderbilt J Transnational L* 293. See also Robert Thomas Kudrle, 'Did Blacklisting Hurt the Tax Havens?' (*Journal of Money Laundering Control*, vol 12, no 1) 33.

140 FATF, 'Ministers Renew the Mandate of the Financial Action Task Force Until 2020' (20 April 2012), available online at: www.fatf-gafi.org/documents/documents/ministersrenewthemandateofthefinancialactiontaskforceuntil2020.html.

In 1998, at the request of the G7, the OECD broadened the scope of illicit financial flows beyond money laundering, and aimed to transform secrecy practices through ‘increased transparency and strengthened arrangements for information exchange between national authorities’.¹⁴¹ The OECD issued its first report on harmful tax practices in an effort to persuade secrecy jurisdictions to cooperatively exchange information regarding financial flows through their territories.¹⁴²

Tax havens, according to the OECD report, have the potential to cause the ‘erosion of national tax bases’, interfere with tax-driven redistributive goals, and permit ‘free riding’ for investors who do not contribute to public spending through tax obligations.¹⁴³

Early OECD work focused on broadcasting harmful tax haven practices. Early reports included a ‘comprehensive list of tax havens’, including uncooperative jurisdictions not in compliance with OECD standards.¹⁴⁴ Over time, the OECD subdivided its list of tax havens into different categories: the ‘white list’, including jurisdictions implementing OECD proposed standards; the ‘grey list’, comprised of jurisdictions that committed themselves to implementing OECD standards; and, the ‘black list’, including those jurisdictions that failed completely to commit to OECD standards.¹⁴⁵ In 2009, the last of the countries on the original ‘black list’ moved up to the ‘grey list’ or the ‘white list’ with commitments to negotiating Tax Information Exchange Agreements (TIEAs).¹⁴⁶

141 *Ibid.*

142 See Kudrle, n 139 above, 33–34. See also Leikvang, n 139 above, 327–329. OECD, ‘Harmful Tax Competition: An Emerging Global Issue’ (1998) 25–34, available online at: www.oecd.org/tax/harmfultaxpractices/1904176.pdf. The report defined ‘harmful tax competition’ as a result of some combination of the following characteristics: no or low effective tax rates; ‘ring-fencing’ of regimes; lack of transparency; lack of effective exchange of information; an artificial definition of the tax base; failure to adhere to international transfer pricing principles; foreign source income exempt from residence country tax; negotiable tax rate or tax base; existence of secrecy provisions; access to a wide network of tax treaties; regimes which are promoted as minimisation vehicles; and regimes which encourage purely tax-driven operations or arrangements. The report explained that harmful tax competition results in: distorting financial and, indirectly, real investment flows; undermining the integrity and fairness of tax structures; discouraging compliance by all taxpayers; reshaping the desired level and mix of taxes and public spending; causing undesired shifts of part of the tax burden to less mobile tax bases, such as labour, property and consumption; and increasing the administrative costs and compliance burdens on tax authorities and taxpayers.

143 *Ibid* 14.

144 See Leikvang, n 139 above, 327–328. See also Fiechter, n 100 above, 55. See further Servaas Van Theil, ‘European Union Action Against Tax Avoidance and Evasion’ (February 2012) CESifo Forum, 13.

145 *Ibid* 328–329.

146 See Leikvang, n 139 above, 329.

OECD standards required that countries engage in negotiating TIEAs or DTAs. DTAs are treaties between countries with middle- or high-taxation schemes, and aim to prevent double taxation of income. This arrangement recognises the importance of taxation for the stability of the states in question. The OECD Model Tax Convention on Income and Capital serves as the template for many of these bilateral treaties.¹⁴⁷ However, for jurisdictions with low or no taxes, the DTA is considered inappropriate and TIEAs are required instead.¹⁴⁸ The OECD also produced a model TIEA for countries to shape their agreements. As the name suggests, TIEAs are agreements detailing rules and methods for the exchange of information regarding financial flows and accounts in relation to taxation by the asset holder's home jurisdiction.

In 2009, the Global Forum on Transparency and Exchange of Information for Tax Purposes (the 'Global Forum') was dramatically restructured to make it a more effective and open body and it was mandated to put in place a robust and in-depth peer review mechanism. The aim was to safeguard the commitments that jurisdictions made and to respond in particular to the G20 call for rapid and effective implementation of the standards of transparency and exchange of information.¹⁴⁹

All members of the Global Forum, as well as jurisdictions identified by the Global Forum as relevant to its work, will undergo reviews of the implementation of their systems for the exchange of information in tax matters. The peer review process is overseen by the 30 members of the Peer Review Group (chaired by France, assisted by four vice-chairs from India, Japan, Jersey and Singapore). The peer reviews happen in two phases: Phase 1 is a review of each jurisdiction's legal and regulatory framework for transparency and the exchange of information for tax purposes; and Phase 2 involves a survey of the practical implementation of the standards. Some jurisdictions have been selected to do a combined

147 Tax Justice Network, 'Tax Information Exchange Arrangements', available online at: www.taxjustice.net/cms/upload/pdf/TJN_0903_Exchange_of_Info_Briefing_draft.pdf.

148 Ian Doyle and Jem Bendell, 'World Review' (Journal of Corporate Citizenship, issue 35) 11.

149 See: www.oecd.org/tax/transparency/46615395.pdf.

Phase 1 and Phase 2 review.¹⁵⁰

The OECD highlights the following achievements since the Global Forum was restructured in 2009:

- More than 800 agreements that provide for the exchange of information in tax matters under the standards have been signed since 2008.
- 110 peer reviews have been launched and 88 peer review reports have been completed and published.
- 545 recommendations have been made for jurisdictions to improve their ability to cooperate in tax matters.
- 55(+) jurisdictions have already introduced or proposed changes to their laws to implement the standards.
- Continuous support by the G20, with five progress reports sent.
- Two pilot projects have been launched with developing countries – Ghana and Kenya, and a platform to coordinate technical assistance to developing countries.
- A Competent Authorities Meeting was organised in Madrid in May 2012, bringing together 186 delegates from 78 Global Forum member jurisdictions and six international organisations in order to examine the best ways to improve their relationships for the exchange of information.

LEGISLATIVE ATTEMPTS TO COMBAT SECRECY BY THE EUROPEAN UNION AND THE UNITED STATES

The European Union (EU) has engaged in activities that ought to affect secrecy practices, though those efforts were not aimed at direct regulation of secrecy jurisdictions. The EU's 'overall goal to make competition fair by

¹⁵⁰ Reviews are conducted in accordance with the 'Methodology', which guarantees that peer input is provided at each stage. Once a review is launched, all members of the Global Forum are asked to provide input regarding the assessed jurisdiction, particularly in Phase 2 reviews where all exchange of information partners are asked to complete a detailed questionnaire about their practical experience with the jurisdiction. Reviews are conducted by an assessment team composed of two expert assessors provided by peer jurisdictions and coordinated by a member of the Global Forum Secretariat. The assessment team's report is presented to the 30-member Peer Review Group (PRG) and, once approved, it becomes a report of the PRG. Finally, all members of the Global Forum are asked to adopt the PRG report. As all members are on equal footing, this is done on a consensus-minus-one basis, so that no single jurisdiction can block the adoption of a report.

securing equal conditions for all competitors in a market implicitly allows the European Union to address the economic disparities caused by tax havens'.¹⁵¹ The EU's Savings Tax Directive requires European Economic Community Member States to automatically exchange information about taxpayer income from interest payments on deposits and other investment vehicles. Income generated by trusts and mutual funds is not required for reporting, however. The Directive's mandated automatic exchange means, in theory, that tax havens cannot interpret for themselves what 'information exchange' does or does not mean. In practice, however, the Directive is easily evaded because of poor drafting: 'beneficial owner' is defined as an individual; and information exchange may be avoided simply by holding income in the name of a shell corporation. Further, some jurisdictions have objected to this Directive and have not engaged its mandated exchange of information. In these jurisdictions, 'foreign recipients of interest income may either choose to pay a small "withholding tax" or allow data regarding their financial status and interest income to be delivered to the tax authorities in their country of domicile'.¹⁵² The European Commission determined that the Directive has not significantly impacted financial practices.¹⁵³

The US has attempted its own legislative battles against tax havens. The Stop Tax Havens Abuse Act (the 'Act'), initially introduced in 2009 and reintroduced in 2011, aims to restrict foreign jurisdictions or financial institutions that operate in the United States if they are of prime money laundering concern or impede US tax enforcement. Though the Act was initially well received, at this stage it seems unlikely to become law because it has not progressed through Congress beyond an initial referral to a committee. Even if this Act were passed, it is designed in the 'name and shame' style of the OECD's lists and would likely have limited impact, as discussed above in relation to the OECD.¹⁵⁴

The more robust attempt at regulating tax havens from the US is found in the Foreign Account Tax Compliance Act (FATCA), which resulted from a post-UBS scandal (discussed below) crackdown on secrecy. The US Congress

151 See Leikvang, n 139 above, 329.

152 *Ibid* 329–330.

153 *Ibid* 329.

154 GovTrack, 'S. 1346: Stop Tax Haven Abuse Act', available online at: www.govtrack.us/congress/bills/112/s1346. See also Anthony Todero, 'The Stop Tax Havens Abuse Act: A Unilateral Solution to a Multilateral Problem' (2010) *Minnesota Journal of Int'l Law* 241, 242.

enacted new portions of the Internal Revenue Code, known collectively as FATCA, which require information reporting on accounts held by US persons and foreign entities ‘with significant US ownership’.¹⁵⁵ Reporting requirements begin in 2014, and foreign financial institutions are obligated to report both the account balance or value and ‘the amount of dividends, interest, other income, and gross proceeds from the sale of property credited to a US account’. FATCA aims to gain information on accounts both owned directly and by shell¹⁵⁶ entities. Non-disclosure results in a penalty charge for institutions or withholding tax for individuals and financial institutions.

Itai Grinberg explains that ‘FATCA tries to use the combined weight of US financial markets and financial institutions that must, as a practical matter, do business in the US marketplace as leverage with other foreign financial institutions to ensure near-comprehensive participation in FATCA’s cross-border information reporting’.¹⁵⁷ Notably, these unilateral measures may or may not carry enough power to force compliance among financial institutions abroad, particularly considering that reporting to the US Government might violate local law where the institution is located.¹⁵⁸ FATCA is alleged to be capable of raising US\$10bn over ten years, but the costs for the foreign banks that must implement the information exchange standards are also significant.¹⁵⁹

It will take time before it is clear whether FATCA is strong enough to force information exchange, and whether it is efficient in terms of collecting sufficient revenues that continue to justify the associated compliance costs. One initial indication of the strength of the FATCA approach is that other governments have begun to implement and extend similar provisions, such as between some European governments and between the UK and its Crown Dependencies and Overseas Territories.

155 Itai Grinberg, ‘Beyond FATCA: An Evolutionary Moment for the International Tax System’ (January 2012) Working Draft, Georgetown Scholarly Commons, 23, available online at: http://scholarship.law.georgetown.edu/fwps_papers/160.

156 *Ibid* 23–24.

157 *Ibid* 24–25.

158 *Ibid* 25.

159 *The Economist*, ‘Swiss Banking Secrecy: Don’t Ask, Won’t Tell’ (11 February 2012), available online at: www.economist.com/node/21547229.

1.2.4 The future of exchange of information

One common thread throughout the Task Force's consultation is the need for greater exchange of information to confront the various tax abuses discussed above. Obviously, without accurate information about a taxpayer's worldwide economic activities, investments and income, it is impossible for domestic tax authorities to properly assess the taxpayer's obligations. Availability of information is critical to effective tax enforcement, which in turn can have a deterrent effect on other taxpayers' conduct and compliance.

The current international standard for exchange of information, as developed by the OECD and endorsed by the UN and the G20, 'provides for full exchange of information on request in all tax matters without regard to a domestic tax interest requirement or bank secrecy for tax purposes. It also provides for extensive safeguards to protect the confidentiality of the information exchanged'.¹⁶⁰

A number of stakeholders interviewed by the Task Force, as well as a number of prominent experts and tax justice organisations, strongly advocate for a move towards automatic exchange of information at the international level. Such a system would obligate the account owner to provide the financial institution with verifiable evidence about the owner's country of citizenship and/or residence. The financial institution would then be obligated to report to the relevant tax authorities the income and assets in the account on an annual basis, along with the account owner's identity.

According to some tax experts, a move towards an international system of automatic exchange of information is needed because the current standard (of information exchange upon request) requires domestic tax authorities to demonstrate a reasonable degree of suspicion before they can make a request. Because of the secrecy and sophistication involved in the offshore financial industry, many tax authorities may simply not have the information required to make effective use of a system of information exchange upon request. Automatic exchange of information is more proactive and preventative; whereas exchange of information upon request is more suited for after-the-fact review and audits.

¹⁶⁰ OECD, 'Countering Offshore Tax Evasion: Some Questions and Answers', 10, accessed at: www.oecd.org/tax/exchange-of-tax-information/42469606.pdf.

Civil society representatives also point to the relatively small number of instances of actual exchange of information that have been published by the OECD in comparison to the large number of bilateral treaties for exchange of information that have been signed. As one stakeholder stated: ‘The current request system is flawed. You need detailed information about named individuals and the probability of tax evasion. There is a heavy burden on the requestor.’ Many stakeholders highlighted the fact that the tax authorities of many developing countries do not currently have the capacity to make effective use of the system of exchange of information upon request.

Furthermore, some tax experts underlined the fact that automatic exchange of information is already entrenched at the domestic level in many countries, for instance in the context of information automatically provided by employers to tax authorities about their employees’ wages. With this in mind, diverse stakeholders underlined that the key obstacles to automatic information exchange are not issues of principle, but rather the practical challenges of how to design an effective system to collect and exchange information, as well as the political challenges to reach agreement upon such a system.

Many stakeholders said that they were encouraged by signs of momentum towards multilateral automatic exchange of information, including developments such as the US FATCA legislation and the resulting trend towards reciprocal automatic exchange of information arrangements with the US; the EU Savings Tax Directive, which provides for automatic exchange of some types of tax information within the EU; and the continued actions to expand the current multilateral information exchange system through the OECD’s Global Forum.¹⁶¹ As one lawyer stated: ‘Taken together, there is significant progress towards a multilateral system of automatic exchange of information. The next question is how to make it universal.’ Even stakeholders in secrecy jurisdictions acknowledged these trends towards automatic exchange of information at the international level.

At a recent meeting of the G20, Finance Ministers and Central Bank Governors, the Secretary-General of the OECD said:

161 Although the OECD Global Forum’s work is based on the current standard of exchange of information upon request, it is also working on the development of technical standards for automatic exchange of information.

‘The political support for automatic exchange of information on investment income has never been greater. Luxembourg has changed its position and the US FATCA legislation is triggering rapid acceptance of automatic exchange and propelling European countries to adopt this approach amongst themselves. In response to the G20 mandate to make automatic exchange of information the new standard, the OECD is developing a standardised, secure and effective system of automatic exchange.’¹⁶²

Furthermore, at the G8 meeting in Lough Erne, Northern Ireland, leaders committed to further actions toward automatic exchange of information:

‘A critical tool in the fight against tax evasion is the exchange of information between jurisdictions. We see recent developments in tax transparency as setting a new standard and commit to developing a single truly global model for multilateral and bilateral automatic tax information exchange building on existing systems. We support the OECD report on the practicalities of implementation of multilateral automatic exchange and will work together with the OECD and in the G20 to implement its recommendations urgently. We call on all jurisdictions to adopt and effectively implement this new single global standard at the earliest opportunity. It is important that all jurisdictions, including developing countries, benefit from this new standard in information exchange. We therefore call on the OECD to work to ensure that the relevant systems and processes are as accessible as possible to help enable all countries to implement this new standard.’¹⁶³

At the recent G20 meeting in July 2013, member nations endorsed the OECD Action Plan on Base Erosion and Profit Shifting. One of the action items is to develop a new multilateral instrument that is ‘designed to provide an innovative approach to international tax matters, reflecting the rapidly evolving nature of the global economy and the need to adapt quickly to

162 See the press release about the OECD’s report to the G20 Finance Ministers and Central Bank Governors at: www.oecd.org/ctp/oecd-reports-new-developments-in-tax-information-exchange.htm. The report identifies the Multilateral Convention on Mutual Administrative Assistance in Tax Matters as the ideal legal instrument for multilateralising automatic exchange of information. A further report was presented at the G8 meeting in Lough Erne, Northern Ireland in June 2013, ‘A Step Change in Tax Transparency: Delivering a Standardized, Secure and Cost Effective Model of Bilateral Automatic Exchange for the Multilateral Context’, accessed at: www.oecd.org/ctp/exchange-of-tax-information/taxtransparency_G8report.pdf.

163 See n 54 above, para 26.

this evolution'. While automatic exchange of information is not explicitly mentioned, the various issues addressed in the Action Plan should imply that automatic exchange of information is part of the negotiation of this new multilateral instrument within the next couple of years.¹⁶⁴

While acknowledging the positive momentum at the international level, some tax experts and civil society representatives raised their concerns about some bilateral attempts to limit or block the development of an effective international automatic exchange of information system. For instance, the Swiss agreements with the UK and Germany to provide an anonymous withholding tax on the Swiss accounts of British and German taxpayers, rather than to disclose information on the specific account holders, is seen to be 'a major threat to the emergence of a comprehensive multilateral automatic information exchange system'.¹⁶⁵ As one tax expert said, 'anonymous withholding undermines tax morale and the expressive role of taxation in liberal democracies'. It therefore remains to be seen whether the political will and sufficient pressure exist to withstand the attempt to develop such 'escape-hatches'.

Other tax experts pointed out that the current system of exchange of information upon request should not be viewed as incompatible with the emergence of an automatic exchange of information system. An automatic system will help tax authorities identify accounts and transactions that they may want to investigate; however, they would still need to make a specific request to obtain further details. Therefore, the current efforts to expand and strengthen the bilateral exchange of information treaty network – supported by the OECD Global Forum – can be viewed as part of the infrastructure for automatic exchange of information.

Several civil society representatives and tax experts noted that automatic exchange of information might not be suitable for all countries, either because of lack of capacity or the potential to use the information for inappropriate purposes. The need to build the capacity of developing countries' tax authorities was an important theme of the Task Force's

164 'It is expected that the Action Plan will largely be completed in a two-year period, recognising that some actions will be addressed faster as work has already been advanced, while others might require longer-term work.' OECD Action Plan, 24–25.

165 See Cohen, n 81 above, 3–4; and Grinberg, n 155 above, 339–346.

consultations and is discussed in detail in a subsequent chapter of this report. The key point is that developing countries require resources and capacity to participate in and benefit from the development of international information exchange standards.

From a human rights perspective, there is an important issue related to the potential misuse of the information that is exchanged for tax purposes. Two main concerns were underlined by stakeholders from different perspectives: first, the potential misuse of tax and personal information by other government departments or agents, including to harass or persecute political opponents or dissidents; and, secondly, the potential for tax and personal information to fall into the hands of criminals and be used to target individuals for robbery, extortion or kidnapping. These concerns tended to be more frequently raised in the Task Force's consultation in developing countries, where examples were given of current and past misuse of tax information for political purposes. Indeed, the IBAHRI has previously intervened in cases of harassment of lawyers, judges and human rights defenders where tax information has been used inappropriately.

These real and potential instances of misuse of tax information point to the need for safeguards in any exchange of information system, especially as momentum builds towards an automatic system where much greater volumes of information will be exchanged. There are currently safeguards that are part of the international standards promoted by the OECD. Furthermore, the OECD Global Forum's peer review process also assesses the adequacy of the safeguards that the tax authorities (of participant countries) have in place, in terms of the legal framework and actual practices.

Consequently, tax experts and other stakeholders suggested excluding from any automatic information exchange system countries that misused tax information in the past or that have a poor human rights record. While there should be a presumption in favour of exchange of information, there is a need to ensure that the procedures and mechanisms for information exchange can respond effectively to genuine human rights concerns. One option is to develop an oversight body that can provide guidance and criteria for when information exchange may need to be restricted.

*Current safeguards for exchange of information*¹⁶⁶

WHAT ARE THE STANDARDS TO PROTECT CONFIDENTIALITY?

Information exchanged for tax purposes must be treated as confidential. Bilateral tax treaties and TIEAs contain rules to ensure that information is used only for authorised purposes and thereby protect taxpayer privacy rights. Confidentiality rules also apply to information exchanged pursuant to other instruments. Typically, unauthorised disclosure of tax-related information received from another country is a criminal offence.

WHAT IF COUNTRIES WANT TO USE TAX INFORMATION FOR OTHER PURPOSES?

First, tax information received from another country can only be used for the purposes stated in the agreements. Secondly, a country is free to decline a request for information in a number of situations. One reason for declining to provide information relates to the concept of public policy/*ordre public*. 'Public policy' generally refers to the vital interests of a country, for instance where information requested relates to a state secret. A case of 'public policy' may also arise, for example, where a tax investigation in another country was motivated by racial or political persecution.

For further information about the current safeguards promoted by the OECD, see the 2012 report, 'Keeping it Safe: the OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes'.¹⁶⁷

166 Source: OECD, 'Countering Offshore Tax Evasion: Some Questions and Answers', 14.

167 See: www.oecd.org/tax/transparency/final%20Keeping%20it%20Safe%20with%20cover.pdf.

1.2.5 Conclusions

Banking secrecy remains a contested and complicated issue. Exchange of information standards are at the heart of the debate. Some experts believe that the winds have shifted, and that banking secrecy must deal with a ‘new international order’¹⁶⁸ in which reporting, at least to a certain extent, is now unavoidable. Others go even further, claiming a ‘remarkable shift in global understandings’ where ‘the United States, the European Union, the OECD, and Switzerland have all coalesced around [the] conclusion’ that ‘all the emerging systems for cross-border tax cooperation assume financial institutions will function as cross-border tax agents, whether as a withholding agent or as an information reporting agent’.¹⁶⁹ The acceptance of international standards on transparency and exchange of information, committed to by 120 jurisdictions, is evidence of the fact that there is widespread acceptance that there should be no bank secrecy for tax purposes and changes are being made by several jurisdictions to their legal frameworks for ensuring greater transparency.

Others, however, are sceptical of the current progress. In response to the OECD lists and other international pressure, it is claimed that requiring a commitment to change is not the same as requiring action. Some critical voices underline the fact that, even after the increased institution of reporting laws and mechanisms, secrecy jurisdictions continue to hide, disguise and protect assets from the reach of the taxman.¹⁷⁰ They claim that bank secrecy is thriving, and describe information exchange agreements as ineffective against the negative consequences of tax abuses. Even while acknowledging some qualitative progress, they note that the actual gains have been extremely modest in comparison with the public positions many states have taken on the subject.¹⁷¹

168 See Fiechter, n 100 above, 63.

169 See Grinberg, n 155 above.

170 Niels Johannesen and Gabriel Zucman, ‘The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown’ (May 2012), accessed at: www.financialtransparency.org/2012/05/07/new-report-the-end-of-bank-secrecy-an-evaluation-of-the-g20-tax-haven-crackdown. See also Dries Lesage, ‘The G20 and Tax Havens: Maintaining the Momentum?’ (18 June 2012), Conference on Governing the Global Economy: The Role of the G20 at the University of Toronto; and Timothy Addison, ‘Shooting Blanks: The War on Tax Havens’ (2009) 16 *Indiana Journal of Global Legal Studies* 703.

171 *Ibid.*

There is no unified line among stakeholders about the way forward. Still, important changes regarding reporting requirements have been made in the last year and may prove to be effective tools against bank secrecy. Varied suggestions seem to draw on the concepts of transparency and accountability. As part of the goal of greater accountability, experts generally appear to agree that concerted international cooperation and multilateral agreements on automatic information exchange will be a critical development in the fight against secrecy.¹⁷²

172 Tax Justice Network, 'Tax Us If You Can: Why Africa Should Stand Up for Tax Justice' (January 2011) 62, available online at: www.taxjustice4africa.net. See also Johannesen and Zucman, n 170 above. See also John Christensen, 'Africa's Bane: Tax Havens, Capital Flight and the Corruption Interface' (Real Instituto Elcano, Working Paper 1/2009) 18.

Chapter Two: Poverty, Human Rights and Tax Abuses

2.1 Poverty, development and taxes

The purpose of this chapter is to provide an overview of the Task Force's understanding of poverty in order to make the connections to human rights and illicit financial flows in subsequent chapters. This chapter will also highlight some of the facts and projections about current trends in global poverty and inequality in order to highlight the moral, ethical and political imperatives for the global community to renew its efforts to address the causes of poverty – including tax abuses.

2.1.1 Task Force findings

The Task Force's discussion of poverty is framed by the IBAHRI Council's Resolution on Poverty and Human Rights of 27 May 2010 that focuses on 'severe, endemic and chronic poverty'. This is consistent with current interpretations of the United Nations (UN) Human Rights Council that focus on 'extreme poverty', including in the recently adopted UN Guiding Principles on Extreme Poverty and Human Rights. Moreover, it coincides with the feedback received during the Task Force's consultation process: stakeholders with diverse perspectives tended to be sceptical of the assertion that 'poverty' could constitute a violation of human rights without further nuance or precision; however, the same stakeholders tended to be more accepting that severe or extreme forms of poverty, especially when caused by acts or omissions of the state, could be associated with violations of human rights.

From a review of the development and human rights literature, the Task Force highlights the multidimensional definitions of poverty that look beyond deprivation of income to denials of capabilities, opportunities and violations of human dignity. Following upon the influential work of Amartya Sen, poverty has been increasingly defined as a multidimensional phenomenon rather than solely as an economic issue; and poverty should be understood as the lack of capability to function in a given society rather than measured against an

arbitrary ‘poverty line’ for income (eg, the World Bank’s current definition of extreme poverty as less than US\$1.25 per day and poverty as less than US\$2.00 per day, denominated in US dollars of the year 2005 converted at purchase power parity). A number of the multidimensional definitions of poverty used by key multilateral agencies and relevant to the Task Force’s human rights analysis are included in Appendix H.

In terms of the basic facts about poverty, it is estimated that among the world’s current population of approximately seven billion human beings, millions of individuals suffer from the following deprivations that affect their human rights:

TABLE 1: INDICATORS OF GLOBAL POVERTY

Indicator	Human rights affected
868 million are chronically undernourished ⁱ	Right to food Right to life
2,000 million lack access to essential medicines ⁱⁱ	Right to health Right to life
884 million lack safe drinking water ⁱⁱⁱ	Right to water and sanitation Right to health
924 million lack adequate shelter ^{iv}	Right to housing
1,600 million have no electricity ^v	Right to housing
2,500 million lack adequate sanitation ^{vi}	Right to water and sanitation
796 million adults are illiterate ^{vii}	Right to education
215 million children (aged five to 17) do wage work outside their household ^{viii}	Freedom from child labour
One-third of all human deaths are due to poverty-related causes ^{ix}	Right to life

i FAO, IFAD and WFP, ‘State of Food Insecurity in the World 2012’ www.fao.org/publications/sofi/en.

ii ‘The World Health Situation’, (2004), Chapter 7, accessed at: <http://apps.who.int/medicinedocs/en/d/Js6160e/9.html>.

iii WHO/UNICEF 2008, p 32.

iv UN Habitat 2003, p vi.

v UN Habitat, ‘Urban Energy’.

vi WHO/UNICEF 2008, p 7.

vii See: www.uis.unesco.org.

viii ILO: ‘The End of Child Labour, Within Reach’, (2006), pp 9, 11, 17–1.

ix WHO, ‘The Global Burden of Disease: 2004 Update’, Geneva (2008), Table A1, pp 54–59.

Given that the Task Force is focused on the impacts of tax abuses on poverty,¹⁷³ it was not necessary to develop an exhaustive list of all the different and interrelated causes of poverty and inequality.¹⁷⁴ Nonetheless, numerous stakeholders cautioned the Task Force about making generalisations about the causes of poverty: some stated poverty to be an inherent part of the human condition. For a number of stakeholders, a distinction was drawn between causes of poverty that are beyond the control of governments (eg, some sorts of natural disasters) and those that are within their control (eg, grand corruption).¹⁷⁵ At the same time, many stakeholders also stated that tax laws (and the efforts to evade them) are purely human phenomena – which suggests greater social responsibility to prevent poverty that results from these.

Moreover, the creation of tax laws and policies at the international and domestic levels can give rise to what the Task Force Chair, Thomas Pogge, calls ‘inequality spirals’, in which the strongest participants: have the greatest opportunities and incentives to achieve the expertise and coordination needed for effective lobbying; use these opportunities to expand their relative position; and then use their increased influence to bend the rules or their application even more in their own favour.¹⁷⁶ Moreover, ‘supranational rule-shaping’ offers especially high returns from lobbying government officials because such rules emerge in a bargaining environment where leading governments can deliver: there is no democratic counterweight or revolutionary danger zone; there is little transparency even *ex post*; and moral restraints can be dispelled by doubts about their international acceptance.¹⁷⁷

173 As discussed above, while the estimates of the magnitude vary, there is no serious debate about the fact that very significant resources are being drained from the public purse, both in developing and developed countries, because of tax abuses.

174 The World Bank’s ‘Voices of the Poor’, based on research with over 60,000 poor people in 60 countries, identifies a range of factors that poor people identify as part of poverty. These include: precarious livelihoods; excluded locations; physical limitations; gender relationships; problems in social relationships; lack of security; abuse by those in power; disempowering institutions; limited capabilities; and weak community organisations.

175 In this regard, the Task Force notes that some natural disasters are not that ‘natural’ (eg, caused or worsened by deforestation, climate change or social conditions) and the impacts of those disasters are dramatically different depending on the government policy before and after the disaster (eg, compare the results of an earthquake in Japan and Haiti).

176 Thomas Pogge, Presentation at São Paulo consultation meeting, slide 10.

177 *Ibid* slide 11.

The UN's 'MDG Progress Report 2012' highlights that extreme poverty is falling in every region; the poverty reduction target has been met; vulnerable employment has only reduced marginally; and hunger remains a global challenge. Similarly, the World Bank's 'Global Monitoring Report 2012' indicates that poverty has decreased significantly: developing countries are on track to meet, ahead of time, the UN's Millennium Development Goals (MDGs) to reduce by half the world's extreme poverty rate by 2015; and hundreds of millions of people have benefited from greater access to education and better-paying jobs.¹⁷⁸

Nonetheless, nearly 1.3 billion people remain below the extreme poverty line with an income of US\$1.25 or less a day and another 1.2 billion live on less than US\$2.00 a day.¹⁷⁹ In some developing countries, there continues to be a wide or widening gap between rich and poor, and between those who can and cannot access opportunities. Other challenges, such as economic shocks, food shortages and environmental destruction threaten to undermine the progress made in recent years.

Some development experts and academics questioned the headlines from the UN and the World Bank that the world is on target to meet the commitment to 'eradicate' poverty and cautioned that the trends in poverty and inequality merit a more critical assessment. For instance, the international commitment to eradicate poverty keeps being watered down by manipulating the dates and wording of the targets.¹⁸⁰

Furthermore, it was pointed out that the most extreme forms of poverty could be avoided through a modest shift in global household income. In the 20 years from 1988 to 2008, the bottom fifth of the world's population lost 22 per cent of its share of global household income and the top twentieth (five per cent) of the world's population gained 6.7 per cent, moving from a share

178 See: <http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTDECPROSPECTS/0,,contentMDK:23148901~pagePK:64165401~piPK:64165026~theSitePK:476883,00.html>.

179 See: <http://iresearch.worldbank.org/PovcalNet/index.htm?1>.

180 Thomas Pogge analyses the various international commitments about poverty eradication over the years and highlights the following: 1996 World Food Summit in Rome commits that the number of extremely poor is to be halved during 1996–2015. This implies an annual reduction by 3.58 per cent (www.fao.org/wfs). The 2000 Millennium Declaration commits that the proportion of extremely poor among the world's people is to be halved during 2000–2015. This implies an annual decline by 3.35 per cent (40 per cent in 15 years). (www.un.org/millennium/declaration/ares552e.htm). Finally, MDG-1 as defined and tracked by the UN commits that the proportion of extremely poor among the population of the developing countries is to be halved during 1990–2015. This implies an annual reduction by 1.25 per cent (27 per cent over 25 years).

of 42.87 per cent in 1988 to one of 45.75 per cent in 2008.¹⁸¹ This indicates that the kind of severe poverty prevalent in the poorest quarter is today quite avoidable, through a shift of merely one–two per cent of the global household income distribution. The possibility of such a shift is indicated by the fact that a larger such shift actually occurred, albeit in the wrong direction.

The critical point at this juncture is that tax abuses are one of the causes of global poverty because they deprive governments of the resources needed to combat poverty and fulfil human rights. As discussed above, tax abuses result in economic flows out of developing countries that exceed the inflows of development assistance; therefore, tax abuses in developed countries can have an effect on perpetuating extreme poverty in developing countries. Conversely, greater tax revenues have the potential to reduce poverty, provided that they are properly spent on programmes that contribute to infrastructure, development and human rights.

Furthermore, concerns were raised about tax abuses contributing to rising levels of inequality between and within nations. As one stakeholder stated: ‘the global shadow economy is contributing to a growth in global inequality, which is also having a major impact on democracy. Poverty may be declining in some places, but inequality is growing. The democratic system cannot survive in a context of massive inequality.’

2.1.2 Poverty eradication through domestic resource mobilisation

For many stakeholders, the connections between taxes, poverty and development were easier to make than the linkages with human rights. In many respects, the issue of tax abuses has been previously and successfully framed in terms of poverty, inequality and development. In this regard, it is interesting to note that the Tax Justice Network was launched at the UN Conference on Financing for Development in 2002.¹⁸² At the time, one of the main motivations for advocacy on tax justice issues was to reduce the reliance of developing countries on aid and debt by providing for better ‘domestic resource mobilisation’. Currently, the financial crisis has given

181 Based upon information provided in correspondence between an international development expert and the Task Force Chair.

182 For a review of the follow-up actions of the UN in the field of financing for development, see: www.un.org/esa/ffd/overview/chronology.htm.

further impetus to these issues, but with an additional focus on poverty and inequality in developed countries.

Furthermore, some stakeholders stated that taxation is one of the most fundamental aspects of development and elimination of poverty: 'It supports the role of the State to provide services and investments. The role of a fair and transparent tax system can provide a political context and environment for development. It creates a positive expectation for public accountability.' Tax authorities and academics highlighted that there is a robust link between broad-based tax systems, citizen participation and sustainable democracies: 'Taxpayers have an interest in controlling their governments. Taxes provide an incentive to fight corruption and illicit financial flows. But, you will never have support for tax unless government is accountable and budgeting is transparent.'

Domestic resource mobilisation is appealing as it may respond to some of the critiques of traditional approaches to poverty reduction, particularly with respect to the over-reliance on international development assistance that may contribute to dependency, inefficiency and a paternalistic or charitable attitude towards developing countries. Furthermore, domestic resource mobilisation may also provide a self-interested response for donors in developed countries that are struggling with declining aid budgets after the global economic and financial crises.

As stated in a recent report of the UK House of Commons International Development Committee, 'Tax is an issue of fundamental importance for development. If developing countries are to escape from aid dependency, and from poverty more broadly, it is imperative that their revenue authorities are able to collect taxes effectively.' The report goes on to suggest improving the effectiveness of tax collection in a number of ways, including with respect to the extractive industries; improved collection of personal income taxation, value added tax (VAT) and local property taxation; providing incentives for hitherto unregistered enterprises to join the formal (ie, taxpaying) sector; automatic exchange of information at the international level; measures to counteract transfer mispricing; and increased transparency and country-by-country reporting.¹⁸³

183 UK House of Commons International Development Committee, 'Tax in Developing Countries: Increasing Resources for Development' (August 2012), accessed at: www.publications.parliament.uk/pa/cm201213/cmselect/cmintdev/130/13002.htm.

In another recent report, the African Tax Administration Forum states that the need to increase the efficiency of revenue mobilisation of Africa's 54 countries to finance their economic development programmes and meet the MDGs have become increasingly compelling.

'Good Tax Governance and more effective tax systems are central to sustainable development because they can:

- mobilise the domestic tax base as a key mechanism for developing countries to escape aid or single resource dependency;
- reinforce government legitimacy through promoting accountability of the government to tax-paying citizens, effective state administration and good public financial management; and
- achieve a fairer sharing of the costs and benefits of globalisation.'¹⁸⁴

Finally, from an African civil society perspective, the African Forum and Network on Debt and Development (AFRODAD) also promotes the link between tax and development:

'Taxation can be used as a long term and reliable source of funding to developing countries but so far it has not been given due attention by governments because they concentrate most of their attention and time on aid. Most developing countries have abundant resources and their sustainable exploration and taxation could contribute to economic growth and poverty reduction. As a principle, taxation should promote growth, equity and poverty reduction. This means that governments should be able to balance between raising resources today and enabling companies to further grow and provide more resources tomorrow while creating jobs and reducing inequalities.'¹⁸⁵

The link between tax and development was further reinforced at the recent G8 meeting in Lough Erne, Northern Ireland. The leaders stated: 'It is in everyone's interests for developing countries to be able to: strengthen their tax base to help create stable and sustainable states; improve their ability to fund their budgets through their own domestic revenues; and increase

184 See n 61 above. See also the Pretoria Communiqué of 2008.

185 AFRODAD, 'Taxation, Development and Good Governance Agenda' in *What Has Tax Got To Do With Development: A Critical Look at Mozambique's Tax System* (2011).

ownership of their own development processes.¹⁸⁶ The G8 encouraged all jurisdictions to join the Global Forum on Transparency and Exchange of Information for Tax Purposes and the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, support a new OECD initiative for a Tax Inspectors Without Borders proposal to assist tax administrations to investigate specific and complex tax cases, and urged the OECD to address the concerns expressed by developing countries on the quality and availability of the information on comparable transactions that is needed to administer transfer pricing effectively.¹⁸⁷

2.1.3 Conclusions

Based on the discussion above, the Task Force notes that tax and domestic resource mobilisation issues are going to figure increasingly in international discussions and cooperation efforts on development and poverty eradication. Indeed, in the coming year, there is an opportunity for these issues to be a part of the discussion of the 'post-2015' agenda at the expiry of the MDGs. Tax justice advocates and development organisations are beginning to focus on this issue.¹⁸⁸

Not only does taxation play a role in raising the resources for governments to provide services to citizens, the tax system may contribute to improved governance through three channels:

1. Common interest processes, which ensure that governments have stronger incentives to promote economic growth since they are dependent on taxes and therefore on the prosperity of taxpayers.
2. State capacity processes, which require states to develop a complex bureaucratic apparatus for tax collection because of their dependence on taxes, particularly direct ones. This is likely to lead to broader improvements in public administration.
3. Taxation may engage taxpayer-citizens collectively in politics and lead them to make claims on the government for reciprocity and

¹⁸⁶ See n 54 above, para 27.

¹⁸⁷ *Ibid* paras 27–29.

¹⁸⁸ See, for example, the recently published briefing note by Christian Aid on 'Tax and the Post-2015 Agenda', accessed at: www.christianaid.org.uk/images/tax-and-the-post-2015-agenda.pdf.

accountability, either through short-term political mobilisations or through long-term increases in political engagement. Governments are therefore compelled to respond to these citizen demands in order to enhance tax compliance and sustain state revenues.¹⁸⁹

These mutually reinforcing linkages between taxation and governance, based on economic interests, may assist in the long-term eradication of poverty. In addition, there are also strong reasons to focus on the linkages between taxation and poverty from the perspective of international human rights law, to which we now turn.

2.2 Human rights affected by poverty and tax abuses

This chapter sets out a rights-based analysis of poverty in order to reinforce the argument that tax abuses have considerable negative impacts on the enjoyment of human rights. Simply put, tax abuses deprive governments of the resources required to provide the programmes that give effect to economic, social and cultural rights, and to create and strengthen the institutions that uphold civil and political rights.

Poverty is not explicitly mentioned in the various international human rights treaties, even though it is implicitly and inextricably woven into the objectives and substance of international human rights law and policy. From the Universal Declaration of Human Rights – in which ‘freedom from want’ is proclaimed as part of the ‘highest aspirations of the common people’ – to the recent UN Guiding Principles on Extreme Poverty and Human Rights, the eradication of poverty and the empowerment of the poor and vulnerable has been a constant and pressing theme of the international human rights community.¹⁹⁰

2.2.1 Task Force findings

Although there are many conceptual links between poverty and human rights, diverse stakeholders cautioned the Task Force about how these links

¹⁸⁹ See n 61 above, 79.

¹⁹⁰ Universal Declaration of Human Rights (1948), preamble. Similar references to ‘freedom from want’ or ‘improved standards of living’ are found in the preambles to the International Covenant on Economic, Social and Cultural Rights (1966); the European Social Charter (1961 and revised in 1996); the American Convention on Human Rights (1969); the African Charter of Human and Peoples’ Rights; and the Cha-Am Hua Hin Declaration on the Intergovernmental Commission on Human Rights of the Association of Southeast Asian Nations (ASEAN) (2009).

should be articulated. Numerous human rights and development experts stressed that poverty should never be called a violation of human rights. As one human rights practitioner put it, ‘poverty is a regrettable circumstance in which human rights are more at risk’.

The human rights and development experts also stressed the importance of focusing on the systemic causes of poverty: ‘it is the system that creates or perpetuates poverty that violates human rights, not the condition of poverty.’ Mechanisms such as forced labour that result in poverty are considered to be a human rights violation.

These same stakeholders acknowledged that human rights should strengthen actions to promote development and alleviate poverty. ‘Human rights can deal with the obstacles that poor people face.’ Human rights can strengthen governance, accountability and efficient administration as remedies to poverty. One tax authority stated: ‘Legally, it may not make much of a difference to understand tax evasion as a human rights issue. However, the human rights analysis could be very important to help strengthen the tax system from a tax morale and political perspective.’

Civil society representatives highlighted that better implementation of economic, social and cultural rights would contribute to poverty alleviation. One human rights lawyer mentioned that the standard is for the ‘progressive realisation’ of economic, social and cultural rights, but this has remained a rather vague concept and ‘the international community should give clearer benchmarks and indicators for implementation’.¹⁹¹ Some stakeholders from developing countries opined that there has been insufficient attention to economic, social and cultural rights: ‘There is a need to push further understanding of economic, social and cultural rights, particularly in developed countries where there may be a more limited view of human rights as a small sub-set of individual rights. In places like Africa, however, people are frustrated with an exclusive focus on civil and political rights rather than economic, social and cultural rights.’

Stakeholders highlighted the importance of distinguishing between the ‘moral outrage’ and the ‘legal obligations’ that are triggered when faced

191 In this regard, the Social and Economic Rights Fulfillment Index (the ‘SERF Index’) was mentioned as an initiative that can contribute to better monitoring and implementation of social and economic rights, see: www.serfindex.org/about.

with poverty. By calling poverty a human rights violation, it implies there is a remedy. But what is that remedy?

Other experts pointed out that the potential human rights issue or violation is when there is an avoidable contribution to a negative human rights impact, and one where those contributing are in a position to know how their conduct results in a negative impact. Such a framing of the human rights issue can often be satisfied in the case of tax abuse: ‘Those who siphon funds out of developing countries can and should know that they are thereby actively diminishing funds that go to efforts to reduce poverty. And those who facilitate tax abuse (eg, tax havens, secrecy jurisdictions, and certain lawyers and accountants) can and should know that their activities likewise take funds away from efforts to reduce poverty.’

Most stakeholders tended to agree that there is an important distinction between labelling tax abuses as ‘legal violations of human rights’ versus stating that tax abuses have ‘negative impacts on human rights’. Depending on the scope and scale of the tax abuses, they might have a significant impact on human rights. As one tax authority expressed it: ‘What do we need to fulfill economic, social and cultural rights? Resources including taxes. Therefore, tax abuses are clearly a human rights issue when massive amounts are lost from State revenues.’

Nonetheless, diverse stakeholders pointed out the difficulty in making a direct link between tax abuses and human rights impacts. They proposed that it is more appropriate to view tax abuses as indirectly linked to human rights impacts: ‘Tax abuses deprive governments of revenues that can pay for social programmes. But you still need to establish that those governments will spend greater tax revenues in a manner that actually improve peoples’ rights. This is not always the case.’

Some human rights and development practitioners raised concern about stretching human rights concepts by moving further into issues such as illicit financial flows and tax abuses. ‘If you put everything under human rights, do you water them down?’ Others took the opposite point of view: ‘there is a strong development and finance scene, but we need to bring them together with the human rights scene to see where there are linkages.’

Finally, as one lawyer said: ‘It’s essential to make the human rights analysis. Everyone is a human rights lawyer these days, so why not tax lawyers as well? We all need a bit of the mental set to think about human rights.’

2.2.2 What are human rights?

Human rights are the fundamental, inalienable and universal rights that belong to each person by virtue of being a human being. While human rights have a long pedigree in historical documents like the Magna Carta, the French Declaration of the Rights of Man and of the Citizen, and the American Declaration of Independence, the modern international consensus about the definition and content of human rights begins with the Universal Declaration of Human Rights that was adopted by the United Nations after the Second World War in 1948.

Since then, the Member States of the UN have signed and ratified human rights instruments that cover civil, political, economic, social and cultural rights, as well as additional protections for specific groups such as women, children, migrant workers and people with disabilities. In addition to the international human rights instruments signed by Member States, various UN bodies and mechanisms also develop human rights declarations, guiding principles, policies and interpretations that help shape international practices and customary international law in the field of human rights.

In addition, there are regional human rights instruments that apply to Member States of regional organisations such as the Council of Europe (the European Convention on Human Rights), the African Union (the African Charter of Human and Peoples’ Rights), the Organization of American States (the American Convention on Human Rights), the League of Arab States (the Arab Charter on Human Rights), as well as the emerging regional standards for Asia being developed further to the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration. At the national level, individual states have human rights protections in their constitutions and domestic laws that implement – to greater or lesser degrees – the international and regional standards.

Given the global scope of the Task Force’s research project, the human rights standards that will be applied are defined as the Universal

Declaration of Human Rights and the following ‘core’ international human rights instruments.

TABLE 2: UN HUMAN RIGHTS INSTRUMENTS

The ‘core’ international human rights instruments of the United Nations	Entry into force	Member States Partiesⁱ
International Covenant on Civil and Political Rights	1966	167
International Covenant on Economic, Social and Cultural Rights	1966	160
Convention on the Elimination of All Forms of Racial Discrimination	1969	175
Convention on the Elimination of All Forms of Discrimination Against Women	1981	187
United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment	1984	151
Convention on the Rights of the Child	1989	193
Convention on the Rights of Persons with Disabilities	2008	127

i As of December 2012.

Given that the Task Force’s focus on tax abuses is made through the lens of poverty, the central human rights that will be analysed are economic, social and cultural rights. As will be discussed below, these so-called ‘second-generation’ human rights help define the obligations of states to take individual and collective actions to protect, respect and fulfil basic human rights to essentials such as food, healthcare and education.

Notwithstanding this focus on economic, social and cultural rights, there are also potential negative impacts of tax abuses on civil and political rights. These ‘first-generation’ civil and political rights are defined by the individual’s freedom from state intervention. Tax abuses deprive governments of the resources required to create and strengthen institutions that uphold civil and political rights.

It is important to highlight that international human rights law and policy is constantly evolving: through the development and adoption of new human rights standards; through the interpretation and clarification of official human rights bodies and mechanisms; and through the evolution of the positions, policies and practices of states and other actors. The discussion below will

outline some of the key trends in international human rights law and policy that are relevant to the analysis of tax abuses and poverty. In particular, economic, social and cultural rights are increasingly understood as binding and measurable rights – rather than aspirational principles.¹⁹²

Given the concerns about tax abuses by multinational enterprises, it is particularly important to explain the evolution of international human rights law to look beyond the state as the primary ‘duty-bearer’ for human rights to the responsibilities of non-state actors, including business enterprises. In this regard, it is important to clarify that the ‘rightsholders’ under international human rights instruments are generally understood to be individuals and groups of individuals rather than corporations or legal persons.¹⁹³

2.2.3 United Nations Declarations that link poverty and human rights

At this point in the discussion, it is useful to outline the connections between poverty and human rights that have been made by various UN agencies over the years.

Beginning at the 1993 Vienna World Conference on Human Rights, the final declaration included the following statements making the linkages between poverty and human rights: ‘the existence of widespread extreme poverty inhibits the full and effective enjoyment of human rights; its immediate alleviation and eventual elimination must remain a high priority for the international community.’¹⁹⁴

Since 2001, the UN Commission on Human Rights and its successor institution, the UN Human Rights Council, have passed a series of resolutions on human rights and extreme poverty that have helped frame the issue on a normative level. Subsequent resolutions¹⁹⁵ and actions by the UN

192 See: ‘The Nature of States Parties’ Obligations (Art 2, Para 1)’, CESCR General Comment No 3, available at: [www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument)

Opendocument, and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.

193 However, in some cases, corporations may be considered to be ‘individuals’ under human rights law. For example, the European Court of Human Rights has ruled that certain rights under the European Convention on Human Rights apply to corporations. See: *Société Colas Est v France*, EHCR 2002-III at 131, 136.

194 Vienna Declaration and Programme of Action, UNGA/A/CONF.157/23 (25 June 1993), paras 14 and 25.

195 Sub-Commission on the Promotion and Protection of Human Rights, res 2001/8, adopted on 15 August 2001; Sub-Commission on the Promotion and Protection of Human Rights, res 2006/9, adopted on 24 August 2006; Human Rights Council, res 2/2, adopted on 27 November 2006; Human Rights Council, res 7/27, adopted on 28 March 2008; Human Rights Council, res 12/19, adopted on 2 October 2009; Human Rights Council, res 15/19, adopted on 30 September 2010.

Special Rapporteur on Extreme Poverty and Human Rights have led to the development of the UN Guiding Principles on Extreme Poverty and Human Rights.¹⁹⁶ These Guiding Principles were recently adopted by the UN Human Rights Council and represent the most comprehensive and recent statement of the UN system on the issue of poverty and human rights.

The Guiding Principles are premised on the understanding that eradicating extreme poverty:

‘is not only a moral duty but also a legal obligation under existing international human rights law. Thus, the norms and principles of human rights law should play a major part in tackling poverty and guiding all public policies affecting persons living in poverty. ... Poverty is an urgent human rights concern in itself. It is both a cause and a consequence of human rights violations and an enabling condition for other violations. Not only is extreme poverty characterized by multiple reinforcing violations of civil, political, economic, social and cultural rights, but persons living in poverty generally experience regular denials of their dignity and equality.’¹⁹⁷

For further information, the key passages of the UN documents linking poverty and human rights are reproduced in Appendix G.

2.2.4 Which human rights are most affected by poverty?

The key points from the passages above are that: (a) poverty is a cause and a consequence of violations of human rights; and (b) international human rights law provides for obligations and approaches that should reinforce states’ individual and collective efforts for the elimination of poverty.

This section examines the human rights that are most affected by poverty. According to the UN Special Rapporteur on Extreme Poverty and Human Rights, there are at least 14 human rights that are affected by poverty:

196 UN Human Rights Council, ‘Guiding Principles on Extreme Poverty and Human Rights, Submitted by the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona’, (A/HRC/21/39), (18 July 2012).

197 See UN Guiding Principles on Extreme Poverty and Human Rights, paras 1 and 3.

- The right to life and physical integrity.¹⁹⁸
- The right to liberty and security of the person.¹⁹⁹
- The right to equal protection before the law, access to justice and effective remedies.²⁰⁰
- The right to recognition as a person before the law.²⁰¹
- The right to privacy and to protection for home and family.²⁰²
- The right to an adequate standard of living.²⁰³
- The right to adequate food and nutrition.²⁰⁴
- The right to water and sanitation.²⁰⁵
- The right to adequate housing.²⁰⁶

198 Universal Declaration of Human Rights, Art 3; International Covenant on Civil and Political Rights, Art 6; European Convention on Human Rights, Art 2; American Convention on Human Rights, Art 4; African Charter on Human and Peoples' Rights, Art 3; Convention on the Rights of the Child, Art 6.

199 Universal Declaration of Human Rights, Art 3; International Covenant on Civil and Political Rights, Art 9; European Convention on Human Rights, Art 5; American Convention on Human Rights, Art 7; African Charter on Human and Peoples' Rights, Art 6.

200 Universal Declaration of Human Rights, Arts 7 and 8; International Covenant on Civil and Political Rights, Arts 2(3), 14 and 26; European Convention on Human Rights, Art 13; American Convention on Human Rights, Arts 24 and 25; African Charter on Human and Peoples' Rights, Art 3; Convention on the Rights of the Child, Art 40; Convention on the Elimination of All Forms of Discrimination Against Women, Art 15.

201 Universal Declaration of Human Rights, article 6; International Covenant on Civil and Political Rights, Art 16; American Convention on Human Rights, article 3; African Charter on Human and Peoples' Rights, Art 5.

202 Universal Declaration of Human Rights, Art 12; International Covenant on Civil and Political Rights, Arts 17 and 23; International Covenant on Economic, Social and Cultural Rights, Art 10; European Convention on Human Rights, Art 8; European Social Charter, Art 16; American Convention on Human Rights, Art 11, 17 and 26, Protocol of San Salvador, Art 15; African Charter on Human and Peoples' Rights, Art 18; Convention on the Rights of the Child, Art 16.

203 Universal Declaration of Human Rights, Art 25; International Covenant on Economic, Social and Cultural Rights, Art 11; African Charter on Human and Peoples' Rights, Pretoria Declaration, Art 10; Convention on the Rights of the Child, Art 27.

204 Universal Declaration of Human Rights, Art 25; International Covenant on Economic, Social and Cultural Rights, Art 11(2); American Convention on Human Rights, Art 26 and Protocol of San Salvador, Art 12; African Charter on Human and Peoples' Rights, Pretoria Declaration, Art 10; Convention on the Rights of the Child, Art 27(3).

205 International Covenant on Economic, Social and Cultural Rights, Art 11(2), as interpreted by General Comment No 15 and General Assembly Resolution A/64/292; Convention on the Rights of the Child, Art 24.1; Convention on the Elimination of all forms of Discrimination Against Women, Art 14(2).

206 Universal Declaration of Human Rights, Art 25; International Covenant on Economic, Social and Cultural Rights, Art 11; European Social Charter, Art 31; African Charter on Human and Peoples' Rights, Art 14 and Pretoria Declaration, Arts 5 and 10; Convention on the Rights of the Child, Art 27(3).

- The right to the highest attainable standard of physical and mental health.²⁰⁷
- The right to work and rights at work.²⁰⁸
- The right to social security.²⁰⁹
- The right to education.²¹⁰
- The rights to take part in cultural life and to enjoy the benefits of scientific progress and its applications.²¹¹

Moreover, a number of foundational human rights principles are affected by poverty, including:

- Dignity, universality, indivisibility, interrelatedness and interdependence of all rights.²¹²
- Equal enjoyment of all human rights by persons living in extreme poverty.²¹³
- Equality between men and women²¹⁴ and the rights of the child.²¹⁵
- Agency and autonomy of persons living in extreme poverty.²¹⁶

207 Universal Declaration of Human Rights, Art 25; International Covenant on Economic, Social and Cultural Rights, Art 12; European Social Charter, Art 11; American Convention on Human Rights, Art 26 and Protocol of San Salvador, Art 10; African Charter on Human and Peoples' Rights, Art 16 and Pretoria Declaration, Art 7; Convention on the Rights of the Child, Art 24; Convention on the Elimination of All Forms of Discrimination Against Women, Art 12.

208 Universal Declaration of Human Rights, Art 23; International Covenant on Economic, Social and Cultural Rights, Arts 6 and 7; European Social Charter, Arts 1 to 10; American Convention on Human Rights, Art 26 and Protocol of San Salvador, Arts 6 and 7; African Charter on Human and Peoples' Rights, Art 15 and Pretoria Declaration, Art 6; Convention on the Rights of the Child, Art 32; Convention on the Elimination of All Forms of Discrimination Against Women, Art 11.

209 Universal Declaration of Human Rights, Art 22; International Covenant on Economic, Social and Cultural Rights, Art 22; European Social Charter, Arts 12, 24 and 30; American Convention on Human Rights, Art 26 and Protocol of San Salvador, Art 9; African Charter on Human and Peoples' Rights, Pretoria Declaration, Art 10; Convention on the Rights of the Child, Art 26.

210 Universal Declaration of Human Rights, Art 26; International Covenant on Economic, Social and Cultural Rights, Art 13 and 14; European Convention on Human Rights, Protocol, Art 2; American Convention on Human Rights, Art 26 and Protocol of San Salvador, Art 13; African Charter on Human and Peoples' Rights, Art 17 and Pretoria Declaration, Art 8; Convention on the Rights of the Child, Arts 28 and 29; Convention on the Elimination of All Forms of Discrimination Against Women, Art 10.

211 Universal Declaration of Human Rights, Art 27; International Covenant on Economic, Social and Cultural Rights, Art 15; American Convention on Human Rights, Art 26 and Protocol of San Salvador, Art 14; African Charter on Human and Peoples' Rights, Art 22 and Pretoria Declaration, Art 9.

212 UN Guiding Principles on Extreme Poverty and Human Rights, paras 15–17.

213 *Ibid* paras 18–22.

214 *Ibid* paras 23–31.

215 *Ibid* paras 32–35.

216 *Ibid* paras 36–41.

- Participation and empowerment.²¹⁷
- Transparency and access to information.²¹⁸
- Accountability.²¹⁹

Based on the work of the UN Special Rapporteur on Extreme Poverty and Human Rights, further explanations of how poverty interacts with these different human rights – as a cause or as a consequence – is provided in Appendix I.

2.2.5 Conclusions

Calling poverty a direct violation of human rights may be contested, but it is undeniable that poverty has many direct and indirect impacts on the full range of human rights. There is agreement throughout the United Nations system that extreme forms of poverty are an important human rights concern. In the recently adopted UN Guiding Principles on Extreme Poverty and Human Rights, the UN Special Rapporteur on Extreme Poverty and Human Rights has illustrated how poverty is connected as a cause or consequence of violations of 14 different human rights and all the key human rights principles, ranging from the right to food, the right to health, the right to education and the right to social security, to the principle of transparency.

This review of the human rights implications of poverty underlines the importance of the IBAHRI Council Resolution on Poverty and Human Rights, and the merit of looking at tax abuses through the lens of internationally recognised human rights.

217 *Ibid* paras 37–41.

218 *Ibid* paras 42–44.

219 *Ibid* paras 45–47.

2.3 Responsibilities to counter tax abuses

To the extent that tax abuses have an impact on poverty and that poverty has an impact on human rights, as outlined above, it is possible to make a connection between tax abuses and human rights. Most simply put, tax abuses deprive governments of the resources required to respect, promote and fulfil human rights. More dramatic examples of human rights impacts can be imagined when you juxtapose the billions of dollars that are said to be flowing out of developing countries with the comparatively small amounts that are required to lift individuals, families and communities out of the most extreme forms of poverty.

This section explores the responsibilities of different actors for addressing tax abuses under international human rights law. A central part of this analysis relates to the obligations of states to progressively realise economic, social and cultural rights, which are closely connected to their commitments to eradicate global poverty. Moreover, the obligations of states with respect to civil and political rights support the increased transparency and access to information that is necessary effectively to confront tax abuses, as well as the strengthened governance required to ensure that increased tax collection results in positive human rights outcomes.

As discussed throughout this report, there is currently a great deal of attention given to corporate tax abuses, which reflects the significant role of business enterprises in the global economy and the tax planning opportunities inherent within the complex corporate structures of multinational enterprises. The recently developed UN Guiding Principles on Business and Human Rights clarify the obligations of states to ensure coherence among corporate law, tax policy and human rights. Furthermore, they set out the responsibilities of business enterprises to avoid any negative impacts on human rights throughout their operations and business relationships. Indeed, the UN Guiding Principles – and other international standards related to corporate social responsibility – can assist in the articulation of new due diligence requirements related to the tax practices of multinational enterprises in different economic sectors (including financial, accounting and legal services).

2.3.1 Task Force findings

One of the key messages heard from diverse stakeholders is that states must always play the primary role in confronting tax abuses. As one lawyer stated: ‘It is the obligation of the state to fix the perceived breach by other actors. In other words, it is up to states to pass the rules and regulations to address tax abuses and to build the capacity to collect taxes.’

Once the state has addressed the issue of collecting taxes and combating tax evasion, it is important to look at how the resources raised by the revenue authority are managed by the executive. There is no guarantee that they will be spent wisely on programmes that advance human rights.

Some stakeholders – both from a human rights and a business perspective – cautioned about shifting the focus from states onto business enterprises. ‘It is unrealistic to expect companies to do other than maximise profit; and, therefore it is critical to emphasise the obligation of the state to impose rules. The long-term focus must be on changing the behaviour of states, rather than to focus on corporations.’ One company representative remarked that:

‘the voices of the groups working on taxes have become powerful. The assumption being promoted is that multinationals are bad and tax authorities are good. This neglects the governance part of the equation. The revenues collected by tax authorities might not be disbursed into good programmes or may be lost entirely through corruption.’

While all stakeholders agreed that good governance is a critical part of improving taxation, some also cautioned that purportedly ‘bad governance’ should not be used as an excuse for tax abuses and secrecy.

Another lawyer used the example of bank secrecy to illustrate the same point:

‘Confronting bank secrecy is not controversial. However, it is problematic to argue that banks have an affirmative obligation to disclose information without a legal basis and clear inter-governmental rules and mechanisms. It is the role of the state to regulate banks and to set the framework for exchange and information. Banks and

financial institutions are likely to have a significant role as cross-border tax intermediaries in this system. Once the rules have been defined, then the banking industry can figure out how to implement the due diligence measures that respect human rights.’

At the same time, some others pointed out that banks and corporations often lobby quite forcefully against regulation. And insofar as this is true, banks and corporations cannot blame inadequate regulation solely on states. ‘It is hard for corporations to practise self-restraint in a competitive environment where their competitors cannot be relied upon to do the same. But it’s not demanding to ask them to forego lobbying for unjust rules when the failure to achieve such rules would not disadvantage them against their competitors. In the absence of the lobbying, none of the firms get[s] the unjust advantage.’

2.3.2 The obligations of states to counter tax abuses

The responsibilities of states to address tax abuses should be understood in relation to their obligations to maximise the resources available to fulfil economic, social and cultural rights. As discussed in the previous chapters, tax abuse can have serious negative impacts on economic, social and cultural rights by diverting resources from the public purse that are needed to fund social programmes – for instance for health, education, housing or social security.

Based on the Task Force’s research, the obligation of states to confront tax abuses flows from an interpretation of the following principles of international human rights law:

- general obligations under the International Covenant on Economic, Social and Cultural Rights;
- extraterritorial obligations under the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights;
- obligations to combat poverty according to the UN Guiding Principles on Extreme Poverty and Human Rights;

- obligations to combat illicit financial flows and repatriate stolen assets; and
- obligations to address tax matters as part of the recovery measures from the economic and financial crises.

These obligations are briefly summarised below. For ease of reference, the key passages from the relevant reports are reproduced in Appendix J.

GENERAL OBLIGATIONS OF STATES UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)

The Committee on Economic, Social and Cultural Rights (the ‘Committee’) has interpreted the following general principles about the scope of states’ obligations to protect, respect and fulfil economic, social and cultural rights:²²⁰

- The obligation to take steps towards the goal of the full realisation of relevant rights includes ‘all appropriate means, including particularly the adoption of legislative measures’. Other measures that may also be appropriate include administrative, financial, educational and social measures.²²¹
- The concept of progressive realisation implies that any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the ICESCR and in the context of the full use of the maximum available resources.²²²
- Any assessment as to whether a state has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Therefore, states are obliged to take the necessary steps ‘to the maximum of its available resources’. In order for a State Party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.²²³

220 ‘The Nature of States Parties’ Obligations (Art 2, Para 1)’ (14 December 1990), 12/14/1990 CESCR General Comment No 3 (E/1991/23).

221 *Ibid* paras 7 and 8.

222 *Ibid* para 9.

223 *Ibid* para 10.

- Even where the available resources are demonstrably inadequate, the obligation remains for a State Party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realisation, or more especially of the non-realisation, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints.²²⁴
- Even in times of severe resource constraints – whether caused by a process of adjustment, of economic recession, or by other factors – the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes.²²⁵
- The obligation to use ‘the maximum of its available resources’ refers to both the resources existing within a state and those available from the international community through international cooperation and assistance: there is a general undertaking for all States Parties ‘to take steps, individually and through international assistance and cooperation, especially economic and technical’.²²⁶

It is useful to note a number of additional commentaries about the obligations of states to take appropriate budgetary measures and confront tax abuses:

- General Recommendation No 24 of the Committee on the Elimination of Discrimination against Women on the right to health underlines the importance of budgetary measures for the fulfilment of economic, social and cultural rights. Once budgetary measures are understood as part of the steps that need to be taken by states, it becomes increasingly important to address tax abuses as part of their obligations with respect to economic, social and cultural rights.²²⁷

224 The Committee on Economic, Social and Cultural Rights has already dealt with these issues in its General Comment No 1 (1989).

225 *Ibid* paras 11 and 12.

226 *Ibid* para 13. See Arts 11, 15, 22 and 23 of the ICESCR.

227 The Committee on the Elimination of Discrimination against Women clarifies that the duty to fulfil rights places an obligation on States Parties to take appropriate legislative, judicial, administrative, budgetary, economic and other measures to the maximum extent of their available resources to ensure that women realise their rights to healthcare. States Parties should *allocate adequate budgetary, human and administrative resources* to ensure that women’s health receives a share of the overall health budget comparable with that for men’s health, taking into account their different health needs. [emphasis added.]

- One of the explicit references to the negative impact of tax evasion on human rights can be found in the Committee on the Rights of the Child's report on Georgia. In its consideration of the state's implementation of the Convention on the Rights of the Child (CRC), the Committee noted that the 'widespread practices of tax evasion and corruption are believed to have a negative effect on the level of resources available for the implementation of the CRC'.²²⁸
- Finally, the interpretation of economic, social and cultural rights to include an obligation for the state to include sufficient resources in national budgets for the realisation of these rights is reinforced in the Draft Principles and Guidelines on Economic, Social and Cultural Rights being prepared under the African Charter on Human and Peoples' Rights.²²⁹

From this enumeration of general principles related to the scope of states' obligations, it is possible to infer a responsibility to address tax abuses as these necessarily reduce the available resources for the progressive realisation of economic, social and cultural rights. Conversely, the individual and collective efforts of states to combat tax abuses through effective legislative, administrative and/or international cooperation measures are important steps to maximise the available resources for the progressive realisation of economic, social and cultural rights.

Particularly in the recent context of economic crisis, effective actions to counteract tax abuses are an important part of all states' efforts to meet their basic minimum obligations for economic, social and cultural rights, to protect vulnerable groups and to justify any retrogressive measures in relation to the total available resources. To be effective, states' efforts to counteract tax abuses should include actions at the domestic level as well as through international assistance and cooperation.

²²⁸ CRC/C/15/Add.124 (CRC, 2000), Georgia.

²²⁹ Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, adopted on 24 October 2011. These Draft Principles and Guidelines state that: '[a]ll States Parties have immediate obligations to take steps, in accordance with a measurable national plan of action, towards the realisation of the protected economic, social and cultural rights. The measures adopted should be deliberate, concrete and targeted as clearly as possible towards ensuring enjoyment of the rights protected in the African Charter. States Parties are obliged to take legislative measures for the protection of economic, social and cultural rights. However, these measures will generally not be sufficient. States Parties are also obliged to allocate *sufficient resources within national budgets* towards the realisation of each right.' [emphasis added.]

EXTRATERRITORIAL OBLIGATIONS OF STATES WITH RESPECT TO ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Given the international dimensions of tax abuses, it is useful to briefly discuss emerging interpretations of the extraterritorial obligations of states in the area of economic, social and cultural rights. These extraterritorial obligations are summarised in the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (the ‘Maastricht Principles’), adopted by a group of prominent legal experts in February 2012.²³⁰

Individually, states have the following extraterritorial obligations:

- to avoid causing harm;
- to undertake impact assessments and prevention measures;
- to elaborate, interpret and apply relevant international agreements and standards (including those pertaining to international trade, investment, finance and taxation) and standards in a manner consistent with their human rights obligations;
- to refrain from conduct that, directly or indirectly, nullifies or impairs the enjoyment and exercise of economic, social and cultural rights of persons outside their territories; and
- to regulate, including with respect to business enterprises where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the state concerned.²³¹

States also have the extraterritorial obligation to create an international enabling environment conducive to the universal fulfilment of relevant rights. In this regard, states must take deliberate, concrete and targeted steps, separately, and jointly through international cooperation, including in matters relating to bilateral and multilateral trade, investment, taxation,

²³⁰ The Maastricht Principles were adopted by a group of prominent experts in the field of economic, social and cultural rights. It is important to note, however, that the Maastricht Principles have not been officially endorsed by governments or by the United Nations. Nonetheless, they are based on a sound interpretation of international human rights law and are useful for the Task Force’s analysis of certain aspects of tax abuses.

²³¹ See Maastricht Principles, Arts 13–25.

finance, environmental protection and development cooperation. This includes obligations for the coordination and allocation of responsibilities among states; the necessity for states to dedicate adequate capacity and resources; and obligations for developed countries to provide international assistance and for developing countries to seek international assistance and cooperation.²³² From the Task Force's perspective, a corollary of this obligation is that states have a duty to change the international regulatory framework(s) when it is known to impede the realisation of human rights.

The Maastricht Principles are particularly useful for the analysis of international cooperation in tax matters, including with respect to the need for exchange of information to confront tax abuses and secrecy jurisdictions. They require states to be mindful of the impacts that their tax laws and policies (eg, bank secrecy) have on the citizens of other states. For instance, it is arguable that secrecy jurisdictions fail to respect economic, social and cultural rights when they turn a blind eye to the economic consequences of policies such as banking secrecy. Moreover, it is arguable that states fail to protect economic, social and cultural rights when they do not adequately regulate or influence the overseas practices of the multinational enterprises that are based and/or operate within their jurisdiction – including with respect to tax planning and reporting matters.

The extraterritorial obligations of states point towards the need to balance individual and collective actions to create a global environment that is conducive to the fulfilment of economic, social and cultural rights. In a competitive global environment, only the most powerful states are able to confront tax abuses unilaterally and smaller states will hesitate to do so. Therefore, it is most realistic and effective for states to address tax abuses in a common framework of international cooperation and assistance. In this regard, it is important to note that the Maastricht Principles explicitly mention taxation as an area where states have the obligation of international cooperation – including through the elaboration, interpretation and application of international agreements and standards in a manner consistent with their human rights obligations.

232 See Maastricht Principles, Arts 32–34.

OBLIGATIONS OF STATES WITH RESPECT TO POVERTY ERADICATION

As discussed above, the UN Guiding Principles on Extreme Poverty and Human Rights represent a timely development of international human rights law and policy that supports the linkages between tax abuses, poverty and human rights.

In order to develop a comprehensive and coherent framework for public policy and political action aimed at the eradication of poverty, including with respect to budgetary and taxation measures, the Guiding Principles highlight the following:²³³

- Poverty reduction strategies should take into account the necessary budgetary implications.
- States should make certain that adequate resources are raised and used to ensure the realisation of the human rights of persons living in poverty. Fiscal policies, including in relation to revenue collection, budget allocations and expenditure, must comply with human rights standards and principles, in particular equality and non-discrimination.
- Given the disproportionate and devastating effect of economic and financial crises on groups most vulnerable to poverty, states must be particularly careful to ensure that crisis recovery measures, including cuts in public expenditure, do not deny or infringe those groups' human rights. Measures must be comprehensive and non-discriminatory. They must ensure sustainable finance for social protection systems to mitigate inequalities and to make certain that the rights of disadvantaged and marginalised individuals and groups are not disproportionately affected.
- Cuts in funding to social services that significantly affect those living in poverty, including by increasing the burden of care of women, should be measures of last resort, taken only after serious consideration of all alternative policy options, including financing alternatives.
- States should take into account their international human rights obligations when designing and implementing all policies, including international trade, taxation, fiscal, monetary, environmental and

²³³ UN Guiding Principles on Extreme Poverty and Human Rights, paras 48 and 49.

investment policies. The international community's commitments to poverty reduction cannot be seen in isolation from international and national policies and decisions, some of which may result in conditions that create, sustain or increase poverty, domestically or extraterritorially. Before deciding whether to adopt any international agreement, or whether to implement any policy measure, states should assess whether the decision they are about to make is compatible with their international human rights obligations to their own citizens as well as to those of foreign countries.

- As part of international cooperation and assistance, states have an obligation to respect and protect the enjoyment of human rights, which involves avoiding conduct that would create a foreseeable risk of impairing the enjoyment of human rights by persons living in poverty beyond their borders, and conducting assessments of the extraterritorial impacts of laws, policies and practices.
- States must take deliberate, specific and targeted steps, individually and jointly, to create an international enabling environment conducive to poverty reduction, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection and development cooperation. This includes cooperating to mobilise the maximum of available resources for the universal fulfilment of human rights, as well as to confront those tax abuses that deprive states of the maximum available resources.
- States have a duty, in accordance with their international obligations, to prevent and protect against human rights abuses committed by non-state actors, including business enterprises, which they are in a position to regulate. Where transnational corporations are involved, all relevant states should cooperate to ensure that businesses respect human rights abroad, including the human rights of persons and communities living in poverty. States should take additional steps to protect against abuses of human rights by business enterprises that are owned or controlled by the state, or that receive substantial support and services from state agencies.
- The obligation of states to protect against human rights infringements by third parties requires taking steps to prevent, investigate, punish and

redress any abuse through effective policies, legislation, regulations and adjudication. States must ensure that those affected by business-related abuses have access to a prompt, accessible and effective remedy, including, where necessary, recourse to judicial redress and non-judicial accountability and grievance mechanisms. This would include addressing any legal, practical and procedural barriers to access to justice, including discrimination, which prevent persons living in poverty from using and benefiting from these mechanisms owing to cultural, social, physical or financial impediments.

A HUMAN RIGHTS-BASED APPROACH TO RECOVERY FROM THE GLOBAL ECONOMIC AND FINANCIAL CRISES

As mentioned above, the recent economic and financial crises have brought issues related to tax abuses to the forefront of public and political attention. In this regard, another recent report by the UN Independent Expert on Extreme Poverty and Human Rights provides some additional guidance for a human rights-based approach to recovery.²³⁴ This report provides one of the most explicit discussions of taxation measures to date within the UN human rights system:

‘States have an unambiguous responsibility to take steps towards the full achievement of economic, social and cultural rights by using the maximum amount of resources available. In the aftermath of the global economic and financial crises, it has become clear that, in many States, efforts to increase resources for recovery through the whole spectrum of available options have been insufficient, thus impeding States’ compliance with human rights. Low levels of domestic taxation revenue, in particular, could be a major obstacle to a State’s ability to meet obligations to realize economic, social and cultural rights.’²³⁵

After discussing the implications of regressive tax measures and tax cuts, exemptions and waivers in terms of their impacts on the poor,²³⁶ the

²³⁴ Report of the Independent Expert on the question of human rights and extreme poverty: on a human rights-based approach to recovery from the global economic and financial crises, with a particular focus on the most vulnerable and marginalised groups (A/HRC/17/34), 17 March 2011.

²³⁵ *Ibid* at para 49.

²³⁶ *Ibid* at paras 50 and 51.

report concludes with the following passage about implementing socially responsible taxation policies and confronting tax abuses:

‘In several countries, the crises have demonstrated a clear need to maximize means of harnessing resources specifically for the realization of economic, social and cultural rights. States should identify additional sources of fiscal space to increase resources for social and economic recovery. From an array of options, States should particularly consider widening the tax base, improving the efficiency of tax collection and reprioritizing expenditures. These types of reforms could help States to achieve a more progressive, equitable and sustainable taxation regime while complying with a human rights framework.

When contemplating widening the tax base, human rights principles require careful consideration to be given to rebalancing the tax contributions of corporations and those in high-income brackets. The introduction of new or higher taxes should not have a detrimental impact on those living in poverty. Improving the efficiency of tax collection requires reconsidering ineffective tax holidays, exemptions and waivers that disproportionately benefit better-off segments of society. A human rights approach also requires States to take steps to eliminate the prevalence of tax evasion, a problem that reduces the resources available for measures to realize human rights.’²³⁷

The UN Independent Expert on Extreme Poverty and Human Rights further applies an analysis of tax matters in her report from a mission to Ireland. The Ireland case study is particularly interesting given the important role that corporate tax concessions played in attracting foreign investment to Ireland prior to the economic and financial crises. The report states:

‘It is critically important that Ireland adopt taxation policies that adequately reflect the need to harness all available resources towards the fulfilment of its economic, social and cultural rights obligations, while avoiding measures that might further endanger the enjoyment of human rights by those most at risk. By increasing its tax take, Ireland would decrease the need for cuts to public services and social protection, and thereby help to protect the most vulnerable from further damage.

²³⁷ *Ibid* at paras 80 and 81.

‘Taxation reform that comes in the form of cuts, exemptions and waivers may also disproportionately benefit the wealthier segments of society, and discriminate against those living in poverty.’²³⁸

THE HUMAN RIGHTS-BASED APPROACH TO CONFRONTING ILLICIT FINANCIAL FLOWS

The UN Office of the High Commissioner for Human Rights (OHCHR) has recently prepared a comprehensive report about the non-repatriation of the proceeds of corruption (or ‘stolen assets’).²³⁹ This report provides a useful and analogous line of argumentation about the obligations of states to confront illicit financial flows and which reinforces the human rights case related to tax abuses. As discussed above, tax abuses are another subcategory of illicit financial flows; and tax abuses also deprive governments of the resources needed to fulfil human rights. Indeed, based on some estimates, tax abuses may deprive governments of far more resources than do the proceeds of corruption, and may have more serious negative impacts on economic, social and cultural rights.²⁴⁰

The OHCHR study outlines the negative impacts of funds of illicit origin on states’ capacity to fulfil their human rights obligations, in particular with respect to economic, social and cultural rights.²⁴¹ Interestingly, it also outlines how funds of illicit origin have a negative impact on the rule of law.²⁴²

The OHCHR study provides a useful analogy that suggests how a human rights-based approach to tax abuses requires international cooperation: it not only demands that countries of origin make every effort to achieve the recovery and repatriation of the illicit outflows for implementation of their international human rights obligations, it also demands that recipient countries understand cooperation in tax matters (such as information

238 Report on Ireland (A/HRC/17/34 Add.2), 17 May 2011, paras 24 and 25.

239 OHCHR, ‘Comprehensive Study on the Negative Impact of the Non-Repatriation of Funds of Illicit Origin to the Countries of Origin on the Enjoyment of Human Rights, in Particular Economic, Social and Cultural Rights’ (A/HRC/19/42), 14 December 2011.

240 At fn 4, the OHCHR study cites Raymond Baker, ‘Capitalism’s Achilles Heel’ (John Wiley & Sons 2005) about the magnitude of illicit financial flows. According to Baker, proceeds of corruption represent around three per cent of the estimated illicit financial flows. Flows originating in organised crime activities – drugs, counterfeit goods and currency, human trafficking, illegal arms trade, smuggling and racketeering – amount to 33 per cent, and flows originating in illegal commercial activities – mispricing for tax evasion, abuses of transfer pricing, and commercial fraud – to 64 per cent.

241 OHCHR study, n 239 above, paras 27–34.

242 *Ibid* paras 35–37.

exchange), not as a discretionary measure but also as a duty derived from the obligations of international cooperation.

This OHCHR study is noteworthy in that it incorporates an analysis of how recovered assets should be spent according to human rights principles. This is an extremely important point when examining tax abuses: in order to establish a causal link between increased resources (through effective regulation and enforcement of tax abuses) and human rights impacts, it is necessary to look at how tax revenues are spent in a given country. In other words, a full discussion of the human rights implications of tax abuses requires not only an examination of the state's obligations as a tax collector, but also an examination of its obligations in terms of allocating and spending increased tax revenues. This point is emphasised in the conclusions of this report.

This study can help frame the issue of tax evasion in terms of the roles and responsibilities both of 'countries of origin' and 'recipient countries' within the legal framework under the International Covenant on Economic, Social and Cultural Rights. To paraphrase the report:

'a human-rights based approach to [tax evasion] not only demands that countries of origin make every effort to [have an effective and equitable tax system] for the implementation of their international human rights obligations, it also demands that recipient countries understand [confronting tax evasion] not as a discretionary measure but also as a duty derived from the obligations of international cooperation and assistance.'²⁴³

This discussion of the duties of 'recipient countries' is helpful for our examination of the role and responsibilities of secrecy jurisdictions. It also provides a useful rationale for strengthening international cooperation and treaties related to exchange of tax information and enforcement.

243 *Ibid* para 26.

2.3.3 The responsibility of business enterprises to avoid negative impacts of tax abuses

Human rights are traditionally conceived as inherent in the relationship between the individual (or group) and the state. However, recent attention has been given to the human rights responsibilities of non-state actors, especially business enterprises given their importance in the globalised economy. This section reviews the key international standards that clarify the responsibilities of business enterprises with respect to human rights, including in relation to poverty and tax abuses. The responsibility of business enterprises to avoid tax abuses that have a negative impact on human rights is derived from the following sources:

- the UN Guiding Principles on Business and Human Rights and related international standards for corporate responsibility;
- the responsibilities of business enterprises under the UN Guiding Principles on Extreme Poverty and Human Rights;
- the UN Principles for Responsible Contracts; and
- the guidance developed for specific industry sectors to respect human rights.

Many stakeholders urged caution with regard to generalising about corporate tax practices, as the majority of companies are compliant with the law. One stakeholder put it in the following manner: ‘For major international companies, there is very little risk of tax fraud or evasion because of the risk. Caught once and you’re dead.’

At the same time, stakeholders noted that many corporate deals and transactions are structured for tax reasons and to stay ahead of the tax regulator; and ‘the most aggressive plans will always be half a step ahead of the regulators’. One stakeholder acknowledged:

‘it’s not such a good story about tax planning. Governments create a set of rules, which create opportunities for operations. Tax treaties encourage flows between different jurisdictions, for example by offering a lower withholding tax rate. Companies have an obligation to maximise value, so businesses are constantly finding new jurisdictions through which to structure their affairs.’

Another stakeholder observed that, ‘tax abuses have been the “elephant in the room” in the conversation about business and human rights to date. Companies don’t think of taxes as material to their human rights risks, at least not directly. They are more concerned about what happens with what is paid, ie, corruption and complicity in violations of human rights’. For instance, the UN Global Compact contains principles for business enterprises about human rights and anti-corruption, as well as policies, tools and practices for companies to prevent corruption. Although tax issues have been discussed, they have not yet been addressed systematically.

Many stakeholders were aware of the UN Guiding Principles on Business and Human Rights and opined that tax abuses are part of businesses responsibilities if they have negative impacts on human rights. One stakeholder stated that: ‘from the perspective of the Guiding Principles, the argument about legal tax planning (ie, the argument that any tax planning is permissible as long as it meets the letter of the law) becomes more tenuous and less compelling.’

THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

The basic responsibilities of business enterprises with respect to human rights were clarified in the Protect, Respect and Remedy Framework adopted by the UN Human Rights Council in 2008. This framework is further elaborated in the UN Guiding Principles on Business and Human Rights, endorsed by the UN Human Rights Council in 2011. It is comprised of three core principles: the state duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies.

*Key concepts for business enterprises*²⁴⁴

There are few internationally recognised rights upon which business cannot have an impact. Therefore, companies should consider all such rights, including those expressed in the International Bill of Human Rights (which includes the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.

In addition to compliance with national laws, companies have a baseline responsibility to respect human rights. Failure to meet this responsibility can subject companies to the courts of public opinion (comprising employees, communities, consumers, civil society, as well as investors), and occasionally to charges in formal courts. Whereas governments define the scope of legal compliance, the broader scope of responsibility is defined by social expectations, as part of what is sometimes called a company's 'social licence to operate'.

Corporate responsibility exists independently of states' duties. Because the responsibility to respect is a baseline expectation, a company cannot compensate for human rights harm by performing good deeds elsewhere. 'Doing no harm' is not merely a passive responsibility, but may entail positive steps.

Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. The responsibility to respect human rights requires that business enterprises avoid causing or contributing to adverse human

²⁴⁴ See UN Guiding Principles on Business and Human Rights, especially Principles 11–15. The full text of the Guiding Principles, including commentary, can be accessed at: www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf.

rights impacts through their own activities, and address such impacts when they occur; and seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

- a policy commitment to meet their responsibility to respect human rights;
- a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; and
- processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute; and

The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.

Business enterprises should not undermine states' abilities to meet their own human rights obligations.

Since their endorsement by the UN Human Rights Council, the UN Guiding Principles on Business and Human Rights have been adopted and implemented by numerous governments, industry associations, companies and civil society organisations.²⁴⁵

²⁴⁵ A UN Guiding Principles Portal has been launched that includes the text of the Guiding Principles; commentaries; implementation and uses of the Guiding Principles; events; history of the Guiding Principles; and additional materials, see: www.business-humanrights.org/Documents/UNGuidingPrinciples.

In terms of global acceptance and implementation, the UN Protect, Respect and Remedy Framework and the UN Guiding Principles on Business and Human Rights are also being integrated into other key international standards that are relevant to business enterprises, including the UN Global Compact, the OECD Guidelines for Multinational Enterprises,²⁴⁶ the International Finance Corporation (IFC) Performance Standards²⁴⁷ and ISO 26000, Guidance for Social Responsibility.²⁴⁸

The integration of the UN Guiding Principles into these other standards for business enterprises related to corporate social responsibility will facilitate the linkages between human rights, corporate taxation and other financial contributions to sustainable development. These international standards often have further guidance and responsibilities related to disclosure and transparency about financial and non-financial information – which can support better reporting of tax information on a country-by-country basis.

In particular, the OECD Guidelines for Multinational Enterprises include the most specific guidance for multinational enterprises about taxation in Chapter XI:

1. It is important that enterprises contribute to the public finances of host countries by making timely payment of their tax liabilities. In particular, enterprises should comply with both the letter and spirit of the tax laws and regulations of the countries in which they operate. Complying with the spirit of the law means discerning and following the intention of the legislature. It does not require an enterprise to make payment in excess of the amount legally required pursuant to such an interpretation. Tax compliance includes such measures as providing to the relevant authorities timely information that is relevant or required by law for purposes of the correct determination of taxes to be assessed in connection with their operations and conforming transfer pricing practices to the arm's length principle.

246 Revised OECD Guidelines, including provisions relating to human rights due diligence, were adopted by OECD Member States on 25 May 2011, see: www.oecd.org/document/19/0,3746,en_21571361_44315115_48029523_1_1_1_1,00.html.

247 Revised IFC Sustainability Framework and Performance Standards, including acknowledgment of business responsibility for human rights (and recommendation of human rights due diligence for high-risk projects) were adopted by IFC's Board of Directors on 12 May 2011 and will come into effect on 1 January 2012. See the IFC fact sheet with information about the revised framework and standards at: www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Sustainability+Framework/Sustainability+Framework++2012/Performance+Standards+and+Guidance+Notes+2012.

248 See: www.iso.org/iso/iso_catalogue/management_and_leadership_standards/social_responsibility/sr_discovering_iso26000.htm.

2. Enterprises should treat tax governance and tax compliance as important elements of their oversight and broader risk management systems. In particular, corporate boards should adopt tax risk management strategies to ensure that the financial, regulatory and reputational risks associated with taxation are fully identified and evaluated.

The OECD Guidelines for Multinational Enterprises also provide commentary with additional guidance for companies about providing information to tax authorities and for conformity with arm's length transfer pricing. This commentary is reproduced in Appendix K.

RESPONSIBILITIES OF BUSINESS ENTERPRISES UNDER THE UN GUIDING PRINCIPLES ON EXTREME POVERTY AND HUMAN RIGHTS²⁴⁹

Given the Task Force's concern about the impact of tax abuses on poverty, the UN Guiding Principles on Extreme Poverty and Human Rights provide additional guidance for business enterprises:

'Businesses should adopt a clear policy commitment to respect human rights, including those of persons living in poverty, and to undertake a human rights due diligence process to identify and assess any actual or potential impacts on human rights posed by the company's own activities and by business partners associated with those activities. They should prevent and mitigate the adverse effects of their actions on the rights of persons living in poverty, including by establishing or participating in operational-level grievance mechanisms for individuals or communities that face such impacts.'

UN 'PRINCIPLES FOR RESPONSIBLE CONTRACTS: INTEGRATING THE MANAGEMENT OF HUMAN RIGHTS RISKS INTO STATE-INVESTOR CONTRACT NEGOTIATIONS'

In an addendum to his May 2011 report, John Ruggie, the UN Special Representative on Business and Human Rights, provided a set of 'Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators'.²⁵⁰ Although these Principles do not explicitly address the issue of taxation,

²⁴⁹ UN Guiding Principles on Extreme Poverty and Human Rights, paras 99–102.

²⁵⁰ (A/HRC/17/31/Add.3), 25 May 2011.

they do address stabilisation clauses and other fiscal measures. In particular, Principle 4 states that: ‘Contractual stabilization clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State’s bona fide efforts to implement laws, regulations or policies, in a non-discriminatory manner, in order to meet its human rights obligations.’

Applying these Principles to the context of taxation, it would be business enterprises that should exercise caution when negotiating special tax regimes, tax holidays or exemptions in order to ensure that they do not have a negative impact on the state’s ability to meet its human rights obligations. In some cases, pressing for such concessions – when they foreseeably will result in negative human rights impacts – would contravene the corporate responsibility to respect human rights.

EMERGING HUMAN RIGHTS GUIDANCE FOR SPECIFIC INDUSTRIES

Moreover, it is important to note that the UN Guiding Principles on Business and Human Rights are influencing the development of specific human rights standards for different industries. In the context of the Task Force’s findings about tax abuses, the fact that the following industries (natural resources, legal profession and financial services) are beginning to implement human rights policies and guidance is encouraging: once there is greater acceptance by these industries that they must exercise due diligence against negative impacts on human rights, there is a greater chance for effective and sustained action on a wider range of issues – including tax abuses.

For the mining and metals industry, the International Council on Mining and Metals (ICMM) – an industry association that brings together 22 of the world’s biggest mining and metals companies as well as 34 national and regional mining associations and global commodity associations – has released guidance for its members on management and best practices to respect human rights.²⁵¹

251 ICMM, ‘Human Rights in the Mining and Metals Industry: Overview, Management Approach and Issues’ (2009); ICMM, ‘Human Rights in the Mining and Metals Industry: Resolving Local Level Concerns and Grievances’ (2010); ICMM, ‘Integrating Human Rights into Corporate Risk Management Processes’ (2012). The ICMM was established in 2001 to improve sustainable development performance in the mining and metals industry.

For the oil and gas industry, the Global Oil and Gas Industry Association for Environmental and Social Issues (IPIECA) launched a Business and Human Rights Project in 2011 and recently prepared a practical guide for oil and gas companies to implement human rights due diligence processes.²⁵²

For the financial services sector, many major banks are members of the Equator Principles and many investment firms adhere to the UN Principles for Responsible Investment. Both of these international standards support greater engagement, due diligence, accountability and transparency for non-financial issues – including human rights. The UK-based Cooperative Bank has been commended for its ethical policy that provides that it will not finance businesses that ‘take an irresponsible approach to the payment of tax in the least developed countries’.²⁵³

Furthermore, there is emerging guidance about the responsibilities of investors to respect human rights in their investment decisions. This guidance points towards the conclusion that investors should consider a company’s tax practices as part of their due diligence into environmental, social and governance matters.²⁵⁴

Tax responsibility for investors

Just as there is a growing awareness of the human rights responsibilities of business enterprises, there is increasing emphasis on their tax responsibilities. In a recent report by ActionAid, entitled ‘Tax Responsibility: An Investor’s Guide’, the following steps are highlighted for investors to demonstrate their responsibility in tax matters.²⁵⁵

252 IPIECA, ‘Human Rights Due Diligence Process: A Practical Guide to Implementation for Oil and Gas Companies’ (2012), accessed at: www.ipieca.org/publication/human-rights-due-diligence-process-practical-guide-implementation-oil-and-gas-companies.

253 See Business and Human Rights Resource Centre, section on ‘Tax Avoidance’ at: www.business-humanrights.org/Documents/Taxavoidance.

254 Institute for Business and Human Rights et al, ‘Investing the Rights Way: A Guide for Investors on Business and Human Rights’ (2013), see: www.ihrb.org/pdf/Investing-the-Rights-Way/Investing-the-Rights-Way.pdf.

255 ActionAid, ‘Tax Responsibility: An Investor’s Guide’ (2013), 3, accessed at: www.actionaid.org.uk/sites/default/files/publications/tax_guide_for_investors_final.pdf.

WHAT IS TAX RESPONSIBILITY?

A responsible approach to corporate tax incorporates at least three elements:

- A. *A responsible tax policy*: A clear, publicly communicated tax policy, which aligns the company on a tax risk management scale; sets out the company's approach to tax negotiations; and rules out specified aggressive tax practices.
- B. *Managing tax planning*: Measures for ensuring that the (responsible) tax policy is implemented throughout the group: including communicating the policy, training relevant employees, setting out compliance mechanisms and providing mechanisms for identifying non-compliance.
- C. *Reporting on tax responsibility*: Detailed published information on where and how a company pays tax – in each jurisdiction where it operates – sufficient to ensure that company practice matches policy, and that investors can gauge risks associated with the company's tax practices.

It is worth noting the similarity between these steps and a human rights due diligence process for business enterprises under the UN Guiding Principles on Business and Human Rights.

RESPONSIBILITIES OF THE LEGAL PROFESSION TO RESPECT HUMAN RIGHTS

Given that the IBA is an organisation of lawyers and bar associations, there was particular interest in the role of lawyers in relation to tax, poverty and human rights issues. Many of the stakeholders interviewed by the Task Force were lawyers.

Some senior members of the legal profession commented on a 'decline in the ethical behavior of tax lawyers over the last 20 to 30 years. Lawyers used to be much less inclined to go along with abusive schemes. Now they are

more willing to give opinions that certain transactions “have substance” or are plausible’. Observers of the legal profession also claimed that ‘some lawyers are complicit in facilitating illicit funds and taking advantage of opportunities for tax abuses. Lawyers have been implicated as intermediaries in cases of tax evasion and other illicit financial flows as a result of attorney–client privilege’.

The concept of attorney–client privilege was raised by numerous stakeholders as being problematic in the context of tax abuses. This is an extremely important and nearly sacrosanct principle for the legal profession and is embedded in many codes of professional conduct. Nonetheless, questions were raised about the limits to privilege and confidentiality if it is being used to encourage, aid or abet tax abuses or other illicit financial flows.

Others observed that:

‘lawyers also have an obligation to keep their clients from getting in trouble with the law. Where was the prudent legal advice to the bankers that are getting in trouble now? Or to the clients that have invested their money offshore?’ Frank discussion between clients and lawyers is required about how and why certain tax planning strategies are being considered. Just because something is technically possible does not mean it’s the best strategy to meet your overall objectives. Ending up in court or in the headlines is not likely part of the objectives of the majority of clients.’

There was widespread agreement that lawyers must balance their obligation to defend their client’s interest with the underlying role of the tax system in society. Lawyers can play a valuable role in helping governments close the information asymmetries with companies. One stakeholder stated: ‘we also need to encourage positive performance and the positive leadership role that lawyers can play in creating rules and regulations. Lawyers need to decide what is acceptable behaviour for their profession and to take the issue of tax abuses outside an individual decision for an individual lawyer.’

In this regard, it is important to note that the American Bar Association (ABA) has endorsed the UN Guiding Principles on Business and Human Rights and acknowledged that they apply to the professional responsibility of lawyers. In the report supporting the ABA resolution endorsing the UN

Guiding Principles, the ABA Human Rights Committee noted that the UN Guiding Principles pour content into the independent and candid advice that lawyers must provide to corporate clients under ABA Model Rule 2.1; and the Rule's Commentary notes that 'moral and ethical factors impinge on most legal questions and may decisively influence how the law will be applied'.²⁵⁶ As one stakeholder noted, the ABA's endorsement of the UN Guiding Principles can be 'a game-changer by making human rights responsibilities into harder law through the professional responsibility of lawyers and bar discipline'.

In the Task Force's consultations, there was significant interest of lawyers in the implications of the UN Guiding Principles for their law practices.²⁵⁷ Based on conversations with stakeholders, the UN Guiding Principles could be applied to lawyers and law firms in the following manner:

- The UN Guiding Principles apply to all business enterprises and therefore apply to law firms. Professional rules (such as ABA Model Rule 2.1) reinforce and clarify these human rights obligations and can extend them to individual lawyers.
- Law firms should have up-front policy commitments to human rights.²⁵⁸
- Merely complying with tax law is not enough when this results in violation of human rights. More than bare legal compliance, lawyers and law firms need to take due diligence measures that allow them to identify, prevent, mitigate and account for how they address their impacts on human rights.

256 This resonates with professional codes of responsibility in Canada, Japan and many European countries, which acknowledge that lawyers must balance their dual roles as guardians and advocates for the interests of their clients, and as gatekeepers for the interests of courts and society.

257 Lawyers have begun to foster discussion about the role of lawyers with respect to the UN Guiding Principles. See: Advocates for International Development, 'Law Firms' Implementation of the Guiding Principles on Business & Human Rights', Discussion Paper (November 2011), accessed at: http://a4id.org/sites/default/files/A4ID%20Paper%20Law%20Firms%20Implementation%20of%20Guiding%20Principles%20Nov%202011_0.pdf. See also John Sherman III, 'The UN Guiding Principles: Practical Implications for Business Lawyers' (2013), accessed at: www.hks.harvard.edu/m-rcbg/CSRI/IDQ_2013_01_Sherman.pdf.

258 These policy commitments should be consistent with UN Guiding Principle 16, which states: 'As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:

- (a) Is approved at the most senior level of the business enterprise;
- (b) Is informed by relevant internal and/or external expertise;
- (c) Stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;
- (d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;
- (e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.'

- Responsibility for human rights includes situations where they cause or are associated with third parties' actions that violate human rights – including by their clients. In such situations, lawyers should use their influence and leverage to encourage their client to not engage in that conduct.²⁵⁹
- When tax lawyers are advising a client company to enter into an arrangement that is potentially abusive and will deprive a developing country of tax revenues, this should trigger a red flag that there is an issue with respect to the UN Guiding Principles, as there may be adverse impacts on human rights. It could also trigger other standards and commitments of the firm or client such as the OECD Guidelines on Multinational Enterprises. At a minimum, this should provoke a frank discussion between the lawyer and the client about the risks and impacts of the arrangement.
- In complex international transactions, lawyers aren't the only advisers and do not necessarily have a wide mandate or authority to undertake human rights due diligence. This underscores the importance of having a human rights commitment up front at the level of the legal profession and law firm that clarifies the firm's commitment to human rights to clients from the outset of its retainer. It also poses a practical challenge of having the influence and leverage to get business partners and clients to respect human rights.

Lawyers, clients and human rights

Respect for human rights falls squarely within lawyers' obligation of ethical conduct. However, lawyers must also consider their responsibilities for human rights with their other obligations to their clients, according to professional rules of conduct and as service providers. These include an obligation to represent and defend a client's interests within the boundaries of the law. For instance, the IBA's International Principles of Conduct for the Legal Profession states:

259 See Commentary to UN Guiding Principle 19.

5. Clients' interest: A lawyer shall treat client interests as paramount, subject always to there being no conflict with the lawyer's duties to the court and the interests of justice, to observe the law, and to maintain ethical standards.²⁶⁰

For example, assume that a lawyer has provided his or her client with a range of tax planning options, all of which are legal, but some of which may have greater impacts on developing countries. Given that some of the tax planning options may have adverse impacts on human rights, what should lawyers and law firms do to discharge their own responsibilities for human rights – especially if and when a client chooses the tax planning option that poses the greatest risk of adverse human rights impacts?

In the Commentary to UN Guiding Principle 19, the responsibility for human rights related to business relationships is discussed in further detail:

‘Where a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products or services by its business relationship with another entity, the situation is more complex. Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise’s leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences.’

²⁶⁰ See IBA, International Principles of Conduct for the Legal Profession (2011), 6, accessed at: www.ibanet.org/Article/Detail.aspx?ArticleUid=bc99fd2c-d253-4bfe-a3b9-c13f196d9e60. In the commentary on p 25, it is further stated that: ‘A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures may be required to vindicate a client’s cause or endeavour.’

The more complex the situation and its implications for human rights, the stronger is the case for the enterprise to draw on independent expert advice in deciding how to respond.

If the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it. And if it lacks leverage there may be ways for the enterprise to increase it. Leverage may be increased by, for example, offering capacity-building or other incentives to the related entity, or collaborating with other actors.

There are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage. Here, the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so.’

Therefore, when dealing with third parties, including clients, the key concept from the UN Guiding Principles for lawyers is ‘leverage’.

Arguably, a lawyer has some degree of leverage over his or her client by virtue of his or her expertise in the law. Indeed, lawyers may be uniquely positioned to explain the human rights implications of various tax planning and business strategies to their clients. For the lawyer, raising human rights issues with clients can be presented as a matter of ethical standards, in the interests of society and justice, or practical business advice and good risk management.

Most importantly, human rights should be understood as a matter of international law, with potential legal implications beyond business and professional ethics. An understanding that human rights are grounded in international and domestic laws is important, especially

in the context of lawyers' obligations of competence²⁶¹ and of independence.²⁶²

In extreme cases, the UN Guiding Principles suggest that a lawyer may need to withdraw his or her services if they cannot influence their client's tax planning strategies to avoid adverse impacts on human rights. In this regard, the Task Force notes that the withdrawal of legal services is normally regulated by rules of professional conduct. For instance, a lawyer would normally be permitted to withdraw his or her services if the client's actions or instructions constituted illegal tax evasion. However, in the grey areas of tax avoidance, it may not be practical or realistic to expect lawyers to withdraw their services, especially as other lawyers or law firms are likely to be eager to take the client's business. In fact, many law firms actively promote their tax planning practices and lawyers are always involved in the creation of the 'next' new tax structure that is 'perfectly legal'.

The Task Force therefore recommends that lawyers, law firms and law associations should concentrate on the means that they have to increase their leverage with respect to their business associates and clients. The UN Guiding Principles suggest 'capacity-building' and 'working with others' as two potential strategies to increase leverage. These strategies can be adapted to the legal profession:

- Lawyers and law firms can provide information sessions and reference materials to their clients about tax and human rights issues.

261 As stated in the IBA International Principles on Conduct for the Legal Profession, explanatory note 9.2: 'As a member of the legal profession, a lawyer is presumed to be knowledgeable, skilled, and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf or to procure that somebody else either in or outside the law firm will do it. Competence is founded upon both ethical and legal principles. It involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied, and includes competent and effective client, file and practice-management strategies.'

262 As stated in the IBA International Principles on Conduct for the Legal Profession, explanatory note 1.2: 'The requirement of independence calls upon the individual practicing lawyer, government and civil society to give priority to the independence of the legal profession over personal aspirations and to respect the need for an independent legal profession. Clients are entitled to expect independent, unbiased and candid advice, irrespective of whether or not the advice is to the client's liking.'

- Law societies can also offer professional development sessions on tax and human rights issues for their members.
- Law societies can provide a mechanism for lawyers to inform and consult about the sorts of transactions or tax planning strategies that may be having negative human rights impacts, to work with other lawyers to clarify the rules of professional conduct that may apply to these strategies, and to propose appropriate legal reforms.
- Further recommendations for the legal profession are included at the end of this report.

2.3.4 Conclusions

When considering the numerous economic, social and cultural rights that are affected by poverty, we can extrapolate that the state has a number of obligations related to tax abuses:

- The obligation to use the maximum available resources to progressively realise human rights – including the obligation to confront tax abuses as part of an overall plan to strengthen financial and tax governance.
- The obligation to ensure coherence between corporate, tax and human rights laws and policies, both at the domestic and international levels; as well as the corollary obligations to avoid measures that have retrogressive impacts and to do no harm with respect to economic, social and cultural rights – including the obligation to examine the domestic and international impacts of corporate, fiscal and tax laws and policies on human rights, and to reform those laws and policies where they have adverse impacts.
- The obligation to regulate and influence the conduct of business enterprises and to protect citizens from business-related harm to human rights, including through their tax planning, compliance and disclosure activities.

- The obligation of international cooperation and technical assistance – including in the fields of taxation (including exchange of information and transparency measures), development and human rights.
- The obligation to invest the increased revenues collected through improved domestic and international tax enforcement in a manner consistent with the fulfilment of human rights.

Business enterprises also have the responsibility to respect human rights through appropriate due diligence. They should have the policies and procedures to ‘know and show’ that they are not having negative impacts on human rights through their corporate structures and throughout their operations. In particular, multinational enterprises, as well as their advisers and financiers, need to exercise greater due diligence about the potential negative impacts of their tax planning strategies. Lawyers play a particularly important and necessary role in addressing the human rights implications of tax abuses.

2.4 Remedies for tax abuses that affect human rights

2.4.1 Task Force findings

This section examines the different remedies that currently exist to address tax abuses. From the discussion above, it should be clear that tax abuses are not explicitly addressed in international human rights law; and, therefore, many of the most relevant and effective remedies currently relate to tax enforcement and financial regulation.

2.4.2 Administrative enforcement and penalties

Normally, tax abuses are remedied through administrative measures (tax audits and investigations) and the non-compliant taxpayer can be reassessed for taxes owing and may be subject to interest, penalties and fines.

At first glance, some of the recent fines levied against corporate tax abuses can appear quite staggering. For example, the recent prosecution of the Swiss bank Wegelin & Co by the US Government resulted in the company ceasing to operate. However, these fines are sometimes also perceived to be

inadequate to truly change corporate conduct and culture and may simply be absorbed as part of the ‘cost of doing business’.

Beyond the monetary value, the negative impact on a business enterprise’s reputation may be significant. As the recent UK case related to Starbucks demonstrates, even where there is no tax evasion according to the law, aggressive tax planning practices can result in public protests and a voluntary payment to the revenue authorities.

Tax abuses can also be prevented by techniques such as withholding taxes, clearance certificates, advanced rulings and the use of electronic invoicing that allow the tax authorities to collect a certain level of taxes up front, some of which can then be refunded to the taxpayer if justified through an assessment or audit.

Brazil revenue authority’s approaches to confront tax abuses

In the Task Force’s consultation meetings in Brazil, stakeholders highlighted some of the revenue authority’s approaches to confronting tax abuses that were considered to be quite effective:

- Novel approach to transfer pricing with withholding taxes on transfers to certain secrecy jurisdictions or offshore financial centres.
- Heavy investment in information technology and use of electronic invoicing and electronic returns.
- Simplified procedures and returns for low-income taxpayers, freeing up resources to concentrate resources for investigation and enforcement on higher-risk and more sophisticated taxpayers.

Overall, Brazil has dramatically increased tax revenues in recent years, some of which are spent on direct income supplements for poor individuals and families, helping to raise many people out of extreme poverty.

The key for many developing countries is to develop the capacity and infrastructure to allow them to successfully detect tax abuses and undertake effective enforcement actions. As discussed above, strengthening this capacity appears to be an emerging priority for international cooperation and development assistance efforts.

The compensation that flows to states through penalties and fines from successful administrative enforcement actions has a potential to provide remedies for the negative impacts that tax abuses have on poverty and human rights; however, it is important that the additional revenues raised should be allocated according to human rights principles and should be spent on programmes with measurable human rights outcomes. In this regard, there is a useful analogy to the obligations of states for spending stolen assets recovered from other countries, as discussed above.²⁶³

2.4.3 Criminal law remedies for tax abuses

There is a potential for criminal liability for tax abuses, either as part of tax statutes or under provisions of the criminal code related to fraud and/or other related crimes such as money laundering and bribery. When dealing with tax evasion by individuals, the threat of criminal liability may have an important punitive and deterrent effect. Notoriously, Al Capone was prosecuted and jailed for tax evasion rather than his other activities in organised crime. More recently, in June 2013, the courts in Milan handed clothing designers Dolce and Gabbana (suspended) prison sentences for tax evasion.²⁶⁴

The question that arises relates to the potential criminal liability for corporate tax abuses. In the Task Force's consultation meetings in Latin America and the SADC region, stakeholders expressed concern that, whereas individual taxpayers may face criminal law penalties, including the possibility of jail, large multinational enterprises may only face financial penalties for their tax abuses. Although individual directors may face personal criminal liability in some circumstances, a corporation may continue to exist and operate after a successful prosecution or settlement for tax abuses.

²⁶³ See section 2.3.2 above.

²⁶⁴ It is alleged that the pair sold their brand to Luxembourg-based holding company Gado in 2004 to avoid declaring taxes on royalties of about €1bn (US\$1.3bn). See: www.trust.org/item/20130619150303-21fn7.

As mentioned above, the fines imposed for some of the most prominent examples of corporate tax abuses can be very significant. However, some stakeholders expressed a concern that these fines are not tough enough to punish and deter further tax abuses. If the fines are not severe enough, some stakeholders argued, they may become an acceptable risk for unscrupulous companies.

‘Given the lead role played by leading banks, law firms, and accounting firms in “enabling” all this dubious activity, global authorities must simply adopt much stiffer sanctions for the “repeat” offenders in this industry. Even large scale fines have not been effective deterrents – we need to adopt much stronger sanctions for the institutions that engage in “pirate banking” misbehavior and the managers that run them.’²⁶⁵

While some civil society representatives and academics expressed the view that criminal liability should be envisioned for the worst forms of corporate tax abuses, it was also highlighted by legal experts that corporations are problematic subjects of criminal law. ‘There are accountability gaps between human and legal persons related to corporate personhood, corporate responsibility, and corporate culture or “personality”.’²⁶⁶ Furthermore, there are a variety of models for attribution of corporate liability including: corporate culture; vicarious liability; (lack of) due diligence and adequate procedures; and identification of senior officers.²⁶⁷ Different legal systems and traditions have very different approaches to corporate criminal liability, so it is difficult to make generalisations that would apply globally.²⁶⁸

However, criminal liability for corporate tax abuses could be usefully developed based on international approaches to criminalise bribery and money laundering. In this regard, one potential avenue is to expand the model under the OECD Anti-Bribery Convention (and consequent domestic legislation such as the UK Bribery Act) to encompass tax abuses.

²⁶⁵ See n 80 above, 44.

²⁶⁶ Celia Wells, ‘Corporate Liability Models’, IBA Task Force Consultation Meeting in São Paulo, 2012, slide 4.

²⁶⁷ *Ibid* slide 6.

²⁶⁸ For instance, there are different approaches to corporate criminal liability in civil and common law jurisdictions, with the former less likely to recognise corporate criminal liability except as narrowly defined by statute.

Corporate criminal liability for bribery

Further to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,²⁶⁹ many developed countries have enacted domestic legislation to criminalise corruption and bribery that also includes provisions for corporate offences.

The 40 countries that have joined the OECD Anti-Bribery Convention generate nearly two-thirds of total world trade and 90 per cent of outward foreign direct investment.²⁷⁰

The Convention establishes a peer-driven monitoring mechanism to ensure the implementation of the international obligations that countries have taken on under the Convention. This monitoring is carried out by the OECD Working Group on Bribery, which is composed of members of all States Parties. The Working Group prepares country monitoring reports with recommendations for each country based on three phases of assessment.

As is stated in the most recent annual report of the OECD Working Group on Bribery:

‘Active enforcement is the best weapon we have to fight foreign bribery. Between 1999, when the Convention entered into force, and December 2012, 90 companies and 221 individuals were sanctioned under criminal proceedings for foreign bribery, and 83 individuals were sentenced to prison. These figures are set to increase, with approximately 320 investigations under way and criminal charges laid against 166 individuals and entities. However, there has been little or no enforcement in over half of the Parties to the Convention.’

269 For the text and commentary of the OECD Convention, see: www.oecd.org/corruption/oecdantibriberyconvention.htm.

270 OECD Working Group on Bribery, *Annual Report 2013*, 3, accessed at: www.oecd.org/daf/anti-bribery/AntiBriberyAnnRep2012.pdf.

Similarly, some international organisations are calling for states to make tax evasion a predicate offence under money laundering statutes.

An overall approach to tackle tax abuses, money laundering and other illicit financial flows in a more coherent and effective manner is part of the OECD's Oslo Dialogue that seeks to strengthen inter-agency cooperation at the domestic and international levels.²⁷¹ It is also interesting to note the increasing convergence between international actions and commitments on tax, corruption and money laundering in the final Communiqué of the June 2013 G8 meeting at Lough Erne, Northern Ireland.

2.4.4 International tax mechanisms

International tax treaties seek to promote domestic law and policy reform and/or bilateral treaties; however, they do not provide for enforcement at an international level, but rather promote strengthened domestic enforcement through greater transparency and information and technical capacity.

In this regard, the key international actions and cooperation are taking place through the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, as well as through regional initiatives such as the African Tax Administration Forum and the Inter-American Center of Tax Administrations.

At the international level, the current focus is on the Global Forum's peer review process, which is aimed at improving domestic legal frameworks and strengthening their implementation consistent with international standards. Another key part of international efforts is the promotion of bilateral Tax Information Exchange Agreements, which strengthen the exchange of information between domestic tax authorities on a bilateral basis in order to provide for domestic administrative or criminal remedies. As discussed above, the current objective is for this regime to progressively evolve into some form of multilateral automatic exchange of information at the international level.

While enforcement is still foreseen to be at the domestic level under an automatic exchange of information system, it needs to be supported by some

²⁷¹ For more information on the Oslo Dialogue, see: www.oecd.org/ctp/crime/Outcomes.pdf.

international architecture. The eventual design of such a system should be undertaken with a view to enhancing access to remedies. The recent announcement at the G8 meeting in June 2013 is indicative of current international priorities:

‘A critical tool in the fight against tax evasion is the exchange of information between jurisdictions. We see recent developments in tax transparency as setting a new standard and commit to developing a single truly global model for multilateral and bilateral automatic tax information exchange building on existing systems. We support the OECD report on the practicalities of implementation of multilateral automatic exchange and will work together with the OECD and in the G20 to implement its recommendations urgently. We call on all jurisdictions to adopt and effectively implement this new single global standard at the earliest opportunity. It is important that all jurisdictions, including developing countries, benefit from this new standard in information exchange. We therefore call on the OECD to work to ensure that the relevant systems and processes are as accessible as possible to help enable all countries to implement this new standard.’

An additional international effort to improve remedies for tax abuses is Tax Inspectors Without Borders (TIWB).²⁷² TIWB aims to enable the effective deployment of tax audit specialists on a demand-led-basis to developing countries. The sharing of expertise and experience would generally focus on the transfer of knowledge relating to international tax issues like transfer pricing, as well as the development of general audit skills. The feasibility study for TIWB was welcomed in the Lough Erne G8 Leaders Communiqué, and governments committed to making tax experts available to developing countries.²⁷³

272 The OECD’s Task Force on Tax and Development conducted a 12-month feasibility study to explore the TIWB project in June 2012. The feasibility study will assess how TIWB can provide an effective mechanism to enable practical, peer-to-peer assistance, through matching demands from developing countries for long- and short-term auditing inputs with appropriate expertise drawn from a pool of currently serving or recently retired tax inspectors/auditors.

273 Paragraph 28 of the Lough Erne G8 Leaders’ Communiqué states: ‘We welcome the OECD’s feasibility study for its Tax Inspectors Without Borders proposal to assist tax administrations investigate specific and complex tax cases. We will take practical steps to support this initiative, including by making tax experts available.’

2.4.5 *International human rights mechanisms*

Currently, there are no international mechanisms to provide individual remedies for violations of economic, social and cultural rights. The Committee on Economic, Social and Cultural Rights – the treaty body that is responsible for the International Covenant on Economic, Social and Cultural Rights (ICESCR) – receives periodic reports from states and provides comments and observations about how the state can improve its implementation of the Covenant. It also issues ‘General Comments’ about different provisions of the ICESCR. Though it has not addressed tax abuses directly in the past, it is conceivable that it could address tax abuses in the future, either in its consideration of the periodic report of a particular state or in a General Comment.

There is an Optional Protocol to the ICESCR that was adopted by the UN General Assembly²⁷⁴ in 2008; however, it will only come into force when ten states have ratified it. Currently, although 42 states have signed the Optional Protocol, only eight states have formally ratified it. In theory, this will provide a new mechanism for remedy at the international level for individuals within states that have ratified the Optional Protocol. How effective it will be with respect to addressing tax abuses remains to be seen.

In addition, states, national and human rights institutions and other stakeholders have the opportunity to address the human rights performance of all states through the Universal Periodic Review (UPR) of the UN Human Rights Council. To date, the issues raised and recommendations made through the UPR have not dealt with tax abuses, but there is no reason that this mechanism could not be used in the future.

Furthermore, tax justice advocates and human rights experts may encourage further study and interpretation of the relationship between tax abuses, poverty and human rights through existing UN human rights mechanisms. In particular, the UN Special Rapporteur on Extreme Poverty and Human Rights has begun to deal with issues related to the financial and economic crises as well as the consequences of tax policies; it would appear to be a logical continuation of the recent work of Magdalena

²⁷⁴ The General Assembly adopted resolution A/RES/63/117 on 10 December 2008, see: www2.ohchr.org/english/law/docs/a.RES.63.117_en.pdf.

Sepúlveda Carmona to examine the implications of tax abuses on poverty and human rights from within the formal UN system. In addition, there is now a UN Working Group on Business and Human Rights that addresses issues related to the human rights responsibilities of business enterprises. This could be a fruitful mechanism for advancing a global conversation about corporate tax abuses from a human rights perspective and, eventually, for developing policies and procedures for responsible tax planning and practices by multinational enterprises.

Another potential mechanism for remedies related to tax abuses by multinational enterprises relates to companies based or operating in OECD countries. As discussed above, the OECD Guidelines on Multinational Enterprises (the 'Guidelines') contain a chapter on human rights, as well as a chapter on taxation. Tax abuses that have a negative impact on human rights could potentially be the subject of a 'specific instance' brought to the OECD National Contact Point (NCP) in the country in which the multinational enterprise is headquartered.²⁷⁵ While NCPs are not empowered to make binding determinations or orders on multinational enterprises, some do undertake investigations into credible claims of violation of the Guidelines (eg, Norwegian NCP). The NCPs try to resolve the 'specific instances' through facilitated dialogue and mediation between the complaining parties and the multinational enterprise in question. As of the end of 2011, there were six 'specific instances' considered by NCPs that involved purported non-observation of the Guidelines' recommendations with respect to taxation;²⁷⁶ and, recently, it was confirmed that the Guidelines apply to the financial services sector.²⁷⁷ However, there is insufficient detail provided about the resolution of these 'specific instances' to assess the tax issue being raised and whether any effective remedy was provided.

275 See: www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/ncps.htm.

276 See OECD, 'Specific Instances Considered by National Contact Points' (2011), at: www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/33914891.pdf.

277 See Norway NCP decision on Norwegian Bank Investment Management, at: www.regjeringen.no/en/sub/syrer-rad-utvalg/ncp_norway/news/nbim_statement.html?id=727722.

MARKET-BASED REMEDIES BASED ON TRANSPARENCY AND DISCLOSURE

Stakeholders all agreed that transparency is the central requirement for better enforcement and improved remedies for tax abuses and their human rights impacts. At the international level, there has been a previous focus on increasing transparency in the extractive industry, but these efforts are currently being deepened and extended to businesses in general. These changes are being driven by reporting requirements for stock markets, government policies and adherence to corporate social responsibility standards.

There has been significant attention to natural resource issues at the global level from an economic, development and human rights perspective. Indeed, there have been a number of recent initiatives to increase the transparency of payments between extractive industry companies and governments in order to reduce the opportunities for bribery and corruption and to improve the analysis of benefits flowing from the development of natural resources. These initiatives include the Extractive Industries Transparency Initiative (EITI), as well as new disclosure regulations under section 1504 of the US Dodd-Frank Act and the new EU Accounting and Transparency Directive.

At the G8 meeting in Lough Erne, Northern Ireland, in June 2013, Canada also announced that it plans to create new rules for transparency and reporting of revenues by extractive industry companies.²⁷⁸ This is significant as Canada is the world's leading mining jurisdiction. In addition, the G8 leaders pledged in the Lough Erne Declaration that: 'Extractive companies should report payments to all governments – and governments should publish income from such companies.'²⁷⁹

278 A general framework for the reporting requirement has been developed in collaboration between the Resource Revenue Transparency Working Group, comprised of the Mining Association of Canada, the Prospectors and Developers Association of Canada, Publish What You Pay Canada and the Revenue Watch Institute, see: www.newswire.ca/en/story/1184067/mining-industry-associations-and-civil-society-release-draft-recommendations-to-improve-mining-transparency.

279 The Lough Erne G8 Leaders' Communiqué contains a number of more specific details about these commitments related to the extractive industry in paras 34–42, accessed at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/207543/180613_LOUGH_ERNE_DECLARATION.pdf.

*G8 Commitments on Extractives and Transparency*²⁸⁰

‘The G8 will take action to raise global standards for extractives transparency and make progress towards common global reporting standards, both for countries with significant domestic extractive industries and the home countries of large multinational extractives corporations. Under such common standards companies would be required to report on extractives payments, governments would take steps to ensure disclosure compliance, and those governments that wish to move towards the EITI standard will voluntarily report their revenues. This would reduce reporting burdens on businesses, help to fight corruption and encourage more effective and efficient investment, including in developing countries.

Thirty-nine countries have signed up to the EITI, which increases transparency and accountability in the payments companies make and the revenues governments receive for their natural resources. We welcome the new EITI rules adopted in May, which aim to increase the coverage and accessibility of data produced by EITI countries and ensure that participating countries are held to a high standard. We encourage other countries to sign up to the EITI.

The US has adopted legislation requiring certain publicly traded extractives companies to report their payments to governments around the world. The EU Accounting and Transparency Directives will introduce equivalent standards for EU Member States. EU G8 members will quickly implement the EU Accounting and Transparency Directives. These will require mandatory reporting of payments to governments by all listed and large unlisted extractive companies in the EU to all governments, and are consistent with section 1504 of the US Dodd Frank legislation and the new EITI standard. The US, UK and France will seek candidacy status for the

280 See n 54 above, paras 36–39.

new EITI standard by 2014. Canada will launch consultations with stakeholders across Canada with a view to developing an equivalent mandatory reporting regime for extractive companies within the next two years. Italy will seek candidacy status for the new EITI standard as soon as possible. Germany is planning to test EITI implementation in a pilot region in view of a future candidacy as an implementation country. Russia and Japan support the goal of EITI and will encourage national companies to become supporters.

We encourage other countries that host major multinational or state-owned enterprises that invest abroad to implement equivalent mandatory reporting rules with a view to creating an international reporting regime that avoids duplicate reporting burdens on business. These global standards should move towards project-level reporting.’

The last sentence is significant in that it provides momentum towards project-level reporting. This implies country-level reporting, which is necessary to help identify and prevent tax abuses and to encourage more efficient and fair international tax policies.

In turn, extractive industry companies and associations have made efforts to better communicate the contributions that natural resource projects make to sustainable development through royalties, taxes and other economic flows, in addition to jobs and business opportunities. In the lead-up to the Rio+20 Conference on Sustainable Development, this was an important theme for the extractive industry.²⁸¹

Furthermore, some leading extractive industry companies have been voluntarily adopting country-by-country reporting of their tax and other payments to governments to implement their commitments to EITI and sustainable development.

281 See the paper prepared for the Task Force by Esther Shubert, ‘Corporate Contributions to Sustainable Development through Taxation, Royalties and Other Economic Flows: A Look at Recent Commitments Made By the Mining Sector’ (14 December 2012).

RioTinto's Tax Reports

RioTinto's Tax Reports have been commended as a leading example of country-by-country reporting on tax matters.²⁸² As part of RioTinto's commitment to transparency and the EITI, the 2011 and 2012 Tax Reports bring together information on the payments the company made to governments in each of the main countries in which it operates, as well as the taxes and net earnings of business units and other group tax information.

RioTinto favours a voluntary approach to disclosure of tax information. Given the existence and success of the EITI as well as its global reach, the company does not believe mandatory rules for disclosure of payments to governments are necessary. However, given that such rules are currently being implemented by both the EU and the United States, it exhorts governments to work together to adopt a consistent global approach, which establishes disclosure requirements and thresholds that are proportionate. The company states that 'mandatory rules need to remain focused on the ultimate objectives, both for governments and for companies: good tax governance, accountability, transparency, and the fight against corruption'.

RioTinto states that its Tax Reports demonstrate that effective disclosures can be made by businesses on a voluntary basis. In a number of areas, including sustainable development reporting, voluntary transparency has been shown to encourage innovation in reporting. This includes proactive engagement with stakeholder audiences to develop reporting models. The company states that the inclusion of a breakdown of payments by levels of government and type of payment was included in its 2011 Tax Report as a result of comments received on previous reports.

282 See RioTinto, 'Taxes Paid in 2012: A Report on the Economic Contribution Made By Rio Tinto to Public Finances', at: www.riotinto.com/documents/RioTinto_taxespaidin2012.pdf; and 'Taxes Paid in 2011: A Report on the Economic Contribution Made By Rio Tinto to Public Finances', at: www.riotinto.com/sustainabledevelopment2011/pdf/taxes_paid_in_2011.pdf.

2.4.6 Conclusions

Both states and businesses should provide better access to remedies. Currently, to address the negative impacts of tax abuses on poverty and human rights, the most effective remedies remain in the realm of domestic tax authorities – particularly those in the most powerful developed countries whose enforcement powers stretch beyond their borders.

Consequently, in the short term it is important to strengthen good fiscal and tax governance and enforcement capacity in developing countries. Transparency and access to information are important human rights principles that support more effective remedies for tax abuses, especially in relation to the movement towards more effective and automatic exchange of tax information between authorities, as well as greater disclosure of information on the financial and non-financial impacts that business enterprises are having on a country-by-country basis.

At present, there are few human rights mechanisms that can deal effectively with tax abuses. However, several UN mechanisms certainly have the mandate and potential to articulate the links between tax abuses, poverty and human rights on an authoritative basis. Further attention and debate on tax abuses from a human rights perspective are important for developing more coherent international standards and good practices for states, multinational enterprises and their advisers and financiers; however, in the short term, human rights can also make a valuable contribution by drawing further public and political attention to this fundamentally important issue.

Chapter Three: Conclusions and Recommendations

Stakeholders interviewed by the Task Force expressed particular concerns about the impact of the tax abuses that occur in the context of corporate profit-shifting, including transfer mispricing between sibling corporations; the negotiation of tax holidays and incentives; the taxation of natural resources; and the use of offshore investment accounts. A common denominator of these tax abuses is their international dimension in that money and profits flow out of developing countries into another jurisdiction, typically with a lower tax burden. Therefore, these tax abuses deprive developing countries of tax revenues, as well as the potential economic benefits if the outflow had been reinvested locally.

International financial centres, tax havens and secrecy jurisdictions (whatever description is used) are under increased scrutiny for their role in facilitating illicit financial flows, including tax abuses. International standards that promote transparency and information exchange for tax purposes are evolving in relation to these challenges. A growing number of jurisdictions have accepted the current international standards and are changing their laws and practices. Momentum appears to be gathering around proposals for automatic information exchange.

The link between tax and development has been firmly established. As the effects of the recent financial and economic crises persist, there is greater public attention to tax abuses in both developed and developing countries where there are profound concerns about rising levels of poverty and inequality and a need to find revenues for social programmes. Tax matters have therefore moved into the centre of the global political agenda. For instance, aggressive tax planning of multinational enterprises has been a central subject at the latest meetings of the G8 and the G20. Moreover, the international community is beginning a new conversation about the best means for achieving effective poverty alleviation and sustainable development as we approach the final milestone of the UN Millennium Development Goals in 2015. Tax matters are a critical piece of ‘domestic

resource mobilisation'; and, therefore, we are likely to see a greater focus of international cooperation and technical assistance on strengthening tax governance and enforcement in developing countries. This represents an important opportunity to confront some of the tax abuses with the greatest impacts on poverty.

Human rights have not often been part of the global debate about tax matters. However, a human rights analysis can strengthen our understanding of poverty and development, as well as reinforce our determination to confront tax abuses. In the recently adopted UN Guiding Principles on Extreme Poverty and Human Rights, the UN Special Rapporteur on Extreme Poverty and Human Rights describes how extreme poverty is connected as a cause or consequence of violations of numerous human rights, including all the key human rights principles – ranging from the right to life, the right to food, the right to health, the right to education, the right to social security and principles of non-discrimination, participation, transparency and accountability. Simply put, tax abuses deprive governments of the resources required to provide the programmes that give effect to economic, social and cultural rights, and to create and strengthen the institutions that uphold civil and political rights. Actions of states that encourage or facilitate tax abuses, or that deliberately frustrate the efforts of other states to counter tax abuses, could constitute a violation of their international human rights obligations, particularly with respect to economic, social and cultural rights.

In conducting a human rights analysis of tax abuses, it is critical to look beyond tax enforcement and compliance to examine how revenues are actually spent. The collection of tax revenues presents an opportunity for governments to invest in infrastructure and social programmes that ensure that the full range of human rights are respected, protected and fulfilled. However, tax revenues can also be mismanaged, misspent and misappropriated, thereby resulting in no positive human rights outcomes or even in negative human rights outcomes.

This causal link between tax collection and actual government spending is critical to making the human rights case. It also underscores the importance of democratic governance and accountability in ensuring that taxes are spent in a manner that reflects the public will, meets the needs of society

and promotes human rights. Organisations and tools that provide for increased participatory budgeting and assessment of human rights impacts of budgets (and free trade agreements and business operations) will help reinforce the information available and analysis needed for a more nuanced understanding of the actual links between tax and human rights.

Transparency and access to information are fundamental elements of democratic governance and accountability, as well as the most powerful tools for confronting tax abuses. Human rights principles and instruments support greater transparency and access to information and therefore can strengthen current initiatives and efforts to address tax abuses at the domestic and international levels.

3.1 Conclusion 1: States have obligations to counter tax abuses at the domestic and international levels, including through cooperation in multinational institutions

While it must be recognised that international human rights treaties do not address tax abuses in an explicit manner, the Task Force concludes that states' legal obligations related to economic, social and cultural rights can be applied to the question of tax abuses:

1. The obligation to use the maximum available resources to progressively realise human rights – including the obligation to confront tax abuses as part of an overall plan to strengthen financial and tax governance.
2. The obligation to ensure coherence between corporate, tax and human rights laws and policies, both at the domestic and international levels; as well as the corollary obligations to avoid measures that have retrogressive impacts on economic, social and cultural rights – including the obligation to examine the domestic and international impacts of corporate, fiscal and tax policies on human rights.
3. The obligation to regulate and influence the conduct of business enterprises and to protect citizens from business-related harm to human rights, including through their tax planning, compliance and disclosure activities.

4. The obligation of international cooperation and technical assistance – including in the fields of taxation (including exchange of information and transparency measures), development and human rights.
5. The obligation to invest the increased revenues collected through improved domestic and international tax enforcement in a manner consistent with the fulfilment of human rights.

3.1.1 Recommendations for states at the domestic level

1. Improve policy coherence between tax laws, corporate laws and international human rights obligations by undertaking impact assessments when considering changes to tax laws and policies and/or monitoring existing laws and policies.
2. Especially in the context of the recovery from the economic and fiscal crises, ensure that new tax measures or incentives are not retrogressive in terms of economic, social and cultural rights, particularly for vulnerable groups.
3. Improve transparency of information about taxes and public finances to allow for informed democratic debate about tax policy and accurate assessment of impacts of tax measures and incentives on human rights.
4. Strengthen the capacity of tax authorities to combat tax abuses through domestic enforcement and international cooperation measures.
5. Strengthen the capacity of human rights enforcement mechanisms (eg, national human rights institutions, courts, etc) to analyse and address the impacts of tax abuses on human rights.

3.1.2 Recommendations for states at the international level

1. Commit to international standards of transparency and exchange of information in tax matters and ensure their effective implementation, including with respect to safeguards against the use of personal information for non-taxation purposes.

2. Improve policy coherence between tax laws, corporate laws and human rights obligations by undertaking impact assessments when considering changes to tax laws and policies that have extraterritorial effects – particularly those policies related to banking secrecy and tax competition that may result in draining resources from developing countries.
3. Provide further international cooperation and technical assistance to developing countries to strengthen their tax governance and capacity to develop effective tax policies and address the most pressing forms of tax abuses.
4. Require business enterprises operating abroad to provide greater transparency and access to tax information to relevant authorities and through public reporting on a country-by-country basis.
5. Begin to include an analysis of tax matters in relevant human rights reporting to the UN treaty bodies and the Universal Periodic Review.

3.1.3 Recommendations for states in multilateral institutions

1. Participate in and cooperate with multilateral efforts to strengthen the effective exchange of tax information with a goal of automatic exchange of information.
2. Cooperate with multilateral efforts to confront tax abuses and other illicit financial flows in a coordinated and integrated manner, including through the OECD's Oslo Dialogue.
3. Cooperate with multilateral efforts for greater transparency of company ownership and legal arrangements.
4. Ensure the provision of adequate safeguards of taxpayers' privacy and other rights in the context of greater international cooperation and exchange of information about tax matters.
5. Undertake further dialogue and analysis of the linkages between taxation, poverty and human rights issues, including in OECD mechanisms for cooperation on tax matters, in the UN human rights system, and in the elaboration of the post-2015 international development agenda.

3.2 Conclusion 2: Business enterprises have a responsibility to avoid negative impacts on human rights caused by tax abuses

According to the UN Guiding Principles on Business and Human Rights, business enterprises have a responsibility to ensure that their operations do not have negative impacts on human rights. The emerging human rights guidance for business enterprises suggests that all business enterprises, including corporate legal advisers and bankers, should exercise due diligence on the potential negative impacts of their operations – including with respect to the impacts of their tax planning strategies. Indeed, tax abuse is poised to become an important issue for business enterprises in terms of corporate social responsibility, reputational risk and human rights.

Furthermore, the estimated scale of corporate tax abuses also undermines some of the claims that foreign investment and private enterprise are major drivers of sustainable development. While there is undeniable evidence that foreign investment and private enterprise is – and can be – a powerful force for development and positive human rights impacts, evidence about the extent of tax abuses by multinational enterprises serves to reinforce criticism and cynicism about the role of the private sector in development.

3.2.1 Recommendations for business enterprises

1. Adopt human rights policies that contain explicit commitments to respect human rights throughout all its operations, including the full range of economic, social and cultural rights.
2. Undertake due diligence measures and impact assessments of all of its operations, including with respect to its tax planning practices and the financial flows and tax revenues that are thereby generated in different jurisdictions.
3. Refrain from negotiating special tax holidays, incentives and rates that will prevent governments from fulfilling their human rights obligations.
4. Provide greater transparency and access to information to tax authorities and through public reporting on a country-by-country basis.
5. Engage in industry-specific discussions about ethical practices and effective contributions to sustainable development with respect to tax matters.

3.3 Conclusion 3: The legal profession has an important role in assisting states and business enterprises in confronting the negative impacts of tax abuses on human rights

There was widespread agreement in the interviews that lawyers must balance their obligation to defend their client's interest with the underlying role of the tax system in society. One stakeholder stated that, 'we also need to encourage positive performance and the positive leadership role that lawyers can play in creating rules and regulations. Lawyers need to decide what is acceptable behaviour for their profession and to take the issue [of tax abuses] outside an individual decision for an individual lawyer'.

3.3.1 Recommendations for lawyers and bar associations

1. At the level of bar associations, develop further professional guidance about the ethical and human rights dimension of taxation. Help build the capacity and awareness of lawyers and law firms about their responsibilities to respect human rights in their practice, including with respect to tax planning practices. Consider the development of mechanisms for lawyers to provide information on tax strategies and schemes that have adverse human rights impacts and to contribute to tax law reform.
2. At the level of law firms, adopt explicit human rights policies and due diligence measures that conform with the UN Guiding Principles on Business and Human Rights and require due consideration of the potential human rights impacts of the legal advice provided to clients. When giving advice in tax matters, ensure that the potential human rights issues and impacts are also presented as a matter of international law.
3. Individual lawyers can support and participate in cooperation efforts around tax matters:
 - (a) Participation by lawyers at both national and international level in work aimed at producing model taxation laws.
 - (b) Participation by lawyers in the development of international human rights norms and instruments related to illicit financial flows and tax abuses.

- (c) Development or strengthening of tracking and recovery laws and mechanisms that can contribute to the remediation of the tax abuses.
- (d) Development of additional practice rules, criteria and tools to help lawyers distinguish between legal tax avoidance and potentially abusive transactions and schemes.
- (e) Participation in the training of public lawyers to enhance and strengthen their capacity in order to ensure equality of arms in the enforcement of tax laws and the negotiation of investment agreements.
- (f) Cooperation among lawyers to try to achieve a harmonised approach to taxation laws as far as possible within the framework of differing national needs and priorities.
- (g) Participation in efforts to educate and raise awareness within the profession and the public about the adverse impacts of tax abuses on poverty and human rights.

Appendices

Appendix A: IBAHRI Council Resolution on Poverty and Human Rights

Adopted on 27 May 2010

The Council of the International Bar Association's Human Rights Institute,

Recalling the Human Rights Institute's mandate to work for "the promotion, protection and enforcement of human rights under a just rule of law," the "implementation of standards and instruments regarding human rights" and the "acquisition and dissemination of information concerning issues related to human rights",

Recognising that poverty is a chronic global problem,

Recognising further that the manifestations of poverty are addressed by international instruments such as the *Universal Declaration of Human Rights*, the *Declaration on the Rights of Indigenous Peoples*, the *United Nations Convention against Corruption* and the *International Covenant on Economic, Social and Cultural Rights* and in regional instruments such as the *African Charter on Human and Peoples' Rights*,

Noting that despite the conceptual and jurisprudential difficulties in classifying poverty itself as a breach of human rights and in implementing the international instruments relating to economic rights, the United Nations Committee on Economic, Social and Cultural rights has stated that there are immediate obligations to take steps towards the full realisation of the rights in the Covenant, and a duty not to discriminate in the fulfilment of economic, social and cultural rights,

Realising that while it may be difficult to establish that each case of poverty is in itself a violation of a fundamental right, it is nevertheless accompanied by violations of fundamental rights and is an affront to human dignity, and is a persistent danger to global peace, security and economic equity within and amongst nations, despite the technological advances and economic growth in many countries created by expanding trade and production opportunities,

Recognising that opinions on the justiciability of economic rights are continually changing,

Accepting that members of the legal profession and the judiciary in all countries have special responsibilities for the attainment and implementation of human rights, including economic rights, as well as for combating the systemic problem of corruption in many countries which is an obstacle to overcoming profound poverty,

Remembering the 1998 IBA Resolution on Non-Discrimination in Legal Practice which recognises that all people are born equal in dignity and that all members of the legal profession should treat all people with whom they come into professional contact without discrimination, including on the grounds of social origin, property, caste, birth or other status,

1. Resolves to adopt a policy favouring the recognition of severe, endemic and chronic poverty as a violation of human rights,
2. Resolves to commit itself to acting as a bridge to lead all lawyers to an appreciation of the importance of the issues of economic, social and cultural rights, and to the realisation that many of these rights are justiciable and suitable for legal attention,
3. Authorises the Human Rights Institute to:
 - a) Publicise this policy by all available means;
 - b) Facilitate bar associations to set up their own committees to act upon issues of poverty and human rights;
 - c) Encourage bar associations to submit their own reports to the UN Committee on Economic, Social and Cultural Rights when periodic review of their own country under the International Covenant occurs;
 - d) Encourage IBA member firms to indicate, and reflect upon, their own internal policies and programs relating to these issues;
 - e) Hold sessions at IBA and other conferences for members of the legal profession to address these issues;

- f) Investigate and report on the enforcement of economic and social rights at the international level (such as through the Optional protocol to the Covenant on Economic, Social and Cultural Rights) and at the regional and domestic level through the courts;
- g) Seek funding for the establishment of a Task Force to investigate the links between severe, endemic and chronic poverty and human rights, and to investigate what bar associations and the legal profession are doing, and should be doing, to use human rights to tackle poverty;
- h) Undertake appropriate follow-up activities;
- i) Do anything else reasonably necessary to facilitate the implementation of this policy.

Appendix B: Stakeholders consulted by the Task Force

The following stakeholders agreed to have their participation in the Task Force consultation process acknowledged in the report. We respected the wishes of other stakeholders not to be acknowledged. We thank all participants in the consultation process for their valuable information, insights and opinions.

Corporate representatives

BOWMAN, Vicky, *RioTinto*

CHALMERS, Ben, *Mining Association of Canada*

DEISLEY, David, *NovaGold*

MERBER, Sandy, *GE International*

MORRIS, William, *GE International*

Corporate or tax lawyers

BAKER, Philip, *Tax Chambers*

DESSAIN, Anthony, *Bedell Cristal Jersey Partnership*

ERWIN, Joe, *Erwin Tax Law*

GOMES, Tracy, *McDermott, Will & Emery*

LOWELL, Cym, *McDermott, Will & Emery*

O’KANE, Michael, *Peters and Peters*

WAITZER, Ed, *Stikeman Elliott*

WARNER, John, *Buchanan Ingersoll & Rooney*

Civil society representatives

CHRISTENSEN, John, *Tax Justice Network*

FONTANA, Alessandra, *U4 Anti-Corruption Network*

GUTNER, Bruno, *Tax Justice Network*

HEARSON, Michael, *ActionAid*

HERRINGSHAW, Vanessa, *Transparency and Accountability Initiative*

INKSATER, Kim, *Just Governance Group*

LEWIS, Mike, *ActionAid*

MARGOLIS, Adrienne, *LABB*

MOORE, Mick, *International Centre for Tax and Development*

O BENLAND, Wolfgang, *Global Policy Forum Europe*

SHERMAN III, John, *Shift – Business and Human Rights Initiative*

STEAD, Joseph, *Christian Aid*

Government or multilateral agencies

BAER, Katherine, *International Monetary Fund*

BHATIA, Monica, *OECD*

BONUCCI, Nicola, *OECD*

GONZALEZ-BENDIKSEN DE ZALDIVA, Diego, *Colombia Revenue Authority*

JORGENSEN, Allan, *Danish Institute for Human Rights*

MAKINWA, Olijobi, *UN Global Compact*

MARAIS, Lincoln, *ATAF*

SEIER, Frank, *Danish Institute for Human Rights*

SHORT, Clare, *former UK MP and Chair of Extractive Industries Transparency Initiative*

WORT, Logan, *ATAF*

Academic institutions

BROOKS, Kim, *Shulich School of Law*

GRINBERG, Itai, *Georgetown Law Centre*

TURNELL, Sean, *Macquarie University*

Brazil side meetings or follow-up interviews

ANCTIL, Karel, *Embassy of Canada in Brazil*

BENDER, Renaude, *Consulate of Canada in Brazil*

BICALHO, Lucidio, *Instituto de Estudos Socioeconômicos*

CANADO, Vanessa

CANDIDO, Caio Marcos, *Ministry of Finance of Brazil*

CRAVEIRO, Alessandra, *GD&C Advogados*

CUADROS, Julia, *Cooperación Peru (NGO)*

DE SANTI, Eurico

DICKIE, Ambra, *Embassy of Canada in Brazil*

DICKSON, Alan J, *Conyers Dill & Pearman*

DOIN, Guilherme, *GD&C Advogados*

GIRAO, Fabiola, *Machado Associados*

JELLINEK, Natalie, *European Union*

QUEZADA, Jose Ricardo, *Instituto Centroamericano de Estudios Fiscales*

SABBATELLI, Maria Rosa, *European Union*

SERPA, Sandro de Vargas, *Ministry of Finance of Brazil*

TOMAZINI, Rosana, *European Union*

SADC side meetings or follow-up interviews

CHIKUMBU, Tafadzwa, *African Forum on Debt and Development*

CHIMBGA, Dzimbabwe, *Zimbabwe Lawyers for Human Rights*

DLAMINI, Thembinkosi Mfundo, *Oxfam*

GANESAN, Arvind, *Human Rights Watch*

JACOB, Cameron, *Human Rights Watch*

KASAMBALA, Tiseke, *Human Rights Watch*

LEON, Peter, *Webber Wentzel*

MARAIS, Lincoln, *ATAF*

NDLANGAMANDLA, Emmanuel, *Swaziland Coordinating Assembly of NGOs*

PETRAS, Irene, *Zimbabwe Lawyers for Human Rights*

SEGURA, Ana Pena, *EU Delegation to Zimbabwe*

SIBANDE, Mukasiri, *Zimbabwe Environmental Law Association*

VOSLOO, Louise, *Deloitte & Touche*

WORT, Logan, *ATAF*

Responses to IBAHRI questionnaire (see Appendix C)

CALIL, Fabio, *Fabio Calil Gandara*

CHITIYO, Catherine, *Atherstone and Cook Legal Practitioners*

GAPU, George, *Scanlen & Holderness*

HERBERT, Tim, *Mourant Ozannes*

MHISHI, Lloyd, *Mhishi Legal Practice*

MUGANDIWA, Andrew, *Wintertons Legal Practitioners*

MULLERAT, Ramon, *OBE, Iuris Valls Abogados*

Appendix C: Questionnaire



*International Bar Association's Human Rights Institute (IBAHRI) questionnaire on Illicit Financial Flows, Poverty and Human Rights
July 2012*

the global voice of
the legal profession*

Name _____ (optional)

Law firm _____ (optional)

Is poverty in itself a violation of human rights under international law?

Yes/No
Please explain...

Does taxation have a role in development and the elimination of poverty?

Yes/No
Please explain...

Could tax avoidance, abusive schemes and tax evasion constitute a direct or indirect violation of human rights? If so, which and whose rights?

Yes/No
Please explain...

Does the legal profession have a role in and responsibility for preventing abusive schemes of tax avoidance?

Yes/No
Please explain...

What are the elements of an effective and equitable taxation system by countries seeking foreign investment (ie, host countries)?

--

Should tax havens be abolished or do they play a valuable role in the global economy?

Would you like to be acknowledged as a consulted party in the publication?

YES/NO

Would you like your law firm name to appear next to your name?

YES/NO

Appendix D: Summaries of Task Force consultation missions

1. Consultation meeting in São Paulo, Brazil

In June, the consultation meeting for Latin America was held in Brazil alongside an IBA conference on international criminal law in São Paulo. Thomas Pogge and Celia Wells represented the Task Force at the consultation meeting. Lloyd Lipsett, Shirley Pouget and Louise Ball also organised individual meetings with tax authorities, international donors, civil society, tax lawyers and financial advisors while in Brazil. The main points discussed at these consultation meetings are summarised below.

DISCUSSION ONE: MINERAL TAXATION POLICIES, TAX PLANNING AND TAX REVENUES

Introduction to tax planning and mineral taxation policies by Lloyd Lipsett

- Tax planning as an important part of corporate structure and strategy.
- Continuous pursuit of novel and complex structures that are the most ‘tax efficient’ meaning that they result in the lowest overall level of taxation.
- Increasing number of questions about the tax contribution of corporations to the economies and societies in which they operate.
- These questions have been highlighted in Latin America, where there is a great deal of foreign investment that coexists with poverty and social inequality.
- The development of natural resources, including in the mining sector, is an integral part of many Latin American countries’ strategies for economic growth and development.
 - On the one hand, governments and communities stand to reap significant benefits from resource development through royalties, direct and indirect taxes (including on employment, goods and services) and other revenues.

- On the other hand, there are widespread concerns that some agreements and tax incentives obtained by mining companies deprive the public purse of the revenues needed for development and social programmes.
- Concerns about how extractive industry revenues are used has led to multi-stakeholder initiatives like the Extractive Industries Transparency Initiative.

Example of human rights analysis of the economic flows from a mine

- The Marlin Mine is a Canadian gold mine in the Western Highlands of Guatemala with significant human rights concerns. One of the first published human rights impact assessments (www.hria-guatemala.com) is about the Marlin Mine. Analysis of seven issues, including the economic flows from the mine, in terms of human rights.
- Marlin Mine as the number one taxpayer in Guatemala, but human rights concerns about how the Government of Guatemala spends its budget (very large percentage on police and military and very small percentage on education, health, infrastructure), as well as persistent concern about corruption.
- Marlin Mine pays royalties to the federal government and directly to municipalities, the latter has positive impacts in terms of developing local capacity and contributing to a comprehensive municipal development plan that had significant local consultation.
- Marlin Mine pays indirect taxes related to employment, goods and services: success with local employment and business opportunities help 'localise' these benefits.
- Marlin Mine created a foundation for social development programmes: some evidence of positive impacts on human rights (eg, health and education), but need for attention to address the negative impacts of the mine.
- Human rights impact assessment helped the company develop a human rights policy and to review its operations in Guatemala (and around the world) based on a greater understanding of human rights responsibilities.

DISCUSSION TWO: TAX ABUSES, TRANSFER PRICING AND BANK SECRECY**Presentation on trends in tax enforcement in Brazil by Fabiola Girão**

- Rise of tax revenues in Brazil, now close to 35 per cent of GDP, which is similar to the OECD average and is much higher than many Latin American countries.
- Some factors that have contributed to this record level of tax collection:
 - Use of information technology to ensure tax compliance:
 - Electronic returns have been used since the 1990s.
 - SPED: integration of databases between different levels of government; electronic accounting and tax filing; e-invoices.
 - Very difficult to evade taxes unless in the informal sector.
 - Compliance certificates required for corporate transactions.
 - Qualification of tax inspectors has increased.
 - Inspections of largest taxpayers and centralization of tax collection at level of the largest taxpayer (eg, collecting VAT throughout the supply chain at the level of the producer).
 - Fight against tax evasion through new rules such as an anti-avoidance rule and transfer-pricing rules:
 - Tax Code: strict legality principle; nullity of fraudulent or sham transactions.
 - 1988 Constitution: property rights and freedom of enterprise are moderated by principles of social solidarity; this led to the reinterpretation of taxpayers' rights and guarantees.
 - Previous attempt to pass a general anti-avoidance rule.
 - New Civil Code includes the abusive exercise of rights as an illicit act.
 - Prevalence of the substance over form for accounting purposes (Law 11638/07).

- Authorities are challenging purely tax-driven transactions that are not supported by business purposes.
- Currently, Brazil does not have a problem to collect taxes; the measures are effective in terms of increasing tax compliance, but they are heavy-handed.
- Brazil is ranked as the most bureaucratic country in terms of tax compliance, measured in terms of hours spent to comply with tax requirements. Electronic filing has not translated into simplification.
- Also, concern about high levels of taxation on productive activities. Is this sustainable for the economy?
- Important to look at how taxes are distributed: general costs and social programmes; debt servicing; social security; investments; direct cash transfer programmes. Are government expenditures focused on reducing inequality and a good development strategy?
- Direct payments to the poor have helped decrease the levels of extreme poverty, but have not been followed by a reduction of wealth concentration and inequality.

Presentation on Brazilian approach to transfer pricing by Daniel Marcondes

- The number of inspections related to transfer pricing has increased in recent years, with a high value (approximately 64 million reais) recovered per inspection.
- The Brazilian approach, compared to the OECD approach, has certain features:
 - Profit margins are set in law. They are easier to implement, but less accurate than if calculated according to the arm's length principle.
 - Similar procedures are used for most companies. This results in standardisation; however, uniformity does not capture the nuance of particular business operations. Eliminating differences of interpretation. Most obligations for compliance are on the taxpayer.

- Most commonly used methods rely upon information in Brazil. This provides for independent information, but questions related to double taxation persist.
- Heavier controls for imports.
- Many OECD countries have difficulty in implementing all OECD rules, eg, for use of safe-harbour provisions; therefore, it is questionable whether developing countries have the capacity to adopt the OECD rules. Brazilian methods are of interest to some developing countries (eg, India) to increase tax collection and enforcement.

Presentation on Brazilian bank secrecy by Professor Luis Edouardo Schoueri

- In the past, tax authorities would need a judicial procedure to have access to bank information.
- The 1988 Constitution provides rights including for data secrecy, but it is not an absolute right.
- Tax laws in the 1990s included tax on financial transactions that can be audited. This gives tax authorities access to accounts, supposedly only for audit purposes. Another Law (No 105) gives access to bank information to audit whether the amounts match up with the tax returns filed. There have been constitutional challenges to these laws. What is happening is that tax authorities become lazy and ask for disclosure of bank information first, rather than as a last resort.
- There is an important safeguard of ensuring that the tax authorities must request disclosure from an independent third party. Reasonable requests will not be refused; and it ensures that tax authorities are respecting the procedures.

Discussion

- In Argentina, there is an ‘access to information’ concern about how taxes are collected and spent. There is no transparency of information for citizens. Disaggregated data is impossible to find.

- In Bolivia, the situation is chaotic. Tax collection has been effective on some companies in mining and hydrocarbons; however, tax collection for other Bolivian companies is very minimal and tax evasion is the norm. There is a huge informal and contraband sector; no broad tax base; and highly dependent on taxing resource companies. Companies face the threat of expropriation, so grudgingly accept high levels of taxes (eg, 32 per cent tax in addition to 18 per cent royalty). Remittances are supposed to be subject to a foreign transfer tax, but it is unclear how well this is enforced.
- What is the moral imperative for tax compliance? It seems that arguments about competitiveness are used to lower taxes, rather than moral arguments about how taxes can contribute to social justice.
 - In Bolivia, there is no popular understanding of a moral imperative to pay taxes, given the high levels of informality in the economy.
 - In Brazil, the high level of efficiency of tax authorities is taking the moral imperative out of the equation. The government is increasingly effective in withholding taxes; in the future, they will have all the information and simply send you a tax return to sign!
- In Argentina, the level of informality is estimated at 35–40 per cent in the underground economy. In the global economy, informality affects everyone; informality also creates opportunities for organised crime.
- In Brazil, new legislation about money laundering. The predicate offence is not limited, so proceeds of tax evasion could be considered to be money laundering. This would mean that criminal charges could be used for tax evasion rather than simply fines. This would heighten the moral censure of and deterrence against tax evasion.

DISCUSSION THREE: TRANSNATIONAL CRIMES AND CORPORATE CRIMINAL LIABILITY**Presentation by Celia Wells on approaches to corporate criminal liability**

- How can corporations be brought to justice for tax evasion? How can corporations be adequately controlled?
- There are different approaches to corporate criminal liability, as well as regulatory offences that have elements of criminal penalties.
- Who is targeted by the measures? The corporate entity, the directors and officers, and/or employees and agents? How to connect between the corporation and individual human actions?
- What offences? There are usually general criminal offences related to tax (eg, cheating the tax authority), fraud and bribery, as well as regulatory offences related to company and financial laws and/or proceeds of crime.
- Where do you prosecute? Where the company is incorporated, where it carries on business or where the offences take place?
- International and domestic legal architecture for anti-bribery is a useful example of extending corporate criminal liability for illicit financial flows.
- OECD Anti-Corruption Convention of 1997 has led to domestic legislation such as the UK Bribery Act of 2010.
- There are various attribution models for corporate criminal liability:
 - vicarious liability (eg, UK regulatory and US federal);
 - due diligence/adequate measures (eg, UK Bribery Act, section 7);
 - identification/Senior Officer (eg, UK Bribery Act, sections 1, 2 and 6);
 - corporate culture (Australia);
- OECD has good practice guidance that says the approach should be flexible and reflect the wide variety of decision-making systems in a corporation.

Discussion

- Corporate criminal liability does not exist in Brazil: criminal liability is personal, with exception for certain environment-related crimes. This is a relatively new development in the Brazilian Constitution of 1988, environmental laws of 1998 and court decisions of 2005. The government has been active for investigations, but there is not much enforcement – only two convictions in all São Paulo in 2010.
- Corporate liability requires a decision of the corporation's legal or contractual representative, an act done on behalf of the corporation, and actual benefit.
- Future changes may be made in revision of the Criminal Code. However, not sure that corporate criminal liability is good for Brazil or other Latin American and civil law jurisdictions.
- New anti-corruption legislation after Brazil signed international conventions (eg, UN, OECD and Inter-American). Individuals are subject to prison up to 12 years. In 2011, 266 special operations to combat corruption, money laundering and related crimes.
- Draft Bill 6.826/2010 formulated in response to OECD criticisms.
- Law 8.137/1990 provides for individual criminal liability for tax evasion if they deceive the tax authority; provide false information; or neglect to include information in documents required. Liability requires a wilful mens rea. Corporations are subject to administrative sanctions. Payment of fines dismisses the criminal case; so criminal law is used as a way to collect taxes.
- In Argentina, there is also a trend towards criminal liability for corporations, now including economic crimes such as tax crimes and money laundering.
- Is criminal liability a distraction in countries with constitutional issues about corporate liability?
- When you can pay your way out of a tax evasion charge, is it an effective sanction? Fines lack moral censure and seem like part of the cost of doing business. Incarceration exists for individuals, but not for

corporations. However, a practical approach suggests that administrative measures can be effective, especially if the sanction is important.

- How can you protect the public interest with administrative fines rather than criminal sanctions? What about the rights of victims? Example of NGO (Sherpa) bringing case to the Cour de Cassation in France.
- Importance of whistleblower protections and incentives:
 - Example of Argentina, where a former Secretary of Senate has admitted to attempting to bribe opposing Senators at the request of the President. Federal law does not provide adequate protection for whistleblowers; therefore, sends a message of non-cooperation as whistleblowers will receive threats and harm.
 - In the US, there are ‘rewards’ for whistleblowers at the SEC. This may be effective in bringing cases forward, but do people really know what they are dealing with and are there false accusations? Also, information is provided in the case of plea bargains, where someone who participated in a scheme gives evidence in order to reduce their penalty.

DISCUSSION FOUR: IMPACT OF TAX ABUSES AND POOR TAX COLLECTION ON POVERTY AND HUMAN RIGHTS

Presentation on global poverty and human rights by Thomas Pogge

- Overview of poverty: a huge issue in human terms, but relatively small in economic terms. Up to one third of human deaths are poverty-related; and despite government pledges to combat poverty, inequality persists and is increasing.
- Inequality is exacerbated by supranational rule-shaping processes and international lobbying.
- Human rights are not realised; recall Article 28 of the Universal Declaration of Human Rights: ‘Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.’

- It is estimated that over a US\$1tn moves out of developing countries in terms of illicit financial flows; while only US\$120bn is spent in terms of ODA and social programmes, of which only US\$15.5bn is aimed at basic human needs.

Discussion

- In Brazil, there is increased tax revenue, but it is not necessarily invested in sustainable development priorities such as infrastructure, education and training. Cash transfers to the poor turns them into consumers, but not necessarily translating into opportunities to reduce inequality.
- In Argentina, there is a direct and indirect impact on poverty because of money laundering and crime. Allows criminals to put their assets into the legal economy and then they can increase their power; it is a disincentive to honest people to work legally. Need more effort at the international level in terms of analysis and enforcing conventions.
- International solutions are being hijacked by elite countries (eg, the G8 and the OECD) that are not necessarily fulfilling their commitments to alleviate poverty. Corruption and tax evasion is not just an issue in developing countries, though the issue tends to be framed that way. Need to address countries like Switzerland and Singapore.
- What do we mean by ‘alleviating poverty’? Does this mean giving poor people money, or does it mean addressing structural causes such as land reform?
- Cutting down on illicit financial flows does not necessarily cut down on poverty. The Brazilian taxation system has become very effective due to investments in information technology, but are the benefits being paid to poor people sustainable? Also, reliance on indirect taxes has increased effectiveness, but is not equitable.
- Cash payments are tangible. Citizens find cash payments to be real and more reliable than foreign development projects.

- There is an intuitive link between tax evasion and human rights; but not sure how to formulate a specific legal claim. Maybe it is more of a correlation between poverty and tax evasion.
- Maybe do not need to use international human rights law to get the result. For instance, groups in the US are effectively lobbying for beneficial ownership disclosure, which will help reduce tax evasion, on the basis of investor disclosure arguments rather than human rights arguments.
- The citizen alone is not going to effectively address the structural issues related to tax evasion and poverty. Need to aggregate individuals into collective action, such as through the political system or class action lawsuits.
- Is it worth considering the creation of an international tribunal to prosecute economic crimes? For instance, corruption and bribery were included in early drafts of the Rome Statute for the International Criminal Court. A recent UN Security Council resolution was aimed at creating an international crime and tribunal related to piracy.
- In Latin America, human rights cases may create obstacles. There is stigma and reluctance for courts to hear and convict in a human rights case.
- Need to have proper architecture for enforcement and development of international tax laws and policies. What is the role of the OECD v the UN?
- It is also important to empower civil society.
- Greater transparency is required, including for country-by-country reporting.
- What is the capacity of governments to deliver social programmes? Tax incentives should be focused on improving delivery of social programmes.
- Need to look at the responsibility of home governments. There is a tendency for home governments, such as the US, to look the other way when its companies are operating abroad. Extraterritorial application of laws should be considered. Need to follow forthcoming case at the Supreme Court related to the Alien Tort Claim Act.

2. Consultation meeting at the SADC Lawyers' Association AGM

The centrepiece of the SADC mission was the multi-stakeholder consultation meeting organised within the SADC Lawyers' Association annual general meeting. The consultation meeting was very well attended, with over 50 lawyers representing revenue authorities, corporate and tax law practices, civil society and human rights organisations.

The consultation meeting was chaired by Sternford Moyo, Task Force member and IBAHRI Co-Chair. He provided an overview of the IBAHRI Task Force and introduced some of the key questions to guide the session. His introduction was followed by three panel presentations:

- First, Lloyd Lipsett, Task Force Rapporteur, provided an overview of the Task Force research conducted to date and the methodology for interviews, consultation meetings and desk research. He then provided an overview of the 'three pillars' of the Task Force's mandate, namely poverty, illicit financial flows and human rights. He then enumerated the main findings and themes that are emerging from the research to date. Notably, there are a number of recent guiding principles adopted by the UN on issues related to extreme poverty and human rights; business and human rights; and non-repatriation of stolen assets that all provide useful precedents to reinforce the links between tax abuses and human rights. His presentation is attached for further information.
- Secondly, Charles Gordema, Senior Research Fellow in the Transnational Threats and International Crimes Division of the Institute for Security Studies, discussed the key corruption and international crime issues affecting the SADC region. He analysed how these are related to illicit financial flows out of the region and stressed the responsibilities of all stakeholders to combat these flows. Some of the main challenges relate to the culture of secrecy that prevails with respect to corporate and banking activity; the lack of capacity of authorities to combat economic crimes; and the poor regulation of strategic phases of the extractive resources value chain. Future actions could help broaden the concepts and tools to combat money laundering to address tax evasion; better review and enforcement of suspicious transactions; and better understanding of the relevant operations of multinational enterprises.

- Thirdly, Lincoln Marais, Director of Institutional Development of the African Tax Administration Forum, discussed the links between tax evasion and human rights. He asserted that taxation is key to state-building, democracy and accountability and that good governance can be promoted by better tax policy, enforcement and morale. Furthermore, domestic resource mobilisation is the bedrock for sustainable development; and, therefore, better tax policy and cooperation can help African countries diminish their dependency on multilateral bodies and resource extraction. Finally, he stressed the need to strengthen the capacity of revenue authorities and finance ministries to be able to confront tax evasion and abuses in a fair, predictable and consistent manner.

The presentations were followed by a vigorous question and discussion period, where participants presented a wide range of views. Many participants made passionate statements linking poverty and human rights in their countries, while acknowledging that the legal and institutional protection of economic, social and cultural rights were often lacking. The lack of institutional protection also extends to poor capacity and/or corruption of governments in their dealing with multinational enterprises. Furthermore, some participants pointed out that increasing revenues of governments will not necessarily benefit the poor; resources must be managed responsibly, transparently and accountably if there is to be progress on human rights and poverty issues. There was also a good discussion of the responsibilities of the legal profession, as well as others (eg, accountants, bankers, politicians) to raise awareness about issues related to tax abuses and their negative impacts on human rights.

The consultation meeting also presented a good opportunity for introductions to various lawyers from the SADC region with whom the Task Force Rapporteur has followed up for individual interviews.

Appendix E: Submission by David Quentin

Corporate profits escaping tax in the developing world: the legal definitional problem

INTRODUCTION

It is widely recognised that one of the major contributing factors perpetuating global poverty and inequality is the flow of wealth out of developing countries, and there is a growing consensus among organisations operating in the development sector that the tax behaviour of multinational corporate groups is an important element of this problem. Corporate profits are perceived to be flowing untaxed from some of the world's poorest countries, in volumes which are said by development organisations to dwarf the influx of development aid, in circumstances where public funds are desperately needed locally to finance investment in health, education and infrastructure.

While there is broad agreement as to the underlying methods by which this is being achieved (we are to a large extent concerned with tax reduction strategies which rely on cross-border intra-group transactions), there is no real clarity about precisely what category of tax misbehaviour these methods fall into. Much of the literature refers to the relevant activities generically as 'tax avoidance and evasion' but to a tax lawyer there is a world of difference between the two categories of behaviour.

We generally perceive 'tax avoidance' to mean tax behaviour which operates within the 'letter' of the law but secures a tax advantage by departing from what might be described as the 'spirit' of the law, whereas 'tax evasion' is widely understood to mean simply not paying tax which is owed as a matter of law. From this distinction further distinctions follow. We know tax *evasion* to be morally wrong because it seems necessarily to involve dishonesty, but we tend to struggle with the idea of tax *avoidance* being morally wrong. After all, why should anyone pay more tax than they actually owe as a strict matter of law?

Likewise we have no doubt that tax evasion should be combated by the enforcement of the law by the relevant authorities, whereas we are not so sure about tax avoidance. Perhaps, being 'legal', it should not be combated at all. How, after all, do we determine the 'spirit' of the law, if not by

reference to the ‘letter’ of the law? Who is to say whether a tax result is outside the ‘spirit’ of the law? Is there not a concern that anti-avoidance measures are at their very mildest a potential contravention of the (business-critical) principle of legal certainty, and at their worst a contravention of the taxpayer’s property rights? And how, if tax avoidance is unacceptable, is it to be distinguished from routine tax planning?

These sorts of difficulties have not yet arisen in the development arena because much of the work has so far been about measuring the scale of the problem, and persuading governments and companies that it needs addressing. But eventually, if the corporate profit element of untaxed financial flows out of developing countries is to be staunched, then legal or quasi-legal analyses of the underlying mischief will need to be arrived at.

I say ‘legal or quasi-legal’ because there are currently two emerging solution paradigms. On the one hand, work of various kinds is being undertaken to explore whether there are international legal solutions to the problem,¹ and at the same time, work is being undertaken to explore whether multinational companies can address the problem themselves as a matter of corporate responsibility.²

This paper is therefore in two parts, with a view to providing legal definitional input in respect of both paradigms.

1. In the first part, this paper examines the specific kinds of activity on the part of multinational corporate groups which are thought to underlie the corporate profits element of illicit financial flows out of developing countries, with a view to defining that activity for the purposes of possible international enforcement measures. In summary, it seeks to sidestep unhelpful distinctions between tax planning, tax avoidance and tax evasion, and propounds instead a conception of tax behaviour by multinational countries which may be identified as ‘abusive’ specifically in the context of vulnerable jurisdictions.

1 See, for example: http://eurodad.org/wp-content/uploads/2012/09/Submission-TAXUD-Discussion-Paper_FINAL1.pdf.

2 See, for example: www.ibis.dk/dokumenter/ibisdoc366_a_brief_on_tax_and_corporate_responsibility_june_2012.pdf.

2. In the second part, this paper explores how legal concepts from outside the ordinary scope of tax law could assist in providing a theoretical basis for less abusive tax behaviour by multinational corporate groups in the developing world, so that standards of corporate responsibility in this area can be defined and implemented.

This paper is concerned with how the ambits of abusive and non-abusive tax behaviour by multinational corporate groups operating in the developing world can be defined in legal or quasi-legal terms for the purpose of staunching the flow of untaxed corporate profits out of some of the world's poorest countries and into the hands of the asset-owning classes of the developed world.

It therefore takes as axiomatic that companies should be paying their fair share of tax in these jurisdictions. Accordingly, it does not address either (i) the proposition that tax avoidance and evasion may be defended on the basis of democratic or governance shortcomings on the part of the taxing jurisdiction, or (ii) the oft-encountered but undiminishingly startling proposition that companies are entitled to profit from their trading activities without suffering tax because they are, in contrast to their attitude to their own tax liabilities, assiduous collectors of employment and sales taxes from local populations.

Part 1: defining abusive tax conduct by multinationals in the developing world

THE NATURE OF A TRADING DEDUCTION AS A VEHICLE FOR TAXPAYER AGGRESSION

As noted above, we are to a large extent concerned with tax reduction strategies which rely on cross-border intra-group transactions, and before examining these strategies in detail it is worth considering the underlying mechanism by which they reduce tax, which is the trading deduction.

Tax on trading activity is generally charged in respect of 'profit'. A taxable profit is not the same as a taxable receipt. You cannot point to a cash receipt of a trading entity and say 'there is the profit – that is what is charged to tax'. This is because 'profit' is a computational artefact rather than actual money. It is (broadly speaking) receipts less expenses, over a specified period of time.

Since expenses are subtracted from receipts, a company can reduce its profits by the simple expedient of spending money. Likewise, if the recipient of the expenditure is a group company in a different jurisdiction, then a corporate group can reduce its profits in one jurisdiction and increase them in another – so that overall profitability remains the same but the profit is moved to a different jurisdiction (perhaps one with a lower tax rate) – by the simple expedient of cross-border expenditure between group companies.

Of course, there are rules which govern the extent to which expenditure carries through to a computation of *taxable* profit. Most tax systems generally only allow certain deductions and disallow others. In particular, tax systems generally only allow deductions for tax purposes where the expenditure is for the purpose of the trade. Tax systems also generally require that intra-group transactions, and particularly cross-border ones, are priced on an arm's length basis for tax purposes.

But the disallowance of a deduction for tax purposes does not affect the reality that the company's actual profit is reduced by that expenditure. Likewise, if the amount of a deduction is reduced by application of transfer pricing rules because the expenditure exceeded that which would be payable had the transaction been priced in accordance with the arm's length principle, that adjustment does not affect the fact that the company's actual profit is reduced by the amount of the actual expenditure. These rules only apply to increase *taxable* profit, and an accountant would view *taxable* profit as a quite artificial construct derived from the application of tax rules to the *actual* profit.

This puts traders in a different position from other categories of taxpayer. An employee or an investor is not really in a position to take a lower figure than gross salary or gross interest or a gross dividend as a starting point for a tax computation. A trader, by contrast (and in particular a trading member of a multinational corporate group), is in a position to engineer an aggressively reduced profitability as the *starting point* for a tax computation.

While as a matter of strict law the burden of proof might remain with the trader to substantiate his tax computations upon adverse assessment by the tax authority, the practical reality is that in these circumstances it is up to the tax authority to identify sums which should be taxed as profit even though

they are simply not there as actual profit in the accounts of the taxpayer. An under-resourced developing world tax authority, or a developing world tax authority without political support as regards the taxation of multinational corporate groups, may well never do this.

This being the case there may be little to be gained scratching one's head over the question whether aggressive tax behaviour of this kind by a trading member of a multinational corporate group constitutes avoidance or evasion. Avoidance and evasion are distinguished by reference to the relationship between the taxpayer behaviour and tax law. If a company reports an aggressively reduced profitability in circumstances where it does not anticipate challenge by the tax authority it may to some extent be neither here nor there whether challenge by the tax authority would be on an anti-avoidance or an anti-evasion basis.

It may be that there is a rule disallowing a deduction altogether, or disallowing it in part, or perhaps a deduction should be adjusted downwards on the basis of the arm's length pricing principle. But if none of these things is in practice going to happen then the taxpayer aggression takes place on a different level from the level of what does, or does not, succeed as a matter of law. In either case the same fiscal mischief eventuates, and in either case it is by virtue of the same underlying species of taxpayer behaviour.

THE 'TAX-EFFICIENT SUPPLY CHAIN MANAGEMENT' ('TESCM') MODEL

The position is further complicated by the existence of a general model of multi-entity multijurisdiction enterprise structure which may inform and legitimise what would otherwise appear to be pure taxpayer aggression along the lines described above. In very simple terms, the model works like this.

The processes involved in a business can be treated as separable into low-value elements like making stuff and selling it, and high-value elements like entrepreneurial activity and intellectual property. In a multinational group the low-value elements tend to be distributed among operating companies in jurisdictions where there is labour (to do the making of stuff) and/or a market (to sell the stuff into), and the high-value elements are concentrated into what one might describe as 'hub' companies. The operating companies which do the low-value making and/or selling generally have to pay the hub

companies for the high-value elements of the overall operation in the form of management fees, royalties etc.

These intra-group transactions have the consequence that the profitability of the overall operation arises in the hub where the value would be said to be generated, rather than in the operating company which just does the low-value making and/or selling. Of course, the operating companies tend to be in jurisdictions with large populations and relatively high tax rates, and the hub companies can be located in jurisdictions where their activities suffer low levels of tax. And so the other consequence of this model, alongside appropriately rewarding the entities in the group for the value they are perceived to add to the supply chain, is that the overall profitability of the business is taken out of jurisdictions where people live and work and buy things, and transferred into tax havens.

On the basis of the foregoing model, the untaxed flow of profits out of developing countries could be taking place on the basis of perfectly defensible pricing. We must therefore be wary of defining the problem as ‘transfer mispricing’. By the same token, we must be equally wary of the suggestion that the solution lies in bolstering the transfer pricing capabilities of developing world tax authorities.³ It is difficult to be comfortable with the idea of funds which have been allocated for development being spent on promulgating the foregoing model, particularly when the organisations providing the transfer pricing training are likely to be the same ‘big four’ professional services networks who market the application of this model (often under the rubric ‘Tax-Efficient Supply Chain Management’ or ‘TESCM’) as a *product*, to multinational corporate groups.⁴

THE EXAMPLE OF **SABMILLER**: AGGRESSIVE **TESCM** IN ACTION

There is a company in Ghana called Accra Brewery Company Ltd which is a member of the multinational group of companies ultimately owned by UK FTSE100 company SABMiller plc. Ghana is a very poor country with a large population and a chronically underfunded public sector. SABMiller

3 See, for example, PwC’s recommendations at: http://ec.europa.eu/taxation_customs/resources/documents/common/publications/studies/transfer_pricing_dev_countries.pdf.

4 See, for example, www.kpmg.com/uk/en/whatwedo/tax/corporatetax/pages/taxefficientsupplychainmanagementtescm.aspx.

is a successful global business. Accra Brewery Company Ltd has a history of apparent unprofitability for Ghanaian tax purposes, notwithstanding its high-volume trade of brewing and selling popular beer brands, and in 2010 it was the subject of a detailed investigation into its tax affairs by development NGO ActionAid.

ActionAid's findings are set out in its report 'Calling Time', which is available, in a form updated to April 2012, on its website.⁵ 'Calling Time' contrasts Accra Brewery Company Ltd's tax profile with that of a local stallholder called Marta:

'SABMiller subsidiary Accra Brewery is Ghana's second-biggest beer producer, pumping out £29 million (Gh¢69 million) of beer a year, and rising. Yet in the past two years it has made a loss, and it paid corporation tax in only one of the four years from 2007-10.

"Wow. I don't believe it," says Marta Luttgrodt on hearing this. Marta sells SABMiller's Club beer at her small beer and food stall, in the shadow of the brewery in which it is made, for 90p (Gh¢2) a bottle. She and her three employees work hard for this success, preparing food from 6.30am every day, and finishing at 8pm.

Marta's business makes a profit of around £220 (Gh¢500) per month. As a taxpayer she must obtain and keep two income tax stamps as proof that she has paid fixed fees of £11 (Gh¢25) per year to the Accra Municipal Authority, and £9 (Gh¢20) per quarter to the Ghana Revenue Authority. Marta's tax payments may seem small in absolute terms, but astonishingly she has paid more income tax in the past two years than her neighbour and supplier, which is part of a multi-billion pound global business.'

ActionAid identifies four strategies whereby Accra Brewery Company Ltd manages to pay less tax on its profits than its neighbour Marta. These strategies were subsequently commented on by Roberto Schatan, former senior adviser at the OECD's Centre for Tax Policy and Administration, in the journal *Tax Notes International*.⁶

5 See: www.actionaid.org.uk/doc_lib/calling_time_on_tax_avoidance.pdf.

6 Roberto Schatan, 'Tax-Minimizing Strategies and the Arm's-Length Principle', *Tax Notes International*, (9 January 2012), p 121

None of the strategies will come as any surprise to anyone who is familiar with group tax planning by multinational groups. Indeed, three of them appear to correspond to the three most important tools for shifting profits out of the tax net of an operating company's jurisdiction, as identified in the World Bank's 2012 report on illicit financial flows, those three tools being transfer mispricing, the offshoring of intangible assets, and thin capitalisation.⁷ I describe them below, summarise Roberto Schatan's commentary, and add some thoughts of my own.

'THE SWISS ROLE'

In total, 4.6 per cent of Accra Brewery Company Ltd's turnover is paid to a company called Bevman Services AG (which resides in the Swiss canton of Zug), purportedly as a fee in respect of management services. According to ActionAid, 'SABMiller told us that the management fees to Bevman are "in respect of a variety of services" including "financial consulting", "personnel strategy", "business advisory services", "marketing" and "technical services"'.

This is precisely the kind of thing one might expect to see where the TESCM model (as described above) has been implemented. The high-value activities are concentrated in hubs (in this case in a Zug-resident hub) and the profitability of the operating companies is reduced by means of fees in respect of the services provided by the hub. Provided that those fees are correctly priced this should be perfectly legitimate. Roberto Schatan observes, however, that: 'Accra Brewery has a long tradition and presence in the domestic market, well before it was acquired by SABMiller. This means that the local management team has likely developed a significant entrepreneurial know-how, with the ability to run their day-to-day business quite autonomously'.

This being the case, one might imagine that the company would struggle to justify spending as much as 4.6 per cent of its turnover on management fees. The reality on the ground, however, turned out to be not so much a matter of mispricing and more a matter of total inconsistency with the TESCM ideal. ActionAid report as follows:

7 'Tax Evasion and Tax Avoidance: The Role of International Profit Shifting', Clemens Fuest and Nadine Riedel in *Draining Development? Controlling Flows of Illicit Funds from Developing Countries* (Peter Reuter (ed), Washington, DC, 2012), p 126.

‘We visited Accra Brewery and spoke to staff working in corporate affairs, procurement, supply chain, human resources and technical services. None was aware of any Swiss involvement in the running of the firm. ActionAid looked into SABMiller’s office in Zug, which is the registered address of Bevman Services AG. When we telephoned, the switchboard operator had never heard of a company by the name of Bevman. An ActionAid employee then visited the office, ostensibly enquiring about employment opportunities in international human resources and marketing. “We don’t do that kind of thing here; we’re just the European head office,” said a staff member.’

‘The fact that those interviewed by ActionAid in the management team of Accra Brewery were not aware that they were being managed from Switzerland,’ observes Roberto Schatan, ‘is not an encouraging sign’. Indeed so inconsistent are ActionAid’s findings with the positive principles underlying TЕСSM, that Schatan raises the possibility that these management fees are simply not deductible against taxable profits at all, by virtue of not having been incurred for the purpose of the business.

Perhaps the best way to understand how this can happen in an organisation like SABMiller, which prides itself on its corporate responsibility, is to characterise TЕСSM as an *ideology* which drives the thinking of those who implement it. In other words, perhaps the management fees are tax-deductible in the minds of the people who file Accra Brewery Company Ltd’s tax returns because TЕСSM says they should be, rather than because those people genuinely consider that Accra Brewery Company Ltd, when it contracts to pay those fees, is actually incurring expenditure for business purposes on correctly priced services.

‘GOING DUTCH’

Owing to the favourable tax treatment of royalty income in the Netherlands, and the jurisdiction’s extensive tax treaty network, Netherlands-resident companies are a mainstay of international tax planning in respect of brands. Sure enough, ActionAid found that Accra Brewery Company Ltd deducts against its taxable profits royalties payable to a Rotterdam-based group company for the rights to use the brands under which it sells beer.

As Roberto Schatan observes, there is nothing wrong with this provided the royalties are correctly priced. ActionAid point out, however, that some of the brands are African, and indeed one of them, Stone Strong Lager, is advertised on the SABMiller website as having its origin in Ghana itself.⁸ This, too, may be perfectly legitimate, provided the Ghanaian company which developed the brand (presumably Accra Brewery Company Ltd) was paid an arm's length price for it. Under these circumstances, as Roberto Schatan explains, the up-front taxable receipt may be expected to be broadly in line with the net present value of the future deductible royalty stream, so that no overall tax advantage is obtained.

It is not known whether the Ghanaian originator of the Stone Strong Lager brand was paid an arm's length price for the transfer of it out of Ghana. It may have been. But if it was not (and let us assume for the sake of this discussion that it was not), then 'going Dutch' is on one level a simple example of transfer mispricing. It is not, however, a matter of obtaining an inflated deduction. It is a matter of setting up a permanent legitimate deduction by means of a single questionable prior transaction.

We noted above how a tax authority in a developing country may not have the resources to mount a counter-attack against aggressive tax behaviour, but in this example (again assuming that the transfer of the intellectual property out of Ghana was at a below-arm's-length price) it is worse than that. The fiscal damage to Ghana is permanent, ongoing and legally defensible, because of a single prior transaction which its tax authority failed to challenge.

Interestingly, while 'going Dutch' could be fiscally benign depending on the terms of the prior transaction, it is the strategy of SABMiller's which, in my informal discussions with corporate responsibility professionals, has proved to be the one most often seen as self-evidently morally unacceptable irrespective of the legal analysis. It just seems to most people to be *wrong* to move a brand of Ghanaian origin to the Netherlands and make the Ghanaian company pay tax-deductible intra-group royalties for its use.

8 See: www.sabmiller.com/index.asp?pageid=1603.

‘THINNING ON TOP’

ActionAid found that Accra Brewery Company Ltd owed money to a group company in Mauritius in an amount exceeding its equity capital by a factor of seven. In other words, Accra Brewery Company Ltd was ‘thinly capitalised’ and therefore making interest payments on debt exceeding amounts it would be able to borrow on the open market if it were a standalone company.

While this could be treated as a particular kind of transfer mispricing, many tax systems have special rules restricting the deductibility of interest for tax purposes in circumstances where the borrower is thinly capitalised, and Ghana’s is one such system.

Ghana’s ‘thin cap’ rule notwithstanding, ActionAid found that Accra Brewery Company Ltd was deducting the entirety of its intra-group interest payments from its taxable profits, and Roberto Schatan (citing the relevant section in Ghana’s tax code) describes this as ‘clearly contrary to Ghana’s anti-avoidance legislation’.

THE LEGAL DEFINITIONAL PROBLEM IN VIEW OF THE FOREGOING EXAMPLES

The foregoing strategies for tax-free profit extraction have several features in common:

1. they are consistent with the ‘Tax-Efficient Supply Chain Management’ model;
2. they each rely on an intra-group transaction with a sibling company in a low-tax jurisdiction (or a jurisdiction which is effectively a low-tax jurisdiction for that category of transaction);
3. the actual mechanism by which cash is extracted from the relevant jurisdiction is by payments under that transaction, and those payments take effect as a deduction against trading profits for accounting purposes; and
4. that deduction is treated as allowable for local tax purposes whether or not it is in self-evident contravention of local tax laws.

It is really only at point 4 where the much traversed legal definitional questions surrounding what constitutes tax avoidance (and how it is to be distinguished from planning on the one hand and evasion on the other) arise. At that point it is possible to say that ‘going Dutch’ looks like legitimate planning, except to the extent that an arm’s length price was not paid for the prior transfer of the brand out of Ghana, and ‘thinning on top’ looks like tax evasion, in the sense that taxable profits were being self-evidently misreported in plain contravention of local anti-avoidance law. In between lies ‘the Swiss role’ which (leaving aside for the moment the argument that the management fee is not deductible for tax purposes at all) looks like transfer mispricing and may therefore be characterised as a species of tax avoidance, in the sense that the tax analysis is valid in principle but on closer inspection the reality does not live up to it.

As at point 4, it is therefore possible to say that the amount of tax lost through ‘thinning on top’ could be reduced by better enforcement of Ghana’s ‘thin cap’ rules; the amount of tax lost through ‘the Swiss role’ could be reduced by better enforcement of Ghana’s transfer pricing rules; and ‘going Dutch’ we just have to let go on the basis that the Ghanaian tax authority is probably out of time to challenge the pricing of the original disposal of the brand.

I can’t help feeling, however, that taking point 4 as the starting point for defining the problem is a mistake. In effect the damage is already done by that stage and the local tax authority is, on a fiscal level, firefighting. In my view it probably makes more sense to define the problem in terms of the complete picture, starting at the top, at point 1 above, with the TESCM model.

As noted above with reference to ‘the Swiss role’, the TESCM model is probably best understood as an ideology, and it is that ideology that appears to be driving the untaxed financial flows from developing countries that we are concerned about, irrespective of whether those flows present to a tax lawyer as aggressive planning, avoidance, or evasion. TESCM appears to be able to drive the conduct of those who implement it, even where it produces results:

- (i) which are illegal, as in ‘thinning on top’;

- (ii) which run counter to reality, as in ‘the Swiss role’; or
- (iii) which people appear to feel are morally wrong in any event, as in ‘going Dutch’.

Because TESCM is an ideology rather than a category of transactions, it cannot simply be outlawed. Transactions of the kind identified at point 2 above, ie, intra-group transactions with a sibling company in a low-tax jurisdiction, could be perfectly legitimate. But I think it is fair to say that transactions of the kind identified at point 2 above may be *presumed* to be entered into in pursuance of TESCM unless the contrary is demonstrated.

If a definition of the problem is to be arrived at which addresses the underlying driver rather than the compliance-level outcomes, I therefore suspect that it will have to rely on a rebuttable presumption as to the purpose of the transactions that it identifies, rather than a simple defined category of transactions. If that presumption is not rebutted, however, a problem transaction will have been identified. Since it is only at point 4 that we get to draw distinctions between planning, avoidance and evasion, it seems to me that a separate label, independent of those distinctions, is required for the category of activity identified by reference to points 1 and 2 above. I suggest the term ‘abuse’.

THE UTILITY OF A DEVELOPMENT-SPECIFIC DEFINITION OF ABUSIVE TAX BEHAVIOUR

There is a debate to be had about whether transactions of the kind entered into at point 2 in pursuance of the ideology identified at 1 are ‘abusive’ or merely ‘potentially abusive’, and it is in view of that debate that the development context comes to the fore. The real significance of point 4 – ie, that the deduction is treated as allowable for local tax purposes whether or not it is in contravention of local tax laws – is not that it gives rise to a definitional debate about whether we are dealing with avoidance or evasion. The real significance of point 4 is that those who deploy TESCM in certain jurisdictions in the developing world do not appear themselves to care whether what they are doing is avoidance or evasion, because the local tax authority is too under-resourced (or does not have the necessary internal political support) to do anything about it either way.

In many jurisdictions point 4 would look very different, because of the scale and clout of the tax authority. This is not just the traditional advanced economies we are talking about; some countries which are way down the rankings in terms of *per capita* GDP are extremely good at collecting tax from local members of multinational corporate groups. Brazil, for example, is notoriously hot on transfer pricing. In these jurisdictions intra-group transactions with sibling companies in low-tax jurisdictions in pursuance of the TESCO model may be treated as merely ‘potentially’ abusive, and the abuse may be tackled on a compliance level in the ordinary way.

In the case of particularly vulnerable jurisdictions, however, where the enforcement piece cannot be relied on, it is clearly and unqualifiedly abusive (rather than merely potentially so) to deploy TESCO to one’s heart’s content, and then self-assess as if accounting deductions were the end of the story for local tax purposes. It seems to me therefore that the ‘definitional dilemma’ as between tax avoidance and tax evasion can in effect be sidestepped altogether in the context of a development-specific definition of tax abuse which only applies with reference to an evidence-based list of specified vulnerable jurisdictions.

The utility of that list would go beyond this context of tax reduction strategies which rely on cross-border intra-group transactions. There are a number of categories of behaviour which I think are not generally considered to be morally wrong, but which should perhaps be treated as ‘abusive’ in the context of vulnerable jurisdictions like Ghana. Lobbying for tax holidays is an obvious example.

CONCLUSION

In view of the foregoing I suggest that an evidence-based list be drawn up of specific countries which are particularly vulnerable to abusive tax behaviour by multinational corporate groups. Abusive tax behaviour can be defined by reference to conduct in those countries, rather than requiring to conform to a universally applicable conception of what constitutes tax avoidance and/or tax evasion.

As regards the definition of abusive tax behaviour insofar as that definition is intended to address cross-border intra-group transactions, I suggest that intra-group transactions between:

- (a) companies resident in vulnerable jurisdictions; and
- (b) companies resident in low-tax jurisdictions (which shall be defined to include jurisdictions which are low-tax jurisdictions for the purposes of the transaction in question);

shall be treated as presumptively abusive unless it can be shown that those transactions have a bona fide commercial rationale from the perspective of the taxpayer company itself that distinguishes them from transactions which might have been entered into for the overall benefit of the group in pursuance of the TЕСM model.

It should be emphasised that this definition would supplement the ordinary conceptions of avoidance and evasion rather than replace them, so as to address head-on the widespread problem of tax-driven transactions which take effect by means of deductions against trading profits. There are of course many other forms of abusive tax conduct which it does not address, for example structured transactions which serve to avoid withholding tax on dividends, or planning in respect of the turnover taxes which often apply in the extractive industries sector.

Part 2: codifying better tax conduct by multinationals in the developing world

THE PROBLEM OF TAX AS A CORPORATE RESPONSIBILITY ISSUE

In some respects tax is seen as a new corporate responsibility battleground, broadly analogous to the environmental issues which have dominated the corporate responsibility agenda for decades. There is a key difference, however, which is that companies are not trying to destroy the environment as much as possible, whereas they are trying to pay as little tax as possible.

People who are manufacturing something can realistically be asked to develop processes which give rise to less pollution, because the pollution is not the objective of the manufacturing process; it is a side effect. It is a

very different matter trying to persuade a multinational corporate group to pay more tax. The group tax function's job is to minimise the tax payable globally out of the group's overall profits, as if it were a cost to the business like any other, and it is not realistic to suggest that they invert their job descriptions and strive instead to pay as much tax as possible (or that they carry on doing their jobs, only not so well as before).

What is required therefore is a plausible definable objective which will assist companies in identifying the right amount of tax, as opposed to either a minimum amount of tax, or a maximum amount of tax – an ideology which pulls in the opposite direction to TЕСM, but which only pulls to a definable point and no further. If instructed to do so, a group tax function could pursue that objective with the same assiduousness that it currently pursues the objective of minimising tax.

PRICING IN GOOD FAITH

In a sense, the opposite ideology to TЕСM would be an ideology which attaches the maximum possible value to the labour of the workers in real jurisdictions where group companies make and sell stuff, and the minimum possible value to the fixed capital and *soi-disant* entrepreneurship located offshore, although this seems a little too much to hope for. What does not seem too much to hope for, however, is that intra-group transactions between companies in vulnerable jurisdictions and companies in low-tax jurisdictions be priced in good faith, rather than in deliberate and often counter-factual pursuance of an ideology which attaches minimum value to onshore activities.

In order to add weight to the pull against the TЕСM ideology, that exercise of pricing in good faith could be characterised as requiring to be conducted with the *utmost* good faith. 'Utmost good faith' (or, to give it the Latin name under which the concept is often to be found, '*uberrima fides*'), is a concept encountered in the law of insurance contracts in common law jurisdictions. It refers to the obligation on the part of the insured to disclose anything material to the risk the insurer is taking on. Of course, if the insured discloses something which makes the risk more likely to eventuate, the insurance premium will be higher, and so the disclosure obligation runs counter to the insured's immediate commercial interests.

Utmost good faith in disclosure for the purpose of insurance contracts is by no means directly analogous to the task of pricing intra-group transactions, but it illustrates how commercial parties which ordinarily act in their own interests can have defined obligations to act contrary to those interests, and can realistically be expected to act in accordance with those obligations. A company which deploys TESCO aggressively against jurisdictions like Brazil and the UK with the prospect of a transfer pricing tussle if they go too far could nonetheless undertake to price intra-group transactions between companies in low-tax jurisdictions and companies in vulnerable jurisdictions like Ghana with the utmost good faith.

How this ‘utmost good faith’ would work in practice is that the local tax function (in addition to actually having regard to local tax laws) would itself take the contrary position in relation to its intra-group pricing rather than waiting indefinitely for the local tax authority to do so. It would proactively adjust intra-group pricing for tax purposes, having regard to (for example) the fact that a low-tax jurisdiction management hub does not actually have any management staff on its payroll, or the fact that a low-tax jurisdiction brand hub did not pay full market value for a brand on which the vulnerable jurisdiction company is now paying royalties. This ‘utmost good faith’ would go beyond existing requirements to take these factors into account; it would mean taking into account to the fullest possible extent their adverse effect on the tax advantages that TESCO brings.

TREATING TAX AS SUBJECT TO PRINCIPLES OF EQUITY OR FAIRNESS

The remainder of this paper considers the application of principles of equity to tax law, and proposes that equity (or ‘fairness’) could form the basis of a voluntarily less abusive approach to tax compliance in the developing world by multinational corporate groups.

Bodies of law generally build up around asymmetric relationships – landlord and tenant, employer and employee, borrower and lender, insurer and insured – and the relationship of taxpayer and the state is likewise asymmetric. It is this asymmetry which no doubt underlies the principle in UK tax law to the effect that ‘there is no equity about a tax’.⁹ The point is

⁹ See *Cape Brandy Syndicate v IRC* 12 TC 358.

that the state may only expropriate funds from subjects on the basis of clear statutory language, and there is no room for any kind of enquiry as to what the state might have been trying to achieve with the statutory language.

‘Equity’ means fairness, and the reason such a (forbidden) enquiry might be characterised as ‘equitable’ is because it might be characterised as an enquiry as to what is fair between taxpayer and state. There is no such notion of fairness, says the principle; the state is the party wielding the power in the taxpayer/state relationship and it must therefore be restricted to taking only what is clearly expressed to be its portion in the legislation.

Notwithstanding this principle, a body of law has developed in the UK which runs counter to it, that body of law being generally known as the *Ramsay* principle, after a case of that name.¹⁰ The *Ramsay* principle is a judge-made anti-avoidance principle which has run through a number of more or less unhelpful (if authoritative) judicial elaborations before settling (it is to be hoped) under a formulation along the following lines: the court is to apply law construed purposively to transactions understood realistically.¹¹ The *Ramsay* principle is not considered to be a principle of equity, perhaps because of the perception that ‘there is no equity about a tax’, but it can very much be viewed as one, because of its relationship with another strand of UK judicial thinking about tax, which one finds predominantly in tax cases which are *not* to do with avoidance.

That other principle is perhaps most startlingly illustrated in a case called *Mallalieu v Drummond*,¹² which was about the deductibility of the maintenance costs of a barrister’s professional wardrobe against her fee income. The judgment of the House of Lords in that case was given by Lord Brightman, who also gave the judgment in a tax-avoidance case from around the same time called *Furniss v Dawson*¹³ (generally considered to be the high-water mark of the *Ramsay* principle). The question in *Mallalieu v Drummond* was whether the wardrobe expenditure fell foul of the exclusion in respect of non-trading expenditure, but the way in which Lord Brightman characterised it was as follows:

10 See *WT Ramsay Ltd v IRC* [1982] AC 300.

11 See *Barclays Mercantile Business Finance v Mawson* [2005] 1 AC 684.

12 [1983] STC 665.

13 [1984] STC 153.

‘Before I seek to examine the conclusions reached by the High Court and the Court of Appeal, I return to my opening observations that the issue involved in this appeal has inevitably opened up a far wider and more fundamental point, namely the right of any self-employed person to maintain, at the expense of his gross income and therefore partly at the expense of the general body of taxpayers, a wardrobe of every-day clothes which are reserved for work.’

In other words, the question was, in Lord Brightman’s mind, a question of whether the deduction was fair on other taxpayers. It was a question, to put it another way, of equity. The relationship between taxpayer and the state may be asymmetric but the relationship between taxpayer and taxpayer is not, and a symmetrical relationship easily admits of fairness as a guiding principle.

By the same token a judicial *anti-avoidance* principle may be understood as a principle of equity if it is considered unfair (or inequitable) for one taxpayer to suffer tax in circumstances where another taxpayer has avoided it by means of a ruse or a stratagem. The way to enforce equity in those circumstances is to rule the ruse or stratagem ineffective, which is what the *Ramsay* principle does.

The *Ramsay* principle is often derided by UK tax practitioners as a mere ‘smell test’ masquerading as a judicial principle, but where courts have a tradition of enforcing equity in a private law context they often apply something which is, in effect, a ‘smell test’ going by a less pejorative rubric. That ‘smell test’ is the question of whether the defendant’s conscience should have been affected in the facts of the case; whether his or her conduct was ‘unconscionable’.¹⁴ It is that idea of *conscience* that the maxim ‘there is no equity about a tax’ really rules out in tax law; the idea that a taxpayer should *feel bad* about avoiding tax.

In a recent case where the Court of Appeal declined to apply the *Ramsay* principle,¹⁵ the judges were nonetheless clearly outraged at the consequent unfairness to other taxpayers. Lord Justice Thomas, in reluctantly siding with the taxpayer, said: ‘The higher-rate taxpayers with large earnings or significant investment income who have taken advantage of the scheme have

14 See, for example, *Twinssectra Ltd v Yardley* [2002] 2 AC 164.

15 See *Mayer v Revenue and Customs Commissioners* [2011] STC 1269.

received benefits that cannot possibly have been intended and which must be paid for by other taxpayers’.

Likewise Toulson LJ expressed his ‘reluctant concurrence in a result which instinctively seems wrong, because it bears no relation to commercial reality and results in a windfall which Parliament cannot have foreseen or intended’. This suggests to me that, if the *Ramsay* principle were re-characterised as an equitable principle, and one that is unashamed of resting on a judicial ‘smell test’, it would not be at all difficult for judges to know when to apply it, and it would have applied in that case. This is because fairness (the protestations of tax practitioners notwithstanding) *is* a concept which can be brought to bear in a tax context. Those who profit from the tax avoidance industry may believe that their clients should not *feel bad* about avoiding tax, but much of the rest of the world (including, so it would appear, the bench of the UK Court of Appeal), disagrees.

If a multinational corporate group decides that, as a matter of corporate responsibility, it is going to voluntarily *feel bad* about avoiding tax in fiscally vulnerable jurisdictions, the way for it to make sure it is approaching its tax liabilities equitably might be to compare itself with a hypothetical taxpayer in the same jurisdiction operating the same kind of trade, but without the benefit of sibling hub companies. Taking into account for tax purposes only the deductions that would be available to that comparator company, in the amounts that would be paid by that comparator company, should result in an equitable amount of tax paid.

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1 October 2012

Appendix F: Definitions of secrecy jurisdictions

There is a lack of definitional agreement among experts about terms such as ‘tax havens’, ‘international financial centres’ and ‘secrecy jurisdictions’.

- The concept of the tax haven generally focuses on types of taxation within a country. The country in question might not levy any income tax, have low levels of taxation, practise ‘ring fencing’ (where domestic income is taxed and foreign income is not) or legislate tax privileges in relation to particular types of corporate structures.¹⁶
- International financial centres are generally characterised by a regulatory environment with little information disclosure or supervision of business activities, and laws imposing very low or no taxation.¹⁷
- The concept of the secrecy jurisdiction, however, focuses on legal constructs as the crux of financial advantage.¹⁸ The laws and regulations of a secrecy jurisdiction are predicated on establishing secrecy, manifested in ‘transactional opacity’, which allows non-residents to conduct financial matters behind a closed curtain. Secrecy jurisdictions come in many forms: countries, principalities, protectorates, dependencies, or subnational states. However, no matter the form, secrecy jurisdictions have the power to create laws and regulations that have effect outside their own geographical boundaries.¹⁹

The following table provides further information about the characteristics of these different jurisdictions.

16 Cobham, ‘Tax Havens and Illicit Flows’ (World Bank, 2012) in *Draining Development? Controlling Flows of Illicit Funds from Developing Countries*, 340, available online at: www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/02/16/000333037_20120216001849/Rendered/PDF/668150PUB0EPI0067848B09780821388693.pdf.

17 *Ibid* 342.

18 *Ibid* 342–343.

19 See Murphy (n 1) 4–5.

Model	Tax haven	International financial centre	Secrecy jurisdiction
Focus	Favourable tax regimes for foreign-held assets	Friendly, 'hands-off' approach toward non-residents and their assets	Laws and regulatory regimes which keep financial transactions secret from the asset holder's home jurisdiction
General characteristics	<p>A tax haven might:</p> <ul style="list-style-type: none"> • Levy no income tax • Have low levels of taxation for foreign-held assets • Practice 'ring fencing' (where domestic income is taxed and foreign income is not) • Legislate tax privileges in relation to particular types of corporate structures 	<p>An international financial centre generally:</p> <ul style="list-style-type: none"> • Leaves international finance unregulated • Directs its business orientation principally toward non-residents • Requires very little information disclosure or supervision of business activities • Imposes very low or no taxation 	<p>A secrecy jurisdiction:</p> <ul style="list-style-type: none"> • Passes laws/regulations aimed at protecting identities of asset holders and other information relevant to finances • Creates 'transactional opacity' by establishing complex legal/regulatory schemes which protect information behind many legally impenetrable walls • Allows non-residents to use the law of the secrecy jurisdiction to avoid legal obligations in home jurisdictions

<p>Definitional issues</p>	<p>Often the term ‘tax haven’ is seen not as a singular broad concept, but as an umbrella concept, which can be broken down into four types:</p> <ul style="list-style-type: none"> • <u>Production havens</u> (Using low tax rates to entice foreign investors to produce goods/services in the haven) • <u>Headquarters havens</u> (Incorporation benefits entice companies to incorporate in the haven, even when shareholding is somewhere else) • <u>Sham havens</u> (Foreign investors benefit from little or no tax on profits earned in the haven, and are able to keep funds safe from shareholders’ home taxation schemes. The sham haven is also host to an offshore financial centre – see relevant portion of this table – that provides banking and insurance products for those same foreign investors) • <u>Secrecy havens</u> (See ‘secrecy jurisdictions’ description in this table) 	<p>Some say that international financial centres are purer forms of tax havens.</p> <p>Others say that international financial centres are facets of sham havens.</p> <p>Additionally, some scholars discuss the rise of the <u>midshore financial centre</u> (incorporates elements of ‘onshore’, such as strong legal systems and double taxation treaties with many states, with ‘offshore’ traits like low taxes and secrecy regimes).</p>	<p>Secrecy jurisdictions are sometimes seen as a subtype of tax havens, as described in this table.</p> <p>Alternatively, some scholars use the terms ‘tax haven’ and ‘secrecy jurisdiction’ interchangeably.</p>
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Appendix G: Key UN Declarations on poverty and human rights

Vienna Declaration and Programme of Action on Human Rights

At the 1993 Vienna World Conference on Human Rights, the final declaration included the following statements making the linkages between poverty and human rights:

The existence of widespread extreme poverty inhibits the full and effective enjoyment of human rights; its immediate alleviation and eventual elimination must remain a high priority for the international community.

The World Conference on Human Rights affirms that extreme poverty and social exclusion constitute a violation of human dignity and that urgent steps are necessary to achieve better knowledge of extreme poverty and its causes, including those related to the problem of development, in order to promote the human rights of the poorest, and to put an end to extreme poverty and social exclusion and to promote the enjoyment of the fruits of social progress. It is essential for States to foster participation by the poorest people in the decision-making process by the community in which they live, the promotion of human rights and efforts to combat extreme poverty.²⁰

UN Commission on Human Rights and UN Human Rights Council

Since 2001, the UN Commission on Human Rights and its successor institution, the UN Human Rights Council, have passed a series of resolutions on human rights and extreme poverty that have helped frame the issue on a normative level, and have provided for the development of the UN Guiding Principles on Extreme Poverty and Human Rights. The initial resolution of the UN Commission on Human Rights included the following statement:

Recalling that, in accordance with the Universal Declaration of Human Rights, the International Covenants on Human Rights recognize that the ideal of free human beings enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his or her economic, social and cultural rights, as well as his or her civil and political rights,

20 Vienna Declaration and Programme of Action, UNGA/A/CONF.157/23 (25 June 1993), paras 14 and 25.

Recalling in particular that article 25 of the Universal Declaration of Human Rights stipulates that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control,

Recalling also that the eradication of widespread poverty, including its most persistent forms, and the full enjoyment of economic, social and cultural rights and civil and political rights remain interrelated goals,

...

Reaffirms that:

- (a) Extreme poverty and exclusion from society constitute a violation of human dignity and that urgent national and international action is therefore required to eliminate them;
- (b) The right to life includes within its existence in human dignity with the minimum necessities of life;
- (c) It is essential for States to foster participation by the poorest people in the decision-making process in the societies in which they live, in the realization of human rights and in efforts to combat extreme poverty and for people living in poverty and vulnerable groups to be empowered to organize themselves and to participate in all aspects of political, economic and social life, particularly the planning and implementation of policies that affect them, thus enabling them to become genuine partners in development;
- (d) The existence of widespread absolute poverty inhibits the full and effective enjoyment of human rights and renders democracy and popular participation fragile;
- (e) For peace and stability to endure, national action and international action and cooperation are required to promote a better life for all in larger freedom, a critical element of which is the eradication of poverty;

- (f) Special attention must be given to the plight of women and children, who often bear the greatest burden of extreme poverty.²¹

Subsequent resolutions²² and actions by the UN Special Rapporteur on Extreme Poverty and Human Rights have led to the development of the UN Guiding Principles on Extreme Poverty and Human Rights.

*UN Guiding Principles on Extreme Poverty and Human Rights*²³

These Guiding Principles represent the most comprehensive and recent statement of the UN system on the issue of poverty and human rights. It is therefore worth citing the preface in its entirety:

1. In a world characterized by an unprecedented level of economic development, technological means and financial resources, that millions of persons are living in extreme poverty is a moral outrage. The present Guiding Principles are premised on the understanding that eradicating extreme poverty is not only a moral duty but also a legal obligation under existing international human rights law. Thus, the norms and principles of human rights law should play a major part in tackling poverty and guiding all public policies affecting persons living in poverty.
2. Poverty is not solely an economic issue, but rather a multidimensional phenomenon that encompasses a lack of both income and the basic capabilities to live in dignity. The Committee on Economic, Social and Cultural Rights stated in 2001 that poverty was ‘a human condition characterized by the sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights’ (E/C.12/2001/10, para. 8). Extreme poverty, in turn, has been defined as ‘the combination of income poverty, human development poverty and social exclusion’ (A/HRC/7/15, para. 13),

²¹ Commission on Human Rights, res 2001/31, adopted on 23 April 2001.

²² Sub-Commission on the Promotion and Protection of Human Rights, res 2001/8, adopted on 15 August 2001; Sub-Commission on the Promotion and Protection of Human Rights, res 2006/9, adopted on 24 August 2006; Human Rights Council, res 2/2, adopted on 27 November 2006; Human Rights Council, res 7/27, adopted on 28 March 2008; Human Rights Council, res 12/19, adopted on 2 October 2009; Human Rights Council, res 15/19, adopted on 30 September 2010.

²³ United Nations Human Rights Council, ‘Guiding Principles on Extreme Poverty and Human Rights, Submitted by the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona’, (A/HRC/21/39), (18 July 2012).

where a prolonged lack of basic security affects several aspects of people's lives simultaneously, severely compromising their chances of exercising or regaining their rights in the foreseeable future (see E/CN.4/Sub.2/1996/13).

3. Poverty is an urgent human rights concern in itself. It is both a cause and a consequence of human rights violations and an enabling condition for other violations. Not only is extreme poverty characterized by multiple reinforcing violations of civil, political, economic, social and cultural rights, but persons living in poverty generally experience regular denials of their dignity and equality.
4. Persons living in poverty are confronted by the most severe obstacles – physical, economic, cultural and social – to accessing their rights and entitlements. Consequently, they experience many interrelated and mutually reinforcing deprivations – including dangerous work conditions, unsafe housing, lack of nutritious food, unequal access to justice, lack of political power and limited access to health care – that prevent them from realizing their rights and perpetuate their poverty. Persons experiencing extreme poverty live in a vicious cycle of powerlessness, stigmatization, discrimination, exclusion and material deprivation, which all mutually reinforce one another.
5. Extreme poverty is not inevitable. It is, at least in part, created, enabled and perpetuated by acts and omissions of States and other economic actors. In the past, public policies have often failed to reach persons living in extreme poverty, resulting in the transmission of poverty across generations. Structural and systemic inequalities – social, political, economic and cultural – often remain unaddressed and further entrench poverty. A lack of policy coherence at the national and international levels frequently undermines or contradicts the commitment to combat poverty.
6. That extreme poverty is not inevitable means that the tools for ending it are within reach. A human rights approach provides a framework for the long-term eradication of extreme poverty based on the recognition of persons living in extreme poverty as rights holders and agents of change.

7. A human rights approach respects the dignity and autonomy of persons living in poverty and empowers them to meaningfully and effectively participate in public life, including in the design of public policy, and to hold duty bearers accountable. The norms set out in international human rights law require that States take their international human rights obligations into account when formulating and implementing policies affecting the lives of persons living in poverty.
8. Although persons living in extreme poverty cannot simply be reduced to a list of vulnerable groups, discrimination and exclusion are among the major causes and consequences of poverty. Persons living in poverty often experience disadvantage and discrimination based on race, gender, age, ethnicity, religion, language or other status. Women frequently encounter greater challenges in accessing income, assets and services and are particularly vulnerable to extreme poverty, as are such groups as children, older persons, persons with disabilities, migrants, refugees, asylum seekers, internally displaced persons, minorities, persons living with HIV/AIDS and indigenous peoples.
9. While States are responsible for realizing human rights, other actors, including international organizations, national human rights institutions, civil society organizations and business enterprises, also have responsibilities regarding the rights of those living in poverty. States must create an enabling environment that fosters and promotes the capacity of individuals, community-based organizations, social movements and other nongovernmental organizations to combat poverty and empower persons living in poverty to claim their rights.
10. States with laws and institutions that actively include those living in extreme poverty will benefit from the social engagement and contribution of their entire populations. The international community will also benefit as more States ensure social cohesion, a better standard of living for the poorest sectors of the population and the empowerment and integration of persons living in poverty into systems of rights and obligations.

Appendix H: Multidimensional definitions of poverty

Institution	Definition
United Nations Special Rapporteur on Extreme Poverty and Human Rights	<i>Poverty</i> is not solely an economic issue, but rather a multidimensional phenomenon that encompasses a lack of both income and the basic capabilities to live in dignity.
Committee on Economic, Social and Cultural Rights	<i>Poverty</i> is a human condition characterized by the sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights. (E/C.12/2001/10, para. 8). <i>Extreme poverty</i> is the combination of income poverty, human development poverty and social exclusion (A/HRC/7/15, para. 13), where a prolonged lack of basic security affects several aspects of people's lives simultaneously, severely compromising their chances of exercising or regaining their rights in the foreseeable future (see E/CN.4/Sub.2/1996/13).
United Nations Economic and Social Council	<i>Poverty</i> is a denial of choices and opportunities, a violation of human dignity. It means lack of basic capacity to participate effectively in society. It means not having enough to feed and clothe a family, not having a school or clinic to go to, not having the land on which to grow one's food or a job to earn one's living, not having access to credit. It means insecurity, powerlessness and exclusion of individuals, households and communities. It means susceptibility to violence, and it often implies living in marginal or fragile environments, without access to clean water or sanitation.
World Bank	<i>Poverty</i> is pronounced deprivation in well-being, and comprises many dimensions. It includes low incomes and the inability to acquire the basic goods and services necessary for survival with dignity. Poverty also encompasses low levels of health and education, poor access to clean water and sanitation, inadequate physical security, lack of voice, and insufficient capacity and opportunity to better one's life.
Copenhagen Declaration	<i>Absolute poverty</i> is a condition characterized by severe deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information. It depends not only on income but also on access to social services.
Christian Aid	<i>Poverty</i> is a lack of power in four dimensions: <ul style="list-style-type: none"> • Personal power (including health, education, mental wellbeing, decent work and leisure conditions, and household relations). • Economic power (income, freedom from extreme inequality, economic security and access to or control over resources). • Social power (community wellbeing, social relations and social inclusion, environmental conditions). • Political power (political freedom, political security and active citizenship).

<p>Multidimensional Poverty Index (MPI) by Oxford Poverty & Human Development Initiative and the United Nations Development Programme</p>	<p>The MPI is calculated according to the following formula: $MPI = H \times A$, where H is the percentage of people who are MPI poor (incidence of poverty) and A is the average intensity of MPI poverty across the poor (percentage).</p> <p>The following ten binary indicators are used to calculate the MPI:</p> <p>Education (each indicator is weighted equally at 1/6)</p> <ol style="list-style-type: none"> 1. Years of schooling: deprived if no household member has completed five years of schooling 2. Child school attendance: deprived if any school-aged child is not attending school up to class 8 <p>Health (each indicator is weighted equally at 1/6)</p> <ol style="list-style-type: none"> 1. Child mortality: deprived if any child has died in the family 2. Nutrition: deprived if any adult or child for whom there is nutritional information is malnourished <p>Standard of living (each indicator is weighted equally at 1/18)</p> <ol style="list-style-type: none"> 1. Electricity: deprived if the household has no electricity 2. Sanitation: deprived if the household's sanitation facility is not improved (according to Millenium Development Goal (MDG) guidelines), or it is improved but shared with other households 3. Drinking water: deprived if the household does not have access to safe drinking water (according to MDG guidelines) or safe drinking water is more than a 30-minute walk from home roundtrip 4. Floor: deprived if the household has a dirt, sand or dung floor 5. Cooking fuel: deprived if the household cooks with dung, wood or charcoal 6. Assets: ownership: deprived if the household does not own more than one radio, television, telephone, bike, motorbike or refrigerator and does not own a car or truck <p>A person is considered poor if they are deprived in at least 30 per cent of the weighted indicators. The intensity of poverty denotes the proportion of indicators in which they are deprived.</p>
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Appendix I: How poverty affects human rights

Below we provide a brief summary of the link between poverty and various human rights, as explained by the UN Special Rapporteur on Extreme Poverty and Human Rights.

Human rights affected by poverty

RIGHT TO LIFE AND PHYSICAL INTEGRITY

Connection to poverty:²⁴

Persons living in poverty are often exposed to both institutional and individual risks of violence and threats to their physical integrity from State agents and private actors, causing them to live in constant fear and insecurity. Continued exposure and vulnerability to violence affect a person's physical and mental health and impair his or her economic development and capacity to escape poverty. Those living in poverty, with little or no economic independence, have fewer possibilities of finding security and protection. Law enforcement agents often profile and deliberately target persons living in poverty. Women and girls living in poverty are particularly affected by gender-based violence that includes, but is not limited to, domestic violence, sexual abuse and harassment and harmful traditional practices. Moreover, poverty is a cause of preventable death, ill-health, high mortality rates and low life expectancy, not only through greater exposure to violence but also material deprivation and its consequences, such as lack of food, safe water and sanitation.

RIGHTS TO LIBERTY AND SECURITY OF THE PERSON

Connection to poverty:²⁵

Various structural and social factors, including discrimination, cause persons living in poverty to come into contact with the criminal justice system with a disproportionately high frequency. They also encounter considerable obstacles in exiting the system. Consequently, disproportionately high

²⁴ UN Guiding Principles on Extreme Poverty and Human Rights, para 63.

²⁵ *Ibid* para 65.

numbers of the poorest and most excluded persons are arrested, detained and imprisoned. Many are subject to pre-trial detention for long periods without meaningful recourse to bail or review. Often unable to afford adequate legal representation, they are more likely to be convicted. While in detention they often have no accessible means of challenging infringements of their rights, such as unsafe or unsanitary conditions, abuse or lengthy delays. Fines imposed on persons living in poverty have a disproportionate impact on them, worsen their situation and perpetuate the vicious circle of poverty. Homeless persons in particular are frequently subject to restrictions on their freedom of movement and criminalized for using public space.

RIGHT TO EQUAL PROTECTION BEFORE THE LAW, ACCESS TO JUSTICE AND EFFECTIVE REMEDIES

Connection to poverty:²⁶

Persons living in poverty are often unable to access justice or to seek redress for actions and omissions that adversely affect them. They encounter a variety of obstacles, from being unable to successfully register initial complaints owing to costs or legal illiteracy, to court decisions in their favour remaining unimplemented. Power imbalances and the lack of independent, accessible and effective complaint mechanisms often prevent them from challenging administrative decisions that adversely affect them. Without effective access to justice, they are unable to seek and obtain a remedy for breaches of domestic and international human rights law, exacerbating their vulnerability, insecurity and isolation, and perpetuating their impoverishment.

RIGHT TO RECOGNITION AS A PERSON BEFORE THE LAW

Connection to poverty:²⁷

Many legal, economic, procedural, practical and cultural barriers impede persons living in poverty from registering at birth and obtaining legal identity documents. Some simply live out of reach of registration centres, others cannot afford the direct and indirect costs and others are denied a legal

²⁶ *Ibid* para 67.

²⁷ *Ibid* para 69.

identity on account of discrimination. Without birth certificates and relevant documents, persons living in poverty are unable to realize a wide range of rights, including the rights to social security, education, health and access to justice. Lack of birth registration also increases the risk of statelessness because individuals may be unable to establish their nationality later in life.

RIGHT TO PRIVACY AND TO PROTECTION FOR HOME AND FAMILY

Connection to poverty:²⁸

Persons living in poverty are more likely to be subject to attacks on their privacy and reputation by State and non-State actors. Such intrusions may be caused by overcrowded housing conditions or the excessive intervention of law enforcement or social services. For example, children from families living in poverty are at greater risk of being removed by the authorities and placed in institutional care.

RIGHT TO AN ADEQUATE STANDARD OF LIVING

Connection to poverty:²⁹

States have the obligation to progressively improve the living conditions of persons living in poverty. While the right to an adequate standard of living includes specific rights, some of which appear separately below, it is also an overarching right that encompasses elements essential for human survival, health and physical and intellectual development. Lack of an adequate standard of living is related to limited or insecure means of livelihood. Often a lack of income and the price of basic commodities combine to form a major obstacle in urban areas. Rural communities usually rely heavily on secure and equitable access to land, fisheries and forests, which are a source of food and shelter, the basis for social, cultural and religious practices and a central factor for economic growth. Many persons, including women, indigenous peoples and small agricultural producers, lack legally enforceable and sustainable control over and access to such resources.

28 *Ibid* para 71.

29 *Ibid* para 73.

RIGHT TO ADEQUATE FOOD AND NUTRITIONConnection to poverty:³⁰

Adequate food is essential for health, survival and physical and intellectual development, and is a precondition for social integration, social cohesion and peaceful community life. Lack of food sovereignty compromises autonomy and dignity. Persons living in poverty often have limited access to adequate and affordable food, or the resources that they need to produce or acquire such food. Even where adequate food is available, it often does not reach persons living in poverty, for example owing to cost, inadequate or discriminatory distribution, limited capacity of marginalized groups to access productive resources, lack of infrastructure or conflict. The quality or nutritional value of the food that persons living in poverty are able to access is also a major concern. As a result of institutional and intrahousehold discrimination or cultural practices, women living in poverty are often denied equitable access to food, or their capacity to procure or produce it is undermined.

RIGHTS TO WATER AND SANITATIONConnection to poverty:³¹

Persons living in poverty are disproportionately affected by limited access to water and adequate sanitation. Unsafe water and lack of access to sanitation are a primary cause of diarrhoeal diseases linked to high levels of child and infant mortality among families living in poverty and restrict the enjoyment of many other rights, including those to health, education, work and privacy, thereby seriously undermining the possibilities of escaping poverty. Persons living in poverty often inhabit areas in which access to water and/or sanitation is restricted owing to cost, lack of infrastructure, denial of services to persons without secure tenure, poor resource management, contamination or climate change. Lack of access to water and sanitation particularly affects women and girls living in poverty.

30 *Ibid* para 75.

31 *Ibid* para 77.

RIGHT TO ADEQUATE HOUSINGConnection to poverty:³²

Persons living in poverty often live in inadequate housing conditions, including in slums and informal settlements, with limited or no access to basic services. Overcrowding, insecurity and disproportionate exposure to natural disasters or environmental hazards commonly threaten the life or health of persons living in poverty. Many lack security of tenure and live in constant fear of evictions and expropriation, without the means of upholding their rights in courts. Discrimination in access to housing, lack of affordable housing and speculation in housing and land, in addition to violations perpetrated by private actors, including landlords, real estate agents and financial companies, contribute to the increased vulnerability of persons living in poverty and push them further into destitution or homelessness. Under these circumstances, women in particular experience multiple forms of discrimination and are exposed to abuse and violence.

RIGHT TO THE HIGHEST ATTAINABLE STANDARD OF PHYSICAL AND MENTAL HEALTHConnection to poverty:³³

In a clear example of the vicious circle of poverty, persons experiencing ill health are more likely to become poor, while persons living in poverty are more vulnerable to accidents, diseases and disability. Limited access to physical and mental health care, including medicines, insufficient nutrition and unsafe living environments deeply affect the health of persons living in poverty and impair their ability to engage in income-generating or productive livelihood activities. Women and girls carry a disproportionate care responsibility when health-care facilities are lacking or inaccessible and thus often must forego education or formal employment to provide care.

32 *Ibid* para 79.

33 *Ibid* para 81.

RIGHT TO WORK AND RIGHTS AT WORKConnection to poverty:³⁴

In rural and urban areas alike, persons living in poverty experience unemployment, underemployment, unreliable casual labour, low wages and unsafe and degrading working conditions. Persons living in poverty tend to work outside the formal economy and without social security benefits, such as maternity leave, sick leave, pensions and disability benefits. They may spend most of their waking hours at the workplace, barely surviving on their earnings and facing exploitation including bonded or forced labour, arbitrary dismissal and abuse. Women are particularly at risk of abuse, as are groups affected by discrimination such as persons with disabilities and undocumented migrants. Women usually take on the bulk of unpaid care work in their households, making them more likely to engage in low paid and insecure employment, or preventing them from entering the labour market altogether.

RIGHT TO SOCIAL SECURITYConnection to poverty:³⁵

Persons living in poverty often cannot enjoy their right to social security. While that right includes both social insurance (contributory schemes) and social assistance (noncontributory schemes), many States rely only on contributory systems as the main source of social security benefits, with social assistance programmes often being inadequate and ineffective. Given that those living in poverty are more likely to work in the informal economy, to hold insecure, low-paid jobs, to be long-term unemployed or to be unable to work, they are unlikely to be able to contribute to and thereby access social insurance benefits such as pensions and unemployment and sickness benefits. These problems are particularly serious for women as discrimination and care responsibilities result in lower wages and interrupted work histories, reducing their ability to contribute to and benefit from social insurance schemes.

34 *Ibid* para 83.

35 *Ibid* para 85.

RIGHT TO EDUCATION

Connection to poverty:³⁶

Children living in poverty are more likely to drop out of or never attend school in order to engage in income-generating activities or to help in the home. Education is a crucial means by which persons can develop their personalities, talents and abilities to their fullest potential, increasing their chances of finding employment, of participating more effectively in society and of escaping poverty. The economic consequences of not finishing primary or secondary school are thus devastating and perpetuate the cycle of poverty. Girls are more commonly denied their right to education, which in turn restricts their choices and increases female impoverishment.

RIGHTS TO TAKE PART IN CULTURAL LIFE AND TO ENJOY THE BENEFITS OF SCIENTIFIC PROGRESS AND ITS APPLICATIONS

Connection to poverty:³⁷

Poverty seriously restricts the ability of individuals or groups to exercise their right to take part in, access and contribute to all spheres of cultural life, as well as their ability to effectively enjoy their own culture and that of others, exacerbating their disempowerment and social exclusion. Free cultural expression through values, beliefs, convictions, languages, knowledge and the arts, institutions and ways of life enables persons living in poverty to express their humanity, their world view, their cultural heritage and the meanings that they give to their existence and their development. Persons living in poverty are often unable to reap the benefits of scientific progress and its applications in an equal manner.

36 *Ibid* para 87.

37 *Ibid* para 89.

Appendix J: Review of key legal text and interpretations related to state obligations to counter tax abuses

General obligations of states under the International Covenant on Economic, Social and Cultural Rights (ICESCR)

The scope of states' obligations with respect to economic, social and cultural rights is set out in Part II (Articles 2 to 5) of the ICESCR. While the ICESCR provides for progressive realisation of economic, social and cultural rights and acknowledges the constraints due to the limits of available resources, it also imposes various obligations of conduct and result that are of immediate effect.

The Committee on Economic, Social and Cultural Rights (the 'Committee') has interpreted the following general principles about the scope of states' obligations to protect, respect and fulfil economic, social and cultural rights:³⁸

- A general undertaking to guarantee that relevant rights will be exercised without discrimination.³⁹
- A general undertaking 'to take steps' towards the goal of the full realization of relevant rights. Such steps must be taken within a reasonably short time after the ICESCR's entry into force for the States concerned; and, such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the ICESCR.⁴⁰
- The obligation to take steps includes 'all appropriate means, including particularly the adoption of legislative measures.' The Committee recognizes that in many instances legislation is highly desirable and in some cases may even be indispensable.⁴¹ Other measures which may also be appropriate include administrative, financial, educational and social measures.⁴² It should be underscored that this does not

38 'The Nature of States Parties' Obligations (Art 2, para 1)' (14 December 1990), CESCR General Comment No 3 (E/1991/23).

39 *Ibid* para 1.

40 *Ibid* para 2.

41 *Ibid* para 3.

42 *Ibid* paras 7 and 8.

necessarily imply one sort of political or economic system.⁴³

- The principal obligation is to take steps ‘with a view to achieving progressively the full realization of the rights recognized’ in the ICESCR. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. Nevertheless, States have the obligation to move as expeditiously and effectively as possible towards the goal of full realization.
- The concept of progressive realization implies that any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the ICESCR and in the context of the full use of the maximum available resources.⁴⁴
- A minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights in the ICESCR.
- Any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Therefore, States are obliged to take the necessary steps ‘to the maximum of its available resources’. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.⁴⁵

43 ‘The Committee notes that the undertaking “to take steps... by all appropriate means including particularly the adoption of legislative measures” neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or *laissez-faire* economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed *inter alia* in the preamble to the Covenant, is recognized and reflected in the system in question. The Committee also notes the relevance in this regard of other human rights and in particular the right to development.’

44 See n 38 above, para 9.

45 *Ibid* para 10.

- Even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints.⁴⁶
- Even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes.⁴⁷
- The obligation to use ‘the maximum of its available resources’ refers to both the resources existing within a State and those available from the international community through international cooperation and assistance: there is a general undertaking for all States parties ‘to take steps, individually and through international assistance and cooperation, especially economic and technical’.⁴⁸

Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights

I. GENERAL PRINCIPLES

1. All human beings everywhere are born free and equal in dignity and are entitled without discrimination to human rights and freedoms.
2. States must at all times observe the principles of non-discrimination, equality, including gender equality, transparency and accountability.
3. All States have obligations to respect, protect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially.

46 The Committee has already dealt with these issues in its General Comment No 1 (1989).

47 *Ibid* paras 11 and 12.

48 *Ibid* paras 13. See Arts 11, 15, 22 and 23 of the ICESCR.

4. Each State has the obligation to realize economic, social and cultural rights, for all persons within its territory, to the maximum of its ability. All States also have extraterritorial obligations to respect, protect and fulfil economic, social and cultural rights as set forth in the following Principles.
5. All human rights are universal, indivisible, interdependent, interrelated and of equal importance. The present Principles elaborate extraterritorial obligations in relation to economic, social and cultural rights, without excluding their applicability to other human rights, including civil and political rights.
6. Economic, social and cultural rights and the corresponding territorial and extraterritorial obligations are contained in the sources of international human rights law, including the Charter of the United Nations; the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; and other universal and regional instruments.
7. Everyone has the right to informed participation in decisions which affect their human rights. States should consult with relevant national mechanisms, including parliaments, and civil society, in the design and implementation of policies and measures relevant to their obligations in relation to economic, social and cultural rights.

II. SCOPE OF EXTRATERRITORIAL OBLIGATIONS OF STATES

8. Definition of extraterritorial obligations

For the purposes of these Principles, extraterritorial obligations encompass:

- (a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory; and
- (b) obligations of a global character that are set out in the Charter of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally.

9. Scope of jurisdiction

A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:

- (a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;
- (b) 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;
- (c) 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.

10. Limits to the entitlement to exercise jurisdiction

The State's obligation to respect, protect and fulfil economic, social and cultural rights extraterritorially does not authorize a State to act in violation of the UN Charter and general international law.

11. State responsibility

State responsibility is engaged as a result of conduct attributable to a State, acting separately or jointly with other States or entities, that constitutes a breach of its international human rights obligations whether within its territory or extraterritorially.

12. Attribution of State responsibility for the conduct of non-State actors

State responsibility extends to:

- (a) acts and omissions of non-State actors acting on the instructions or under the direction or control of the State; and
- (b) acts and omissions of persons or entities which are not organs of the State, such as corporations and other business enterprises, where they are empowered by the State to exercise elements of governmental

authority, provided those persons or entities are acting in that capacity in the particular instance.

13. Obligation to avoid causing harm

States must desist from acts and 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.

14. Impact assessment and prevention

States must conduct prior assessment, with public participation, of the risks and potential extraterritorial impacts of their laws, policies and practices on the enjoyment of economic, social and cultural rights. The results of the assessment must be made public. The assessment must also be undertaken to inform the measures that States must adopt to prevent violations or ensure their cessation as well as to ensure effective remedies.

15. Obligations of States as members of international organizations

As a member of an international organization, the State remains responsible for its own conduct in relation to its human rights obligations within its territory and extraterritorially. A State that transfers competences to, or participates in, an international organization must take all reasonable steps to ensure that the relevant organization acts consistently with the international human rights obligations of that State.

16. Obligations of international organizations

The present Principles apply to States without excluding their applicability to the human rights obligations of international organizations under, *inter alia*, general international law and international agreements to which they are parties.

17. International agreements

States must elaborate, interpret and apply relevant international agreements and standards in a manner consistent with their human rights

obligations. Such obligations include those pertaining to international trade, investment, finance, taxation, environmental protection, development cooperation, and security.

18. Belligerent occupation and effective control

A State in belligerent occupation or that otherwise exercises effective control over territory outside its national territory must respect, protect and fulfil the economic, social and cultural rights of persons within that territory. A State exercising effective control over persons outside its national territory must respect, protect and fulfil economic, social and cultural rights of those persons.

III. OBLIGATIONS TO RESPECT

19. General obligation

All States must take action, separately, and jointly through international cooperation, to respect the economic, social and cultural rights of persons within their territories and extraterritorially, as set out in Principles 20 to 22.

20. Direct interference

All States have the obligation to refrain from conduct which nullifies or impairs the enjoyment and exercise of economic, social and cultural rights of persons outside their territories.

21. Indirect interference

States must refrain from any conduct which:

- (a) impairs the ability of another State or international organization to comply with that State's or that international organization's obligations as regards economic, social and cultural rights; or
- (b) aids, assists, directs, controls or coerces another State or international organization to breach that State's or that international organization's obligations as regards economic, social and cultural rights, where the former States do so with knowledge of the circumstances of the act.

22. Sanctions and equivalent measures

States must refrain from adopting measures, such as embargoes or other economic sanctions, which would result in nullifying or impairing the enjoyment of economic, social and cultural rights. Where sanctions are undertaken to fulfil other international legal obligations, States must ensure that human rights obligations are fully respected in the design, implementation and termination of any sanctions regime. States must refrain in all circumstances from embargoes and equivalent measures on goods and services essential to meet core obligations.

IV. OBLIGATIONS TO PROTECT

23. General obligation

All States must take action, separately, and jointly through international cooperation, to protect economic, social and cultural rights of persons within their territories and extraterritorially, as set out in Principles 24 to 27.

24. Obligation to regulate

All States must take necessary measures to ensure that non-State actors which they are in a position to regulate, as set out in Principle 25, such as private individuals and organizations, and transnational corporations and other business enterprises, do not nullify or impair the enjoyment of economic, social and cultural rights. These include administrative, legislative, investigative, adjudicatory and other measures. All other States have a duty to refrain from nullifying or impairing the discharge of this obligation to protect.

25. Bases for protection

States must adopt and enforce measures to protect economic, social and cultural rights through legal and other means, including diplomatic means, in each of the following circumstances:

- (a) the harm or threat of harm originates or occurs on its territory;
- (b) where the non-State actor has the nationality of the State concerned;

- (c) as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned;
- (d) where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-State actor's activities are carried out in that State's territory;
- (e) where any conduct impairing economic, social and cultural rights constitutes a violation of a peremptory norm of international law. Where such a violation also constitutes a crime under international law, States must exercise universal jurisdiction over those bearing responsibility or lawfully transfer them to an appropriate jurisdiction.

26. Position to influence

States that are in a position to influence the conduct of non-State actors even if they are not in a position to regulate such conduct, such as through their public procurement system or international diplomacy, should exercise such influence, in accordance with the Charter of the United Nations and general international law, in order to protect economic, social and cultural rights.

27. Obligation to cooperate

All States must cooperate to ensure that non-State actors do not impair the enjoyment of the economic, social and cultural rights of any persons. This obligation includes measures to prevent human rights abuses by non-State actors, to hold them to account for any such abuses, and to ensure an effective remedy for those affected.

V. OBLIGATIONS TO FULFIL

28. General obligation

All States must take action, separately, and jointly through international cooperation, to fulfil economic, social and cultural rights of persons within their territories and extraterritorially, as set out in Principles 29 to 35.

29. Obligation to create an international enabling environment

States must take deliberate, concrete and targeted steps, separately, and jointly through international cooperation, to create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection, and development cooperation.

The compliance with this obligation is to be achieved through, inter alia:

- (a) elaboration, interpretation, application and regular review of multilateral and bilateral agreements as well as international standards;
- (b) measures and policies by each State in respect of its foreign relations, including actions within international organizations, and its domestic measures and policies that can contribute to the fulfilment of economic, social and cultural rights extraterritorially.

30. Coordination and allocation of responsibilities

States should coordinate with each other, including in the allocation of responsibilities, in order to cooperate effectively in the universal fulfilment of economic, social and cultural rights. The lack of such coordination does not exonerate a State from giving effect to its separate extraterritorial obligations.

31. Capacity and resources

A State has the obligation to fulfil economic, social and cultural rights in its territory to the maximum of its ability. Each State must separately and, where necessary, jointly contribute to the fulfilment of economic, social and cultural rights extraterritorially, commensurate with, inter alia, its economic, technical and technological capacities, available resources, and influence in international decision-making processes. States must cooperate to mobilize the maximum of available resources for the universal fulfilment of economic, social and cultural rights.

32. Principles and priorities in cooperation

In fulfilling economic, social and cultural rights extraterritorially, States must:

- (a) prioritize the realization of the rights of disadvantaged, marginalized and vulnerable groups;
- (b) prioritize core obligations to realize minimum essential levels of economic, social and cultural rights, and move as expeditiously and effectively as possible towards the full realization of economic, social and cultural rights;
- (c) observe international human rights standards, including the right to self-determination and the right to participate in decision-making, as well as the principles of non-discrimination and equality, including gender equality, transparency, and accountability; and
- (d) avoid any retrogressive measures or else discharge their burden to demonstrate that such measures are duly justified by reference to the full range of human rights obligations, and are only taken after a comprehensive examination of alternatives.

33. Obligation to provide international assistance

As part of the broader obligation of international cooperation, States, acting separately and jointly, that are in a position to do so, must provide international assistance to contribute to the fulfilment of economic, social and cultural rights in other States, in a manner consistent with Principle 32.

34. Obligation to seek international assistance and cooperation

A State has the obligation to seek international assistance and cooperation on mutually agreed terms when that State is unable, despite its best efforts, to guarantee economic, social and cultural rights within its territory. That State has an obligation to ensure that assistance provided is used towards the realization of economic, social and cultural rights.

35. Response to a request for international assistance or cooperation

States that receive a request to assist or cooperate and are in a position to do so must consider the request in good faith, and respond in a manner consistent with their obligations to fulfil economic, social and cultural rights extraterritorially. In responding to the request, States must be guided by Principles 31 and 32.

VI. ACCOUNTABILITY AND REMEDIES

36. Accountability

States must ensure the availability of effective mechanisms to provide for accountability in the discharge of their extraterritorial obligations. In order to ensure the effectiveness of such mechanisms, States must establish systems and procedures for the full and thorough monitoring of compliance with their human rights obligations, including through national human rights institutions acting in conformity with the United Nations Principles relating to the Status of National Institutions (Paris Principles).

37. General obligation to provide effective remedy

States must ensure the enjoyment of the right to a prompt, accessible and effective remedy before an independent authority, including, where necessary, recourse to a judicial authority, for violations of economic, social and cultural rights. Where the harm resulting from an alleged violation has occurred on the territory of a State other than a State in which the harmful conduct took place, any State concerned must provide remedies to the victim.

To give effect to this obligation, States should:

- (a) seek cooperation and assistance from other concerned States where necessary to ensure a remedy;
- (b) ensure remedies are available for groups as well as individuals;
- (c) ensure the participation of victims in the determination of appropriate remedies;
- (d) ensure access to remedies, both judicial and non-judicial, at the national and international levels; and

- (e) accept the right of individual complaints and develop judicial remedies at the international level.

38. Effective remedies and reparation

Remedies, to be effective, must be capable of leading to a prompt, thorough and impartial investigation; cessation of the violation if it is ongoing; and adequate reparation, including, as necessary, restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition. To avoid irreparable harm, interim measures must be available and States must respect the indication of interim measures by a competent judicial or quasi-judicial body. Victims have the right to truth about the facts and circumstances surrounding the violations, which should also be disclosed to the public, provided that it causes no further harm to the victim.

39. Inter-State complaints mechanisms

States should avail themselves of, and cooperate with, inter-State complaints mechanisms, including human rights mechanisms, to ensure reparation for any violation of an extraterritorial obligation relating to economic, social and cultural rights. States should seek reparation in the interest of injured persons as beneficiaries under the relevant treaties addressing economic, social and cultural rights, and should take into account, wherever feasible, the views of injured persons with regard to the reparation to be sought. Reparation for the injuries obtained from the responsible State should be transferred to the injured persons.

40. Non-judicial accountability mechanisms

In addition to the requisite judicial remedies, States should make non-judicial remedies available, which may include, inter alia, access to complaints mechanisms established under the auspices of international organizations, national human rights institutions or ombudspersons, and ensure that these remedies comply with the requirements of effective remedies under Principle 37. States should ensure additional accountability measures are in place at the domestic level, such as access to a parliamentary body tasked with monitoring governmental policies, as well as at the international level.

41. Reporting and monitoring

States must cooperate with international and regional human rights mechanisms, including periodic reporting and inquiry procedures of treaty bodies and mechanisms of the UN Human Rights Council, and peer review mechanisms, on the implementation of their extraterritorial obligations in relation to economic, social and cultural rights, and redress instances of non-compliance as identified by these mechanisms.

VII. FINAL PROVISIONS

42. States, in giving effect to their extraterritorial obligations, may only subject economic, social and cultural rights to limitations when permitted under international law and where all procedural and substantive safeguards have been satisfied.

43. Nothing in these Principles should be read as limiting or undermining any legal obligations or responsibilities that States, international organizations and non-State actors, such as transnational corporations and other business enterprises, may be subject to under international human rights law.

44. These principles on the extraterritorial obligations of States may not be invoked as a justification to limit or undermine the obligations of the State towards people on its territory.

General Recommendation No 24 of the Committee on the Elimination of Discrimination against Women on the right to health

In its General Recommendation No 24 related specifically to the right to health, the Committee clarifies that the duty to fulfil rights places an obligation on States Parties to take appropriate legislative, judicial, administrative, budgetary, economic and other measures to the maximum extent of their available resources to ensure that women realise their rights to healthcare.⁴⁹ States Parties should allocate adequate budgetary, human and administrative resources to ensure that women's health receives a share

⁴⁹ Committee on the Elimination of Discrimination against Women, General Recommendation No 24: Art 12 of the Convention (women and health), para 17.

of the overall health budget comparable with that for men's health, taking into account their different health needs.⁵⁰

This General Recommendation underlines the importance of budgetary measures to the fulfilment of economic, social and cultural rights. Once budgetary measures are understood as part of the steps that need to be taken by states, it becomes increasingly important to address tax abuses as part of their obligations with respect to economic, social and cultural rights.

Committee on the Rights of the Child

One of the very few explicit references to the negative impact of tax evasion on human rights can be found in the Committee on the Rights of the Child's report on Georgia. In its consideration of the state's implementation of the Convention on the Rights of the Child (CRC), the Committee noted that the 'widespread practices of tax evasion and corruption are believed to have a negative effect on the level of resources available for the implementation of the CRC'.⁵¹

While the CRC addresses the specific rights of children, many of these rights are economic, social and cultural in nature, addressing issues such as education, health and housing. Therefore, this explicit reference to tax evasion – and its link to corruption – once again reinforces the fact that tax issues are relevant to economic, social and cultural rights.

Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights

These Draft Principles and Guidelines state that:

'[a]ll States parties have immediate obligations to take steps, in accordance with a measurable national plan of action, towards the realisation of the protected economic, social and cultural rights. The measures adopted should be deliberate, concrete and targeted as clearly as possible towards ensuring enjoyment of the rights protected in the African Charter. States parties are obliged to take legislative

50 Committee on the Elimination of Discrimination against Women, General Recommendation No 24: Art 12 of the Convention (women and health), para 30.

51 CRC/C/15/Add.124 (CRC, 2000), Georgia.

measures for the protection of economic, social and cultural rights.

However, these measures will generally not be sufficient. States

Parties are also obliged to allocate sufficient resources within national budgets towards the realisation of each right.⁵²

Once again, this reference demonstrates the increased attention being given to the budgetary means required to realise economic, social and cultural rights. This reinforces the link between tax abuses and human rights as part of the states' obligation to mobilise adequate resources.

*The UN Guiding Principles on Extreme Poverty and Human Rights*⁵³

- States have an immediate obligation to take steps towards the full realization of economic, social and cultural rights, and human rights law demands that at least minimum essential levels of all rights should always be ensured. International human rights law does allow, if resource constraints dictate, for the progressive realization of some aspects of economic, social and cultural rights over a period of time and with well-defined indicators, although deliberate retrogressive measures may be taken only exceptionally and on a temporary basis. At all times, States need to demonstrate the specific measures taken to tackle poverty and prove that they have done so to the maximum of their available resources, including through international assistance and cooperation.
- Ensuring that those living in poverty can enjoy at least minimum essential levels of all economic, social and cultural rights is not simply a matter of implementing current policies more fully. The eradication of poverty requires policies that specifically address the situation of those living in poverty through a comprehensive and coherent framework covering all domains of public policy and political action.

52 Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights. African Commission on Human and Peoples' Rights, adopted on 24 October 2011.

53 UN Guiding Principles on Extreme Poverty and Human Rights, paras 91 to 98. There are additional discussions of the role of the international community in realising specific rights in the following General Commentaries of the Committee on Economic, Social and Cultural Rights: General Comment No 2: International technical assistance measures, paras 2, 6–10, 82–84; General Comment No 3: Nature of States Parties obligations, para 14; General Comment No 4: Right to adequate housing, para 19; General Comment No 12: Right to adequate food, paras 27, 36 and 41; General Comment No 13: Right to education, para 60; General Comment No 14: Right to health, paras 38–42; General Comment No 15: Right to water, paras 30–36, 60; General Comment No 18: Right to work, paras 29–30 and 52–53.

- States should adopt a comprehensive national strategy to reduce poverty and social exclusion.
- States should ensure that public policies accord due priority to persons living in extreme poverty. When designing and implementing public policies and allocating resources, States should accord due priority to the human rights of the most disadvantaged groups, especially persons living in extreme poverty.
- States should ensure that facilities, goods and services required for the enjoyment of human rights are accessible, available, adaptable, affordable and of good quality.
- States should ensure policy coherence between their human rights obligations and other policies, including international trade, taxation, fiscal, monetary, environmental and investment policies.
- States have obligations of international assistance and cooperation that should contribute to mobilizing resources for the eradication of poverty.
- When devising and adopting poverty reduction strategies, these should take into account the necessary budgetary implications.
- States should make certain that adequate resources are raised and used to ensure the realization of the human rights of persons living in poverty. Fiscal policies, including in relation to revenue collection, budget allocations and expenditure, must comply with human rights standards and principles, in particular equality and non-discrimination.
- Given the disproportionate and devastating effect of economic and financial crises on groups most vulnerable to poverty, States must be particularly careful to ensure that crisis recovery measures, including cuts in public expenditure, do not deny or infringe those groups' human rights. Measures must be comprehensive and non-discriminatory. They must ensure sustainable finance for social protection systems to mitigate inequalities and to make certain that the rights of disadvantaged and marginalized individuals and groups are not disproportionately affected.
- Cuts in funding to social services that significantly affect those living in poverty, including by increasing the burden of care of women, should

be measures of last resort, taken only after serious consideration of all alternative policy options, including financing alternatives.

- States should take into account their international human rights obligations when designing and implementing all policies, including international trade, taxation, fiscal, monetary, environmental and investment policies. The international community's commitments to poverty reduction cannot be seen in isolation from international and national policies and decisions, some of which may result in conditions that create, sustain or increase poverty, domestically or extraterritorially. Before deciding whether to adopt any international agreement, or whether to implement any policy measure, States should assess whether the decision they are about to make is compatible with their international human rights obligations to their own citizens as well as to those of foreign countries.
- As part of international cooperation and assistance, States have an obligation to respect and protect the enjoyment of human rights, which involves avoiding conduct that would create a foreseeable risk of impairing the enjoyment of human rights by persons living in poverty beyond their borders, and conducting assessments of the extraterritorial impacts of laws, policies and practices.
- States must take deliberate, specific and targeted steps, individually and jointly, to create an international enabling environment conducive to poverty reduction, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection and development cooperation. This includes cooperating to mobilize the maximum of available resources for the universal fulfilment of human rights.

Report of the Independent Expert on the question of human rights and extreme poverty: on a human rights-based approach to recovery from the global economic and financial crises, with a particular focus on the most vulnerable and marginalized groups

49. States have an unambiguous responsibility to take steps towards the full achievement of economic, social and cultural rights by using the maximum amount of resources available. In the aftermath of the global economic and financial crises, it has become clear that, in many States, efforts to increase resources for recovery through the whole spectrum of available options have been insufficient, thus impeding States' compliance with human rights. Low levels of domestic taxation revenue, in particular, could be a major obstacle to a State's ability to meet obligations to realize economic, social and cultural rights.
50. While raising tax revenue can be an essential part of an effective policy response to the effects of the crises, States should, however, be cognizant of their obligations to implement policies in accordance with the principles of non-discrimination and equality. In this context, the introduction of or an increase in regressive sales taxes or value added taxes may have a disproportionate impact on those who are already experiencing financial difficulties. Regressive taxes may represent an unequal added burden for those living in poverty or experiencing economic hardship, as they constitute a larger percentage of income. The real income of women living in poverty is particularly affected by the introduction of regressive taxes, especially when the introduction of taxes is carried out in conjunction with reductions to expenditure on public services. States must be vigilant in balancing the need to increase taxation revenue with their responsibilities to protect the most vulnerable and prevent further inequality.
51. Taxation reform that comes in the form of cuts, exemptions and waivers may also disproportionately benefit the wealthier segments of society, discriminating against people living in poverty. States that institute tax cuts will decrease the resources available to realize their economic, social and cultural rights commitments and increase the risk that they will be unable to meet their obligation to utilize the maximum available resources for their fulfilment.

80. In several countries, the crises have demonstrated a clear need to maximize means of harnessing resources specifically for the realization of economic, social and cultural rights. States should identify additional sources of fiscal space to increase resources for social and economic recovery. From an array of options, States should particularly consider widening the tax base, improving the efficiency of tax collection and reprioritizing expenditures. These types of reforms could help States to achieve a more progressive, equitable and sustainable taxation regime while complying with a human rights framework.
81. When contemplating widening the tax base, human rights principles require careful consideration to be given to rebalancing the tax contributions of corporations and those in high-income brackets. The introduction of new or higher taxes should not have a detrimental impact on those living in poverty. Improving the efficiency of tax collection requires reconsidering ineffective tax holidays, exemptions and waivers that disproportionately benefit better-off segments of society. A human rights approach also requires States to take steps to eliminate the prevalence of tax evasion, a problem that reduces the resources available for measures to realize human rights. Consideration should also be given to reprioritizing spending on social sectors (such as education and health) over, for example, military expenditures in order to ensure the maximum use of available resources for the realization of economic, social and cultural rights. As discussed below, a human rights approach requires States to debate fiscal options openly, avoiding technocratic decisions being made behind closed doors, and instead allowing for greater transparency and participation.

The Independent Expert on the question of human rights and extreme poverty: mission to Ireland

23. ... An assessment of whether or not a State is using the maximum available resources to ensure compliance with economic, social and cultural rights obligations depends on how the State generates and mobilizes resources. In this context, the independent expert is concerned about the low level of taxation in Ireland, indeed lower than most other European countries. Low levels of domestic taxation revenue

can be a major obstacle to a State's ability to meet obligations to realize economic, social and cultural rights. The Government must ensure that the recovery policies, which to date have mainly focused on instituting cuts to public expenditure without significantly altering the taxation rate, are the most effective means of protecting the economic, social and cultural rights of the population, particularly the most disadvantaged groups in society.

24. While the State is entitled to decide the scale and pace of adjustments, the independent expert notes that seeking to achieve adjustments primarily through expenditure cuts rather than tax increases might have a major impact on the most vulnerable segments of society. Reductions in public expenditure affect the poorest and most vulnerable with the most severity, whereas some increase in taxation rates could place the burden on those who are better equipped to cope. It is critically important that Ireland adopt taxation policies that adequately reflect the need to harness all available resources towards the fulfilment of its economic, social and cultural rights obligations, while avoiding measures that might further endanger the enjoyment of human rights by those most at risk. By increasing its tax take, Ireland would decrease the need for cuts to public services and social protection, and thereby help to protect the most vulnerable from further damage.
25. Taxation reform that comes in the form of cuts, exemptions and waivers may also disproportionately benefit the wealthier segments of society, and discriminate against those living in poverty.

OHCHR, 'Comprehensive study on the negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, in particular economic, social and cultural rights' (AIHRC/19/42), 14 December 2011

22. That corruption impedes States from complying with their human rights obligations has been increasingly emphasized. It is believed that diversion of available resources due to corruption impacts the obligation to take steps, to the maximum of available resources, to progressively achieve the full realization of economic, social, and cultural rights. Rights violation due to corruption-related diversion of

funds is particularly apparent when States cannot fulfil their minimum core obligations regarding each right.

23. In this context, under certain conditions a successful procedure of asset repatriation might remedy the State's corruption-related failure to comply with human rights obligations. Being a component of any anti-corruption strategy, the asset-recovery process should be understood in light of the human rights framework, as part of the several efforts that States must make in order to comply with their human rights obligations.
24. These obligations apply to both countries of origin and recipient countries of funds of illicit origin due to the principle of international cooperation and assistance towards the realization of human rights, particularly economic, social, and cultural rights. According to this principle, States' obligations to respect, protect, and fulfil human rights are not only applicable in relation to their own domestic populations but do have an extraterritorial scope, applying to both countries in a position to assist and countries in need of assistance.
25. As with other forms of international cooperation, such as international cooperation for development and for the realization of economic, social, and cultural rights, mutual legal assistance implies a mutual responsibility. In the context of asset-recovery processes, on the one hand, countries of origin must seek repatriation as part of their duty to ensure the application of the maximum available resources to the full realization of economic, social, and cultural rights. On the other hand, recipient countries have the duty to assist and facilitate repatriation as part of their obligation of international cooperation and assistance.
26. Therefore, a human rights-based approach to the asset-recovery process not only demands that countries of origin make every effort to achieve the recovery and repatriation of proceeds of corruption for implementation of their international human rights obligations, it also demands that recipient countries understand repatriation not as a discretionary measure but also as a duty derived from the obligations of international cooperation and assistance.

A. The negative impact of the non-repatriation of funds of illicit origin to the countries of origin on the enjoyment of human rights, in particular economic, social and cultural rights

27. On the surface, it seems apparent that any resource that the State is deprived of because of corruption has the same negative effect, regardless of whether it is exported or domestically retained. Along the same lines, proceeds of corruption reintegrated into the State budget will, if invested in accordance with human rights obligations, positively impact these rights.
28. As recovered resources are not foreseen or public income included in the budget, States must allocate them in accordance with their obligation to devote the maximum of available resources to the fulfilment of economic, social, and cultural rights. This is the starting point with regards to the measures that must be taken with repatriated funds.
29. There is no straightforward answer about how money is best invested in order to realize economic, social, and cultural rights. While the duty to allocate restituted funds in conformity with the ‘maximum available resources’ principle must govern allocation decisions, no general one-fits-all rule can be suggested, since claims are dependent on the particular situation of each country. However, the human rights-based approach provides important guidance to take into account.
30. In the first place, it requires that the decision-making process complies with both principles of transparency and participation. Decisions over resources allocation cannot be made behind closed doors, but publicly and openly, with due attention to civil society’s demands. In some cases, lack of transparency and participation in the allocation decisions can end up in the use of the recovered assets to ends different from those sought by human rights principles. Moreover, publicity for and accessibility of budget information, which should be compiled in easy-to-monitor categories, is essential in order to notice spending priorities and make the right allocation decisions. Lastly, the allocation decision-making process would benefit from comparing actual budget allocations against human rights indicators.

31. On the other hand, the allocation decision-making process should also be informed by the human rights-based approach principle of providing effective remedies, including the creation of conditions for avoiding new human rights violations in the future. Applied to the context of repatriation agreements envisaged by article 57, paragraph 5, of the United Nations Convention against Corruption, this principle could be used as a framework for these usually difficult negotiations. The human rights-based approach requires that repatriated funds be appropriately used in the creation of conditions for complying with human rights obligations and for avoiding new corruption-based diversions. There are national precedents that show a path for future reference in search of matching both the needs of the society harmed by the consequences of corruption and the recipients' concerns about the final destination of the returned funds.
32. Additionally, managing and oversight mechanisms can be as important as making the correct decision for the final destination of the funds. These include establishing the procedures and the authorities that will be accountable for guaranteeing that the allocation decisions will be strictly followed. Well-designed tracking arrangements facilitate oversight activities and continuous monitoring, particularly by civil society organizations.
33. These management arrangements are enhanced when they are in line with the human rights-based approach, since transparency, participation and accountability are three main pillars of any scheme devised for pursuing proper and efficient administration, including public recordings of receipts, public declarations of intended use of funds and public budgeting, public reporting on actual expenditures and on the achieved results, proper mechanisms of auditing, and official response and measures to correct identified weaknesses or mismanagement. The need for transparency in budget spending is a lesson that has been learned from situations in which the recovered assets transferred to an off-budget fund gave rise to a number of questionable transactions.
34. Finally, it is remarkable that such transparency measures seem consistent with the commitments endorsed by both developed and developing countries in point 24 of the Accra Agenda for Action.

B. The impact on the rule of law in the country of origin

35. Beyond the relationship between available economic resources and human rights obligations, the non-repatriation of funds of illicit origin has an impact on the rule of law in the country of origin. As recalled by Council resolution 17/23 mandating this study, ‘the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies and the rule of law’.
36. Where both the incentives for and opportunities to export illicit wealth are significant, as it seems to be the case in many developing countries, it is very likely that the damage to the rule of law be exacerbated. It has been pointed out that:

‘the potential to hide illicit capital securely in tax havens is a direct stimulus to corruption and other illicit activities like transfer mispricing. It decreases the chances of detection and therefore increases the likely returns. Especially in polities characterized by high degrees of socio-economic inequality and little or no effective institutionalized popular control of the actions of political elites (“democracy”), those fractions of the political elite that are able and willing to participate in this nexus of corrupt internal accumulation and illicit capital outflows are also motivated or able to create or change the rules of the game, in order to ensure that they can continue playing it in a rewarding way. In practice this is likely to mean: tax agencies collect enough money to run basic government services but have overall low capacity, especially in dealing with complex international issues like transfer pricing; police services lack investigatory powers; court systems are vulnerable to corruption; weak public audit offices lack independent authority; legislatures lack collective cohesion and authority; fragile, unstable political parties are motivated by money and patronage; and public services lack a collective, professional ethos. Indirectly, these processes may further weaken the protection of property rights through their incentive effects on political elites. Powerful groups that control considerable (illicit) capital but locate

much of it overseas do not have strong incentives to strengthen property rights at home (for everyone)'.

37. In other words, the opportunities to export funds of illicit origin generate perverse incentives against building a democratic society. The non-repatriation of funds of illicit origin increases the conditions leading to this kind of institutional damage. By requiring obligations to both countries of origin and recipient countries, a human rights-based approach to the asset recovery process contributes to remedying that negative impact.

Appendix K: OECD Guidelines for Multinational Enterprises

XI. Taxation

1. It is important that enterprises contribute to the public finances of host countries by making timely payment of their tax liabilities. In particular, enterprises should comply with both the letter and spirit of the tax laws and regulations of the countries in which they operate. Complying with the spirit of the law means discerning and following the intention of the legislature. It does not require an enterprise to make payment in excess of the amount legally required pursuant to such an interpretation. Tax compliance includes such measures as providing to the relevant authorities timely information that is relevant or required by law for purposes of the correct determination of taxes to be assessed in connection with their operations and conforming transfer pricing practices to the arm's length principle.
2. Enterprises should treat tax governance and tax compliance as important elements of their oversight and broader risk management systems. In particular, corporate boards should adopt tax risk management strategies to ensure that the financial, regulatory and reputational risks associated with taxation are fully identified and evaluated.

Commentary on taxation

100. Corporate citizenship in the area of taxation implies that enterprises should comply with both the letter and the spirit of the tax laws and regulations in all countries in which they operate, co-operate with authorities and make information that is relevant or required by law available to them. An enterprise complies with the spirit of the tax laws and regulations if it takes reasonable steps to determine the intention of the legislature and interprets those tax rules consistent with that intention in light of the statutory language and relevant, contemporaneous legislative history. Transactions should not be structured in a way that will have tax results that are inconsistent with the underlying economic consequences of the transaction unless there

exists specific legislation designed to give that result. In this case, the enterprise should reasonably believe that the transaction is structured in a way that gives a tax result for the enterprise which is not contrary to the intentions of the legislature.

101. Tax compliance also entails co-operation with tax authorities and provision of the information they require to ensure an effective and equitable application of the tax laws. Such co-operation should include responding in a timely and complete manner to requests for information made by a competent authority pursuant to the provisions of a tax treaty or exchange of information agreement. However, this commitment to provide information is not without limitation. In particular, the *Guidelines* make a link between the information that should be provided and its relevance to the enforcement of applicable tax laws. This recognises the need to balance the burden on business in complying with applicable tax laws and the need for tax authorities to have the complete, timely and accurate information to enable them to enforce their tax laws.
102. Enterprises' commitments to co-operation, transparency and tax compliance should be reflected in risk management systems, structures and policies. In the case of enterprises having a corporate legal form, corporate boards are in a position to oversee tax risk in a number of ways. For example, corporate boards should proactively develop appropriate tax policy principles, as well as establish internal tax control systems so that the actions of management are consistent with the views of the board with regard to tax risk. The board should be informed about all potentially material tax risks and responsibility should be assigned for performing internal tax control functions and reporting to the board. A comprehensive risk management strategy that includes tax will allow the enterprise to not only act as a good corporate citizen but also to effectively manage tax risk, which can serve to avoid major financial, regulatory and reputation risk for an enterprise.
103. A member of a multinational enterprise group in one country may have extensive economic relationships with members of the same multinational enterprise group in other countries. Such relationships

may affect the tax liability of each of the parties. Accordingly, tax authorities may need information from outside their jurisdiction in order to be able to evaluate those relationships and determine the tax liability of the member of the MNE group in their jurisdiction. Again, the information to be provided is limited to that which is relevant to or required by law for the proposed evaluation of those economic relationships for the purpose of determining the correct tax liability of the member of the MNE group. MNEs should co-operate in providing that information.

104. Transfer pricing is a particularly important issue for corporate citizenship and taxation. The dramatic increase in global trade and cross-border direct investment (and the important role played in such trade and investment by multinational enterprises) means that transfer pricing is a significant determinant of the tax liabilities of members of a multinational enterprise group because it materially influences the division of the tax base between countries in which the multinational enterprise operates. The arm's length principle which is included in both the OECD Model Tax Convention and the UN Model Double Taxation Convention between Developed and Developing Countries, is the internationally accepted standard for adjusting the profits between associated enterprises. Application of the arm's length principle avoids inappropriate shifting of profits or losses and minimises risks of double taxation. Its proper application requires multinational enterprises to co-operate with tax authorities and to furnish all information that is relevant or required by law regarding the selection of the transfer pricing method adopted for the international transactions undertaken by them and their related party. It is recognised that determining whether transfer pricing adequately reflects the arm's length standard (or principle) is often difficult both for multinational enterprises and for tax administrations and that its application is not an exact science.
105. The Committee on Fiscal Affairs of the OECD undertakes ongoing work to develop recommendations for ensuring that transfer pricing reflects the arm's length principle. Its work resulted in the publication in 1995 of the *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (*OECD Transfer Pricing*

Guidelines) which was the subject of the Recommendation of the OECD Council on the Determination of Transfer Pricing between Associated Enterprises (members of an MNE group would normally fall within the definition of Associated Enterprises). The *OECD Transfer Pricing Guidelines* and that Council Recommendation are updated on an ongoing basis to reflect changes in the global economy and experiences of tax administrations and taxpayers dealing with transfer pricing. The arm's length principle as it applies to the attribution of profits of permanent establishments for the purposes of the determination of a host State's taxing rights under a tax treaty was the subject of an OECD Council Recommendation adopted in 2008.

106. The *OECD Transfer Pricing Guidelines* focus on the application of the arm's length principle to evaluate the transfer pricing of associated enterprises. The *OECD Transfer Pricing Guidelines* aim to help tax administrations (of both OECD member countries and non-member countries) and multinational enterprises by indicating mutually satisfactory solutions to transfer pricing cases, thereby minimising conflict among tax administrations and between tax administrations and multinational enterprises and avoiding costly litigation. Multinational enterprises are encouraged to follow the guidance in the *OECD Transfer Pricing Guidelines*, as amended and supplemented, in order to ensure that their transfer prices reflect the arm's length principle.



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the legal profession

Tax Abuses, Poverty and Human Rights

A report of the International Bar Association's Human Rights Institute
Task Force on Illicit Financial Flows, Poverty and Human Rights

This report examines the pressing issues related to tax abuses from the perspective of international human rights law and policy. Prepared by a Task Force of renowned experts and chaired by Thomas Pogge, the report analyses how tax abuses deprive governments of the resources needed to combat poverty and fulfil their human rights obligations. This innovative report:

- provides a detailed overview of tax abuses and secrecy jurisdictions
- investigates the links between tax abuses, poverty and human rights
- draws on case studies from Brazil, Jersey and the SADC region
- evaluates responsibilities and remedies to counter tax abuses affecting human rights
- delivers unique recommendations for states, business enterprises and the legal profession

This report covers developments in international tax cooperation on issues such as automatic exchange of information, and base erosion and profit-shifting. It also assesses trends in international development policy which are increasingly focused on strengthening good tax governance in developing countries – thereby reducing dependency on foreign aid and improving development outcomes. It demonstrates the evolution of international human rights law and policy, whilst highlighting tax abuses as a pressing human rights concern.

With increasing media and civil society scrutiny on tax abuses by governments, as well as the tax practices of wealthy individuals and multinational enterprises, the Task Force's report seeks to engage the legal profession in this crucial global discussion.

International Bar Association's Human Rights Institute Task Force on Illicit Financial Flows, Poverty and Human Rights: Stephen B Cohen, Lloyd Lipsett (Rapporteur), Sternford Moyo, Robin Palmer, Thomas Pogge (Chair), Shirley Pouget and Celia Wells.