

# Addressing Illicit Financial Flows – National, Regional and Global Interventions



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Southern Regions Program

**About the project:**

As a unique space under the Financial Transparency Coalition (FTC), the Southern Regions Programme (SRP) plays a crucial role of an incubator by placing just tax systems and financial transparency at the heart of development debates. In October 2017, during a South-South strategy meeting it was recognised to bring out a collaborative document that emerged from the perspective of the Global South. Five members<sup>1</sup> of the SRP came together to author the IFF Toolkit in an effort to address issues of financial secrecy, enablers of illicit financial flows, lopsided impact on domestic resources and the ability to raise further resources due to loss of revenue as IFFs and the much-needed reforms in the international financial architecture set in the context of Global South. The toolkit uses case study-based evidence to simplify the issue of tax abuse. The document also covers tax incentive abuse as a subject under IFFs. The toolkit has benefitted from discussions held at the Nepal Social Forum (March 8th-10th, 2018), Paper on Illicit Financial Flows: Rights, Restoring Justice and Freedom and Pan-Continental Southern Dialogue on Illicit Financial Flows<sup>2</sup>, Nairobi (November 21-22, 2018).

**Disclaimer:**

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<sup>2</sup> See more here - <https://financialtransparency.org/ftcs-pan-continental-southern-dialogue-illicit-financial-flows-nairobi-21st-22nd/>

## A Toolkit on Illicit Financial Flows: Module 4

# Addressing Illicit Financial Flows - National, Regional and Global Interventions



# List of Acronyms

AAAA	—	Addis Ababa Action Agenda	IATF	—	Inter-Agency Task Force
ADR	—	Association for Democratic Reforms	ICESCR	—	International Covenant on Economic Social and Cultural Rights
BPfA	—	Beijing Declaration and Platform for Action	IFFs	—	Illicit financial flows
CAN	—	Andean Community	ILO	—	International Labour Organization
CARICOM	—	Caribbean Community	IMF	—	International Monetary Fund
CAT	—	Committee against Torture	IT department	—	Income tax department
CBDR	—	Common but Differentiated Responsibilities	MLI	—	Multilateral instrument
CCPR	—	Human Rights Committee	MNC	—	Multinational Corporation
CED	—	Committee on Enforced Disappearances	NEGI	—	Northern Economic Governance Institutions
CEDAW	—	Committee on the Elimination of Discrimination against Women	OECD	—	The Organisation for Economic Co-operation and Development
CEPAL	—	Economic Commission for Latin America and the Caribbean	OHCHR	—	United Nations High Commissioner for Human Rights
CERD	—	Committee on the Elimination of Racial Discrimination	RTI	—	Right to Information
CESCR	—	Committee on Economic, Social and Cultural Rights	SDGs	—	Sustainable Development Goals
CGT	—	Capital Gains Tax	SICA	—	Central American Integration System
CIAT	—	Inter-American Centre for Tax Administrators	SPT	—	Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment
CIC	—	Central Information Commission	TJNA	—	Tax Justice Network Africa
CMW	—	Committee on Migrant Workers	TNCs	—	Transnational Corporations
CRC	—	Committee on the Rights of the Child	UNCAC	—	UN Convention Against Corruption
CRPD	—	Committee on the Rights of Persons with Disabilities	UNCTAD	—	United Nations Conference on Trade and Development
CSW	—	Committee for the Status of Women	UNECA	—	United Nations Economic Commission for Africa
DTAA	—	Double Taxation Avoidance Agreement	UNESCAP	—	United Nations Economic and Social Commission for Asia and the Pacific
ECOSOC	—	Economic and Social Council	UNODC	—	United Nations Office on Drugs and Crime
FDI	—	Foreign Direct Investment	UNSR	—	UN Special Rapporteur
FfD	—	Financing for Development	VNRs	—	Voluntary National Reviews
GRs	—	General Recommendations	WHO	—	World Health Organisation
HLPF	—	High Level Political Forum			
IASB	—	International Accounting Standards Board			

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# Introduction and Background

This module will examine effective interventions, mechanisms and processes employed by governments or the civil societies of developing countries to curb illicit finance on regional, national and global levels. These interventions are often prompted by scandals such as the Panama Papers or other emblematic data leaks that have revealed the extent of the illicit financial flows, and those involved in them.

However, exposing these stories alone is not enough, as it is equally important to assess alternative frameworks like human rights institutions, rapporteurs and multilateral bodies when approaching the issue. Therefore, in this module we will explore those who truly make the rules on illicit financial flows. This demands the full participation of the Global South while aligning approaches to tackle IFFs with human rights principles by focusing on those who are the most affected by it and securing their right to remedy.



# Mapping Southern Institutions and Processes Tackling IFFs

The approach of international institutions, processes and mechanisms to tackle IFFs at the moment are fragmented and in different competing spaces. The five spheres of global governance show where the balance is tipped in favour of northern-based dominated bodies, while other bodies have a more even southern majority power.

For civil society in developing countries, human rights frameworks and financing the sustainable development agenda are international spaces where intersectional issues can show the impact of an unequal, unfair and a neoliberal financial system. Human rights and SDG spaces tend to have equal representation between all countries, but have a limited role in economic governance.

What is notable is that institutions that are dominated in the Global North hold most of the economic and financial power in the world, including G20, OECD, IMF and the World Bank. Whereas, developing countries hold most of the power in the UN General Assembly, where they are either a part of non-political bodies (e.g. UN Committee of Experts on International Tax Matters) or require a full consensus (e.g. UN FFD Forum).

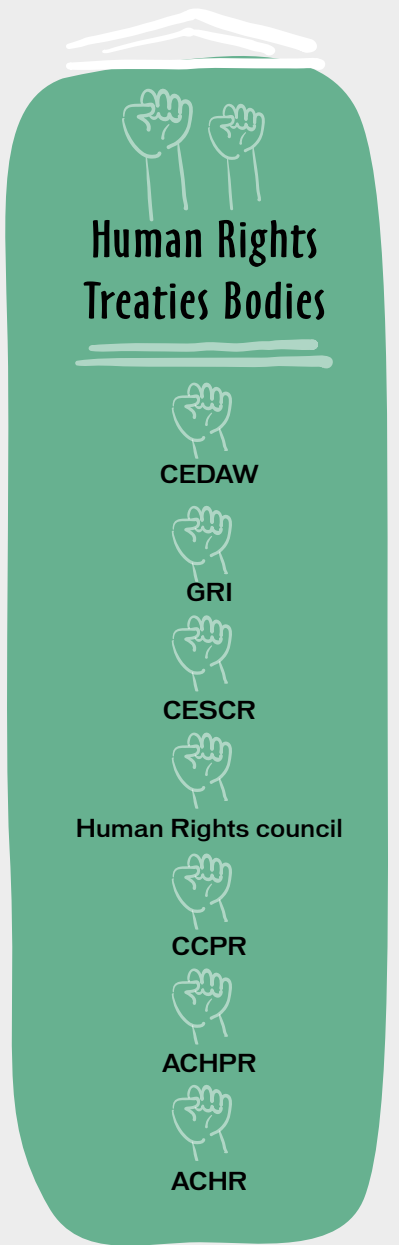
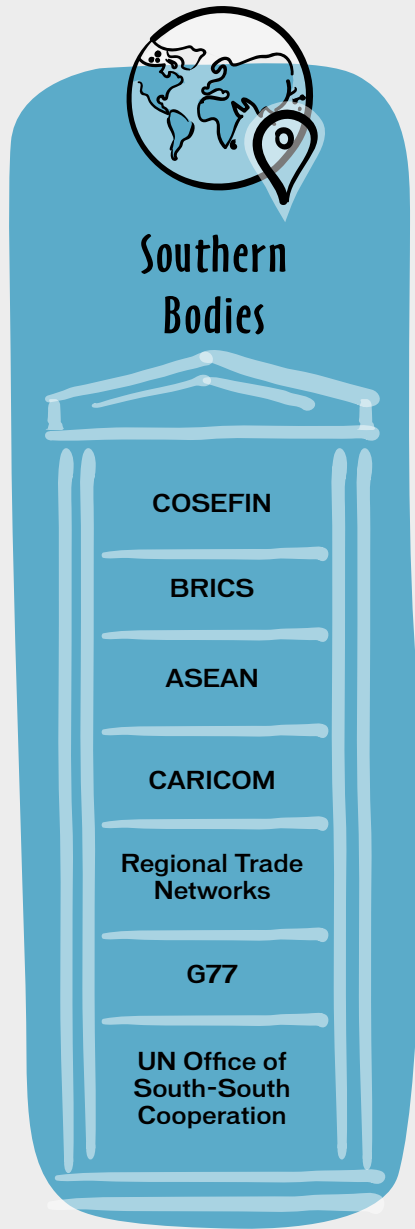
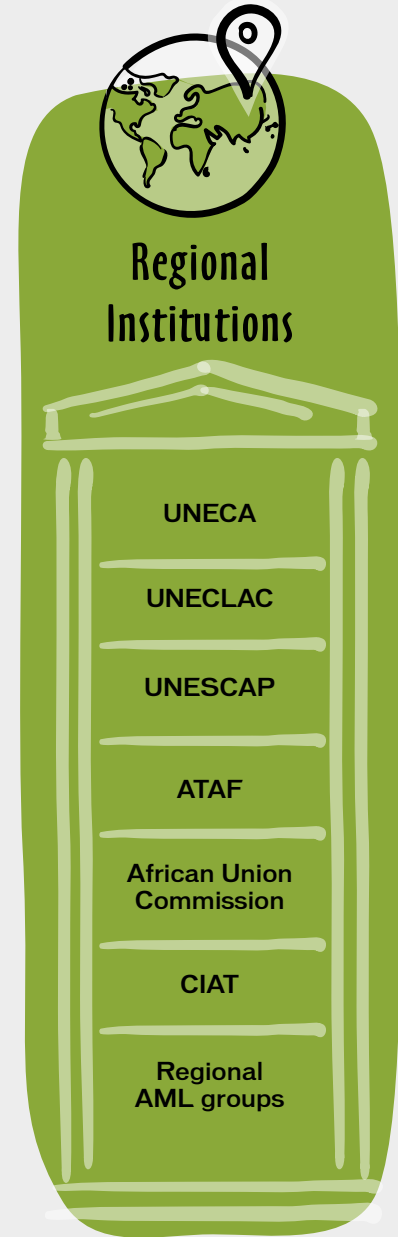
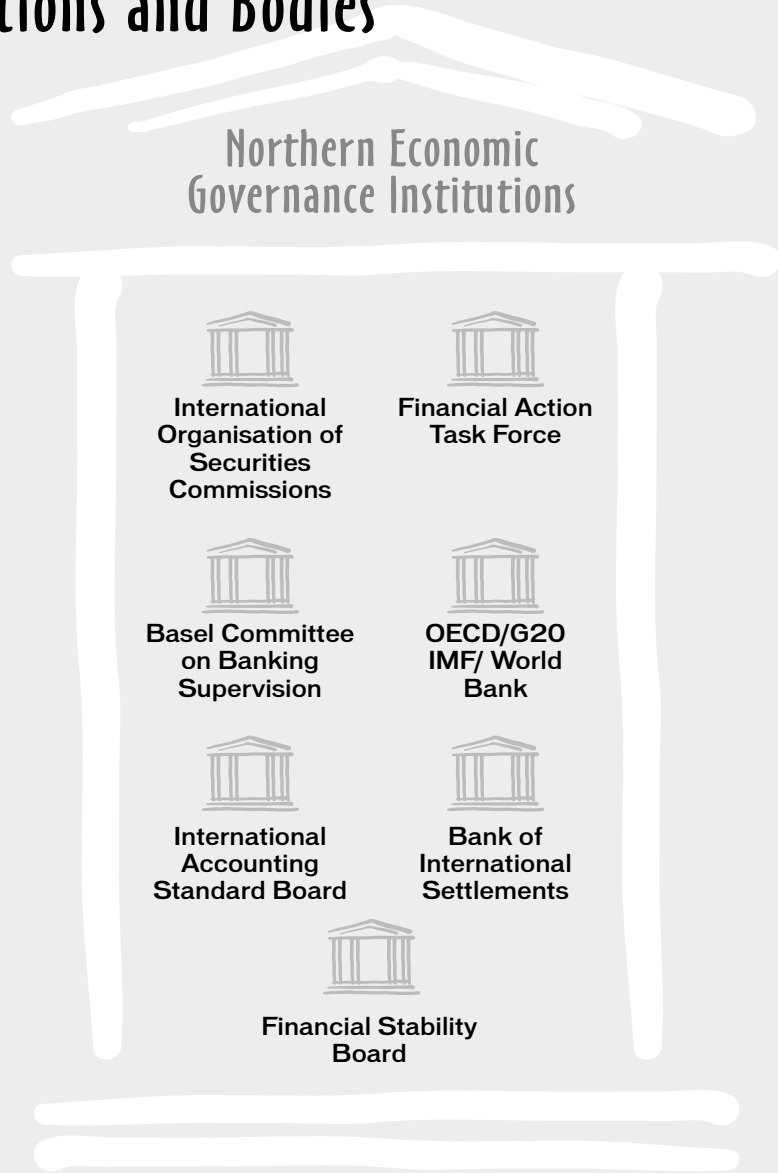
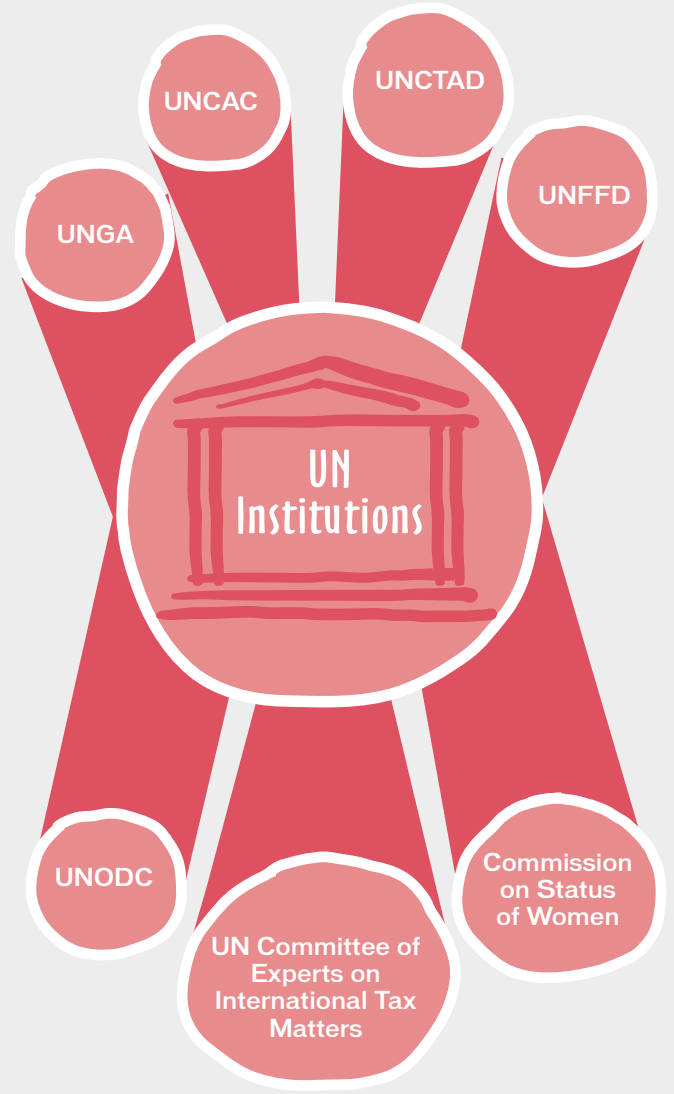
In the human rights system we see a gradual rise in the importance of economic issues via the rapporteurs of the UN Human Rights Council. It

is also important to note that the agendas of the various treaty bodies and regional human rights mechanisms are starting to increasingly provide monitoring on IFFs and related issues. In addition, the SDG specific monitoring is also starting to make an impact as IFFs is an SDG indicator. Thus, bodies like the Committee for the Status of Women (CSW) have since begun commenting on the issue.

Spaces such as regional bodies and regional institutions are where Global South has arguably the most important entry points. However, Northern countries are members of even such spaces. UN regional economic commissions, and more recently regional tax fora, are avenues for developing countries to exchange best practices on IFF matters and to develop national approaches that take into consideration their differentiated and distinct needs.

There is a challenge presented to the entire multilateral system (whether Northern, Southern or somewhat equally dominated) by private sector initiatives that rely on either multi-stakeholder approaches (like World Economic Forum), or on defining the purpose so narrowly that it excludes civil society and many governmental stakeholders entirely (IASB, which is not a public institution). They are often allowed to exist by explicit or implicit consent by Northern Economic Governance Institutions (NEGI).

# Mapping International Institutions and Bodies



# Engaging With Rights based Mechanisms

One of the key ways to shift power in bodies is with equal and meaningful representation from the Global South on the issues of illicit financial flows in the context of human rights, gender equality and SDG. In this section, we will discuss different mechanisms and entry points in each process for advocating against IFFs. We will also discuss how to engage with them and the rationale behind targeting these spaces.



## Commission of Status of Women

### Objective



The Commission on the Status of Women (CSW) is the principal global inter-governmental body dedicated to the promotion of gender equality and the empowerment of women.

### Purpose



The CSW takes the lead in monitoring and reviewing progress and emerging challenges in the implementation of the Beijing Declaration and Platform for Action (BPfA), and in gender mainstreaming in the UN.

### Entry point(s)



- 1 As functional commission of the Economic and Social Council (ECOSOC), it is expected to be “instrumental in promoting women’s rights, documenting the reality of women’s lives throughout the world, and shaping global standards on gender equality and the empowerment of women.”
- 2 Evaluates progress in implementation of the 1995 Beijing Declaration for Action<sup>2</sup> and the 23rd Special Session of the General Assembly held in 2000.

### Advocacy cycle

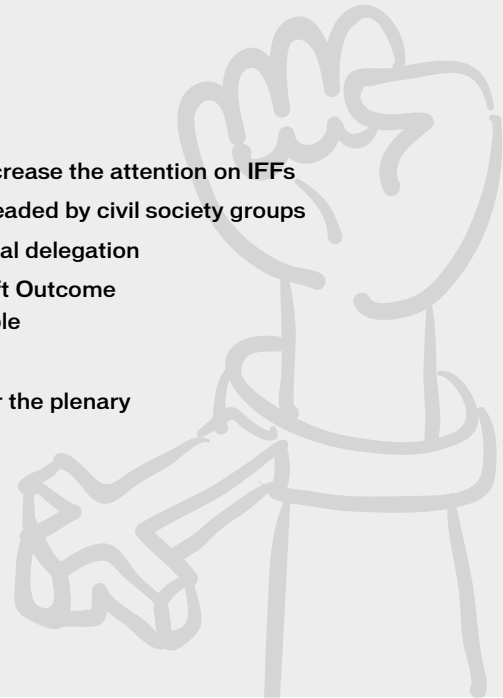
#### Time

Meets annually for 8 weeks in March, following the commemoration of International Women’s Day (8th March).

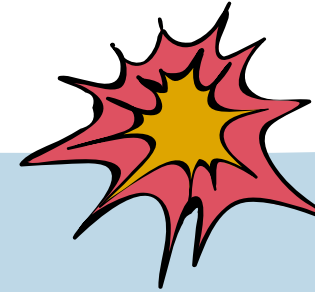
#### How to Engage?:



- Engage in dialogue with governments to increase the attention on IFFs
- Engage in regional CSW processes spearheaded by civil society groups
- Participate as members of a country’s official delegation
- Contribute to formulating inputs for the draft Outcome Document, in countries where this is possible
- Organise side events on thematic issues
- Prepare oral interventions or statements for the plenary session or Experts’ meetings
- Participate in NGO side events



### Creating Impact



- CSW has taken an interest in the issue of illicit financial flows and its implications on gender equality and women’s empowerment agenda.
- In 2018, in its discussion on the priority theme Empowering Rural Women and Girls, the CSW in its 62nd session noted the continuing economic marginalisation faced by rural women and overall, the multiple and intersecting forms of discrimination they encounter. The CSW emphasised the need to close resource gaps in order to address these issues:
- “The Commission reaffirms the importance of significantly increasing investments to close resource gaps for achieving gender equality and the empowerment of all women and girls, including rural women and girls, though, inter alia, the mobilization of financial resources from all sources, including domestic and international resource mobilization and allocation the full implementation of official development assistance commitments and combating illicit financial flows, so as to build on progress achieved and strengthen international cooperation, including North-South, South-South and triangular cooperation, bearing in mind that South-South cooperation is not a substitute for, but rather a complement to, North-South cooperation”

(as agreed conclusions in CSW 62, para 43).

- In 2019 too, as CSW met for its 63rd session, it reiterated the need to plug resource gaps, including by combatting IFFs.



# Sustainable Development Goals

## Objective



The SDGs were negotiated in 2015 as part of the 2030 Agenda for Sustainable Development as a set of goals and targets that governments agreed upon for the next 15 years.

## Purpose



Along with the SDG review processes, there is ongoing monitoring of specific 16 Goals and 244 indicators that all governments will be reporting on once they have both identified a definition, and the data to be used.

## Entry point(s)



SDG review processes: Regional SDG forums and Voluntary National Reviews (VNRs) which are then presented at the High Level Political Forum (HLPF) every year.

## Advocacy cycle

### Time

Multiple opportunities to intervene at national, regional and global levels.

### How to Engage?:



- Feeding into VNRs or creating shadow VNR processes where civil society organisations and other groups can add their inputs..
- Pushing an SDG coordination mechanism within the national level, coordinated by a ministry or inter-ministerial task-force where different sections and branches of government coordinate SDG delivery, request inputs and create a space for dialogue with other actors as well.
- Doing complementary and additional monitoring of SDG goals and targets in an independent fashion, and feeding this formally in consultations and requests for non-state monitoring of SDGs as data platforms and data sharing is an important part of monitoring progress towards the SDGs.

## Background

The 2030 Agenda is different from the previous MDG agenda in many ways. The agenda is both universal –applying to all countries–and common but differentiated responsibilities (CBDR) where the Global North has a greater responsibility over historical injustices including climate change and inequality. This should result in shifting power to economic-governance institutions where the Global North and the Global South are equal.

# Our Focus- sDG Target 16.4



The SDG target 16.4 focuses on “significantly reducing illicit financial and arms flows, strengthening recovery and return of stolen assets” and cross-cuts with several other goals like:

- Poverty (goal 1)
- Gender (target 5.1, 5.2)
- Climate (goal 13)
- Inequality (target 10.1, 10.2)
- Corruption (16.5)
- Domestic resource mobilisation (target 17.1)

## Indicator Process

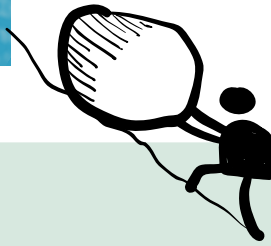
UNODC and UNCTAD are the co-custodian agencies of target 16.4, responsible to come up with indicators, statistics and methodology. Headed by the UN STATS, the Inter Agency Expert Group on SDGs comprises of national statistical commissions and other such bodies who ultimately advice and make decisions on indicators and their progress. UNCTAD focuses on the commercial and tax related aspect of IFFs and UNODC concentrates on the criminal aspect.

- In terms of developing regions, UNCTAD has partnered with UNECA by conducting pilot studies in 9 African countries.
- In Asia-Pacific and Latin America, UNODC has taken the lead in this process.

## What is the issue?

As a tier II indicator<sup>3</sup> with limited parameters of identification, the target faces several conceptual, technical and methodological challenges and risks being dropped by the time of the 2020 review summit of the SDGs.

At present, there is only one indicator that has been proposed under target 16.4. It uses the proportion of legal persons and arrangements for which beneficial ownership is publicly available. The proposed indicator does not clarify if it includes all legal entities like companies, limited liability partnerships, trusts, foundations, cooperative societies and associations. While information from different public beneficial registers can prove to be useful, coming up with a single indicator is met with great challenges and in this light, a mixed list of robust indicators is preferable.



## Status Quo

The Second Expert Meeting on the Statistical Measurement of Illicit Financial Flows held in 2018 identified that IFFs are a monetary measure of:

- International transfers of illicitly earned capital
- Legal capital transferred internationally for illicit purposes
- Legal capital transferred illicitly”

This meeting also discussed three provisional indicators for the SDG target:

- To measure misaligned profit using country-by-country reports of multinational corporations, including both the country from where the profits

are declared to where the real economic activity takes place.

- Using the aggregate data from the Common Reporting Standard framework which requires financial institutions to exchange information to confirm the citizenship of account holders with resident countries and address tax evasion by the undeclared offshore assets.
- An exposure to the risk of IFFs indicator by combining opacity of partner jurisdictions with scale measures of bilateral economic and financial relationships.



## Tax Evasion as an Indicator for Developing Countries

National indicators on tax evasion could bridge a huge gap for developing countries in closing avenues for tax abuse as well. In 1976, an Inter-American Centre for Tax Administrators (CIAT) working group broke down major avenues for tax evasion with respect to the activities employed by transnational companies<sup>4</sup>. In November 2019, UNESCAP recognised issues of tax competition and base erosion as the underlying reasons for tax evasion and IFFs<sup>5</sup>. Some of these indicators identified sectors and instruments that could be used for both tax evasion and avoidance:

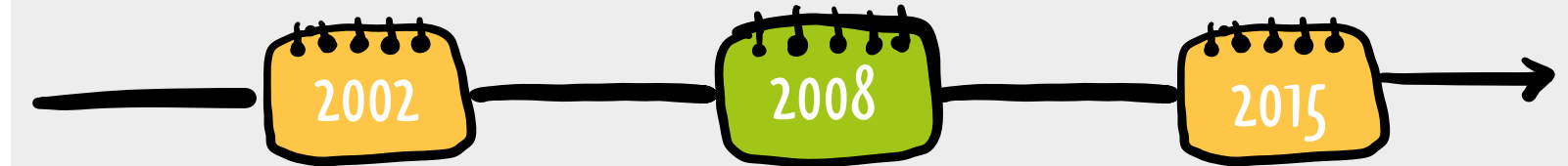
- Shell companies and trusts used as instruments to disguise ownership, control or connection.
- Highly inventive industries which make use of the huge margin between the value of their goods, the cost of production and of volume of research and development expenditure.
- “Permanent loss makers” suggests uncommercial trading and a common control relationship with suppliers and/ or customers.



## Addis Ababa Action Agenda

The SDG agenda is closely linked to the Financing for Development (FfD) process.

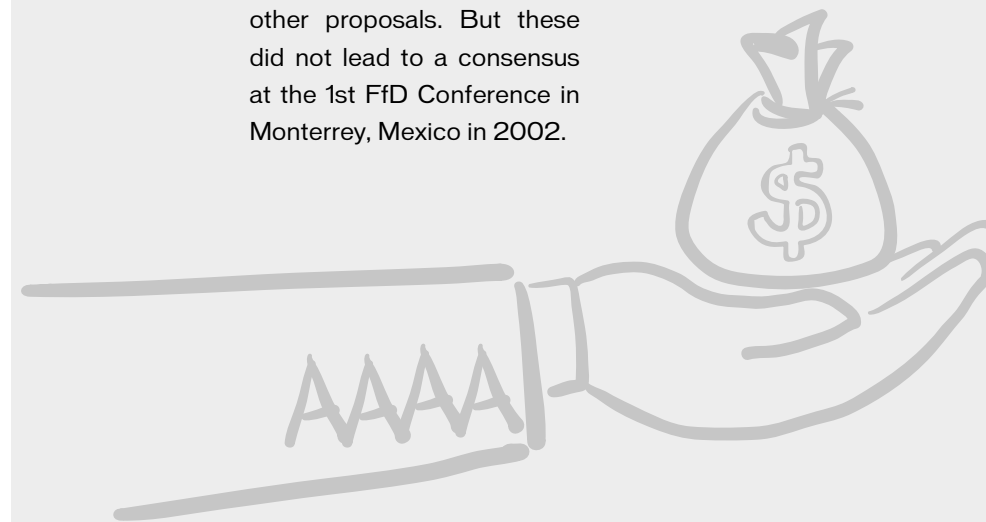
### Timeline of the Financing for Development process



- It started with an international consultation after the Asian Financial Crisis, and the landmark ‘Zedillo Report’ that laid the foundations to the FfD agenda—foreseeing the creation of an International Tax Organisation, and taxing financial transactions among other proposals. But these did not lead to a consensus at the 1st FfD Conference in Monterrey, Mexico in 2002.

- A second FfD conference was held in 2008 in Doha<sup>6</sup>, leading to the Doha Declaration that explicitly stated the need for international tax co-operation but without a tangible institutional space for this purpose.

- The 3rd FfD Summit, was held in Addis Ababa in 2015, resulting into the Addis Ababa Action Agenda (AAAA), which slightly increased the frequency of UN Tax Committee meetings, agreed to ending illicit financial flows, and also created a monitoring, follow-up and review mechanism for the FfD process in the form of the Inter-Agency Task Force (IATF) report, and the annual FfD Forum.



Due to the resistance of the governments in the Global North, the 2002 FfD Conference<sup>7</sup> did not agree on the formation of the ITO, but rather took a step towards agreeing that taxation constitutes a cross-border dimension. Currently, only the last point has been taken up by the OECD, who has created the Multilateral Instrument (MLI) for tax information exchange. However, it remains incomplete as most developing countries do not have access to tax information flows to be able to spot suspicious and abusive tax transactions.

Finally, Addis Ababa 3rd FfD conference also considered the creation of an international tax commission in the UN system, but it did not proceed due to the blocking by US and European states who said they would veto the entire agreement if developing countries did

not withdraw their demand for tax governance. The main step forward in strengthening the FfD process was the inclusion of the annual Inter-Agency Task Force (IATF) report to monitor the entire Addis Ababa outcome, and how the FfD links to the SDGs being reviewed during the year. Then, the monitoring report was taken to the annual FfD forum where governments negotiated an annual outcome document of internationally agreed conclusions.

While it is important to push for opportunities to create a UN Tax Body through the various follow-up processes, there are many opportunities to follow-up and monitor the existing commitment concerning IFFs and linking tax co-operation and IFFs to human rights frameworks, including:



## How to engage?



**Making inputs and submissions to the Inter-Agency Task Force on FfD**



To ensure that Global South government positions and priorities are included in the annual monitoring report, and rights-based frameworks are promoted in all avenues of monitoring progress.

**Working with champion UN agencies and international bodies to lead on specific issues**



Use potential avenues like the ILO, UNODC, WHO, UN Women to strengthen the IFF and tax cooperation as well as promoting social and economic rights with tax revenue.

**Working with regional UN economic bodies to strengthen regional follow-up process on FfD**



To elevate the positions of developing countries at the global follow-up. Regional follow-up should lead to formal inputs and negotiated outcomes at the regional level, which are then reflected at the global level.

**Organising side-events, oral and written submissions at the UN FfD Forum**



To enable developing countries into setting the rules on economic governance and to raise adequate funds to resource human rights and SDG frameworks.

**Linking FfD follow-up with the Commission on Status of Women (CSW), as well as SDG follow-up**



Bring back focus financing SDGs—a key stumbling block —by linking the FfD follow-up process with the means of implementation under Goal 17.

**Organising national level dialogues around FfD**



Countries should prepare their positions to the FfD process based on an inclusive national monitoring and dialogue.

# 4 International Human Rights Frameworks

Article 2.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) says that states must devote the maximum available resources to ensure the progressive realisation of all economic, social and cultural rights as expeditiously and effectively as possible, even during times of severe resource constraints, whether caused by a process of adjustment, economic recession or other factors<sup>2</sup>. The UN Convention on the Rights of Persons with Disabilities (Article 4.2) and the UN Convention on the Rights of the Child (Article 4) are both explicit about state parties' obligations to take steps to use the maximum available resources to ensure economic, social and cultural rights. Meanwhile, the Maastricht Guidelines on violations of economic, social and cultural rights clarifies that a state is in violation of

the Covenant if it fails to allocate the maximum of its available resources to realizing human rights. In 2014, the UN Special Rapporteur (UNSR) on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, devoted her final annual report to examine tax and fiscal policy as a major determinant of the enjoyment of human rights<sup>3</sup>. Her report noted that while human rights obligations do not prescribe precise taxation policies, obligations under various international and regional treaties, as well as many constitutions do impose limits on the discretion of States in the formulation of fiscal policies. In order to ensure that States respect, protect and fulfil rights and in order to assist them in opening fiscal space towards the realisation of human rights, fiscal policies must be guided by the obligations taken on by states under these treaties.



## Special Procedures of the Human Rights Council

### Objective



The special procedures of the Human Rights Council are independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective. The system of Special Procedures is a central element of the United Nations human rights machinery and covers all human rights: civil, cultural, economic, political, and social. As of 1 August 2017, there are 44 thematic and 12 country mandates.

### Entry points



- Special Rapporteur on the Right to Development<sup>8</sup>
- Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights<sup>9</sup>
- Independent Expert on the promotion of a democratic and equitable international order
- Independent expert on human rights and international solidarity
- Special Rapporteur on extreme poverty and human rights

Here, we look at some of the country monitoring and reports, by two rapporteurs in particular, who have been active in defining IFFs. In theory, almost all rapporteurs could touch upon IFFs if further submissions and engagement were made more systematically, as these feed into the development of international human rights, laws and norms around which human rights are defined.

## The Independent Experts on Foreign Debt and Human Rights

One such appointment is the Independent Expert on the effects of foreign debt and other related

international financial obligations of States. In June, 2014, Mr. Juan Pablo Bohoslavsky, a lawyer from Argentina, was appointed as the Independent Expert on Foreign Debt and Human Rights<sup>10</sup>. He was given the mandate to carry out analytical research and undertake country missions, in an effort to work with Governments, the United Nations, non-governmental actors and other stakeholders on issues falling under his mandate.

Through the adoption of Resolution 25/9<sup>11</sup> the Human Rights Council also asked the Independent Expert to “continue considering the

impact of illicit financial flows on the enjoyment of human rights.”<sup>12</sup> The Independent Expert is tasked with carrying out country missions and engaging in dialogues with the Government, international financial institutions, UN agencies and civil society as a part of the mandate to undertake global analysis and develop practical recommendations and suggestions to the countries concerned. The Independent Expert also engages in consultations with the World Bank and the International Monetary Fund and other international development organisations.

## How to engage?



Submit thematic papers or studies

These often form useful inputs for the Independent Experts’ reports. Civil society organisations can also attend thematic consultations or participate in meetings conducted by the Independent Expert during country missions.

Creating impact

In 2018, the Independent Expert on Foreign Debt and Human Rights delivered a strong message in his fifth annual report to the UN General Assembly, “Women carry most of the burden of austerity measures, fiscal consolidation and other economic reform policies. These measures, instead of promoting women’s human rights, add to existing structural inequality, and further entrench discrimination against women.”<sup>13</sup> The evidence, analysis and recommendations presented in his report benefited from independent research and consultations with a variety of stakeholders, and other inputs including submissions from NGOs.

## Special Rapporteur on extreme poverty and human rights

During successive mandates (held in the past by Magdalena Sepúlveda, and currently by Philip Alston), the special rapporteur on extreme poverty and human rights has commented on the need for states to respect their duty to collect maximum available resources for the enjoyment of human rights, as well as not impede other states in realising their revenue potential by use of harmful tax regulations, laws and practices that constrain other states from being able to collect taxes.

Sepúlveda made this point strongly in her 2013 report concerning Ireland. 'Providing an avenue for high-net-worth individuals and transnational corporations to evade tax liabilities...could be

The most relevant treaty bodies in terms of tackling illicit financial flows to this date have been the Committee on the Elimination of Discrimination against Women (CEDAW) and the Committee on Economic, Social and Cultural Rights (CESCR).

contrary to obligations of international assistance and cooperation, because it can directly undermine the ability of another State to mobilise the maximum available resources for the progressive realisation of economic, social and cultural rights<sup>14</sup>. Article 21 of the Maastricht principles says that States must refrain from engaging in activity that impairs the ability of other states to comply with its own human rights commitments.

For instance, there are questions to be answered about the impact of Irish tax policy on developing countries' ability to raise revenue in pursuit of the fulfilment of citizens' rights. Whether Irish tax policy contravenes our obligation to respect and protect the enjoyment of human rights everywhere, which involves avoiding conduct that would foreseeably risk impairing the enjoyment of human rights by persons beyond their borders, as well as conducting assessments of the extraterritorial impact of laws, policies and practices.<sup>15</sup>

Beyond establishing this link between tax and human rights to demonstrate how bad tax policies, practices and MNC behaviour contribute to lower tax revenues, it is important to make recommendations and follow-up points. In Particular:

The development of tax and fiscal policy must be grounded in the principles of human rights. Greater coherence across government departments is

needed to ensure that fiscal policies comply with our human rights obligations under international law and do not promote inequitable growth, or contribute to further marginalization of people and communities or create greater inequality between men and women.

A human rights impact assessment is carried out on all aspects of the budget measures<sup>16</sup>. This analysis should be published together with other budget documents (like financial costing of measures) on the Ministries of Finance website at budget time to allow for the greatest possibility of public engagement.

Fiscal policy should be subject to review for its human rights impact after an agreed-upon period.

All major changes to the tax code should always include an assessment of potential spillover impact on the Global South countries. The impact assessments should consult the affected people and trigger concrete policy actions to remedy any negative impacts discovered.

There should be mechanisms to lodge official human rights based complaints in various treaty bodies to challenge harmful fiscal policies, as well as abusive practices of Transnational Corporations (TNCs) where their behaviour deliberately abuses international tax laws and norms, and thus creates

tax abuses that are considered IFFs.

## Treaty Bodies

The human rights treaty bodies are committees of independent experts that monitor implementation of the [core international human rights treaties](#)<sup>17</sup>. Each State party to a treaty has an obligation to take steps to ensure that everyone in the State can enjoy the rights set out in the treaty. Currently, there are nine human rights international treaties, and one optional protocol, from which 10 treaty bodies have been established. The treaty bodies are composed of independent experts of recognized competence in human rights, who are nominated and elected for fixed renewable terms of four years by State parties. They are:

- [Committee on the Elimination of Racial Discrimination \(CERD\)](#)<sup>18</sup>
- [Committee on Economic, Social and Cultural Rights \(CESCR\)](#)<sup>19</sup>
- [Human Rights Committee \(CCPR\)](#)<sup>20</sup>
- [Committee on the Elimination of Discrimination against Women \(CEDAW\)](#)<sup>21</sup>
- [Committee against Torture \(CAT\)](#)<sup>22</sup>
- [Committee on the Rights of the Child \(CRC\)](#)<sup>23</sup>

- [Committee on Migrant Workers \(CMW\)](#)<sup>24</sup>
- [The Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment \(SPT\)](#)<sup>25</sup>
- [Committee on the Rights of Persons with Disabilities \(CRPD\)](#)<sup>26</sup>
- [Committee on Enforced Disappearances \(CED\)](#)<sup>27</sup>

The most relevant treaty bodies in terms of tackling illicit financial flows to this date have been the Committee on the Elimination of Discrimination against Women (CEDAW) and the Committee on Economic, Social and Cultural Rights (CESCR).

CEDAW was adopted by the UN General Assembly on 18 December, 1979 and entered into force on 3 September, 1981. It's the first and only international treaty that comprehensively addresses women's rights in all spheres—civil, political, social, economic, and cultural. Often referred to as the International Bill of Rights of Women, CEDAW today is one of the most widely ratified UN Conventions.

Given this comprehensive definition of discrimination, there is thus a case to be made for examining, through the lens of CEDAW and utilising CEDAW mechanisms, the effects or impacts of

IFFs on women and their ability to fully enjoy their human rights, the benefits of development and for the potential or actual discriminatory effects of IFFs. CEDAW's goal is to eliminate all forms of discrimination and achieve substantive gender equality. Recognising the longstanding history of gender inequality and women's subordination, its structural roots and the role that social and cultural norms play in perpetuating inequalities, CEDAW adopts a broad and comprehensive definition of discrimination in Article 1 as:


*'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.*

Discrimination, according to CEDAW, manifests in direct and indirect forms. Direct discrimination refers to different treatment on the basis of sex or gender. On the other hand, indirect discrimination refers to any law, policy or practice that, whether by intent or outcome, has a different effect on women and men, especially when it hinders their ability to enjoy their human rights. An economic policy or practice, for example, that affects

women and men differently or that hinders women from fully enjoying their rights on a basis of equality of men and women or that reinforces or leads to further marginalization of women, would be considered discriminatory in Article 3:

*"States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men. "*

The Committee, composed of 23 experts in various fields, meets yearly for two weeks to deliberate on reports submitted by State parties. The Committee also solicits and receives shadow or alternative reports from NGOs and other independent entities like National Human Rights Commissions that can inform their consideration of State parties' reports. The Committee is also mandated to issue general recommendations (GRs) that elaborate on thematic or contemporary issues as well as interpret and provide advice on the Convention's relevance and practical application. While GRs are non-binding, they represent a useful and important body of norms.



### NGOs and civil society organizations historically have played many important roles in CEDAW mechanisms and processes:

- Monitoring treaty implementation, and lobbying governments for policy reforms in lieu of more effective implementation.
- Providing inputs to State parties' reports, especially in countries where governments initiate multi-stakeholder consultations in the course of preparing reports to the Committee.
- Preparing shadow or alternative reports as direct submissions to the Committee which can serve as body of evidence to be considered by the Committee. Such shadow or alternative reports could cover all articles of the Convention or focus on one thematic issue (e.g. women's access to social services and how they are impeded by lack of resources as a result of IFFs).
- Preparing inputs for reports by UN Country Teams or other UN entities to CEDAW in countries where these are practiced.
- South-South evaluation of Universal Periodic Review.

# Regional Actions - A peak into Latin America

Unlike the high level commitments and strong regional institutions in Africa, the Latin American and Caribbean region is facing a setback in terms of regional integration. Ministers meet more frequently in Inter-American institutions in Washington rather than within the Region. Recent initiatives such as the Bank of the South, the Union of South American Nations and the Community of Latin American and Caribbean States have been, quite literally, sacrificed, in favour of Washington-based institutions and sub-regional fora such as the Andean Community (CAN), Central American Integration System (SICA) or the Caribbean Community (CARICOM). Therefore, civil society organisations have had to lead and create new fora to interact with regional policymakers. Additionally, governments and the civil society have had to fall back on regional anchors of the UN such as the Economic Commission for Latin America and the Caribbean (CEPAL).

Regional or sub-regional groups can be of formal or informal nature. They are credible spaces for civil society groups to come up with possible solutions and recommendations on the impact of IFFs and the base erosion practices of MNCs.





## Actors in Latin America to engage with

### Parliamentarians



#### Strategy

Establishing a network of Latin American and Caribbean parliamentarians that become champions on issues of IFFs is an important step for civil society organisations.

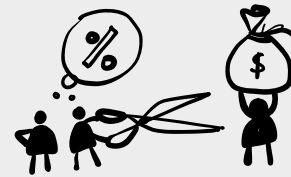
#### Initiatives

Latindadd and Fundación SES organise the regional Seminar of Parliamentarian for tax justice. It is an opportunity to prioritise and educate them on issues of IFFs.

#### Adapting it in your context

In the absence of regional platforms, civil society organisations can take such initiatives nationally and build similar platforms.

### CIAT



#### Strategy

The Inter-American Centre for Tax Administrations (CIAT) continues to be a good forum for tax policy coordination and horizontal cooperation between tax administrations. CIAT is a highly technical organisation that promotes knowledge exchange among its members. CIAT continues to be a strong ally in regional spaces to combat IFFs.

#### Initiatives

Civil society organisations in the region have advocated for strengthened exchange of experiences between tax administrations in Latin America and the Caribbean.

#### Adapting it in your context

Civil society can pursue sub-regional anti-money laundering groups or existing tax cooperation fora to facilitate communication between tax administrations of developing countries.

### CEPAL



#### Strategy

CEPAL has a permanent staff and a research agenda dedicated to studying IFFs.

#### Initiatives

SDG regional forums are good target spaces to provide inputs. The LAC Forum on Sustainable Development organised by CEPAL likewise is a welcome space.

#### Adapting it in your context

Civil society groups can actively participate on issues of IFFs and human rights to further the voices from the Global South. These are also helpful spaces to engage with the regions' trade unions, grassroots organisations and social movements.

# National Actions

**b**efore delving into creating spaces for advocacy and actions, we first set the issue of IFFs in a local context. We also look into cases where such interventions have proven to be useful. These include transparency and anti-corruption led initiatives, human rights legislations, judicial activism, tax and budget advocacy, grassroots campaigns and collaboration with journalists.

## Right to Information and other Human Rights legislation

Also known as Freedom of Information, the Right to Information is fundamental to a participative democracy and enables efficient delivery of public services. Even in the absence of a request, the South African law for example, mandates public authorities to proactively publish information

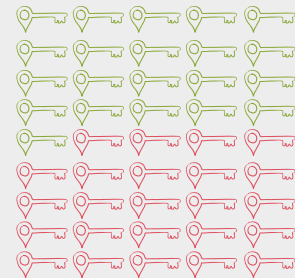




## Regions with Access to Information Laws

**African Union  
(without Arab  
League States)**

**21 out of 45**



**Asia (other - East Asia  
and South-East Asia)**

**10 out of 17**



**South Asia**

**7 out of 8**



**Pacific (includes  
Australia and New Zealand)**

**5 out of 14**



**Central Asia**

**4 out of 5**



**Latin America**

**16 out of 21**



Source: Open Society Justice Initiative (2019). States that Guarantee a Right of Access to Information (RTI). Available here: <https://www.right2info.org/resources/publications/countries-with-ati-laws-1/view>.<sup>28</sup> [Accessed on August 6, 2019]

on public services. Not only used for promoting good practices, it is also used to pressurise enforcement agencies. RTI laws are therefore at the centre of fulfilling SDG target 16.6 which aims to “develop effective, accountable and transparent institutions at all levels”. Journalists, public prosecutors and transparency activists are at the forefront of exposing illicit practices, often risking their own lives.

## Bringing Transparency in Political Financing

India’s Right to Information Act (2005) allows disclosure of information if public interest can be established. Transparency in political financing is crucial for a functioning and active democracy. Political financing is especially prone to attracting funds from illicit means. In India, political parties are financed through electoral trusts that are not-for-profit entities essentially meant to ensure transparency and accountability in of political parties. In 2014, An RTI application made to the Income Tax (IT) department on behalf of the Association for Democratic Reforms (ADR), a non-governmental organisation, sought disclosure of the names and addresses of all the Electoral Trusts and other charitable trusts formed from Assessment Year 2003-04 and 2013-14. The application also sought audit reports, the

details of contributions received by electoral trusts and distributed to political parties and the terms of income tax exemptions as claimed by these trusts. The IT department however, refused to provide the information sought on the grounds that this information was held in a fiduciary capacity and argued that there was no interest in public disclosure of this personal information. Challenging this decision, the appellant argued that electoral trusts have a legal duty to furnish this information in the spirit of transparency of political financing which is a matter of public concern. Moreover, the privacy grounds cited by the IT department applied to natural persons and not legal persons. The argument made by ADR requested that political parties be treated as public authorities and should therefore come under the RTI Act.

Upon reviewing, the Central Information Commission (CIC) in 2013 held that electoral trusts and their further distribution to political parties is not personal information. It was further held by Income Tax Department in fiduciary capacity. Financial contributions made to any political party, auditing reports and their income tax returns must be disclosed in a timely manner. Despite the CIC order, major political parties have failed to comply with this order.

## Public Interest Litigation of

## NCell in Nepal

Public interest litigation is a highly effective tool for civil society or private individuals to realise social justice. Public interest litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.

Article 88 of the Constitution of Nepal 1990 and article 107 of the Interim Constitution of Nepal, 2063 (year 2006 in Gregorian calendar) have provisions designed to help the development of PIL in Nepal. Forum for Protection of Public Interest (Pro-Public) is one of the first organisations in Nepal which has been working for public interest with high rate of successful Public Interest Litigations.<sup>29</sup>

In April 2019, a group of Nepali individuals filed a public interest litigation against Ncell Private Limited (Case 074-WO-0475), to essentially recover the full tax charge with the late interest and fines, that then would amount to NPR63 billion (\$548 million). The letter by the tax authority was issued to Axiata as a follow-up to the full written order of the Supreme Court issued on 9 April 2019, which related to its oral order dated 6 February 2019 in a public interest

litigation filed by Mr Dwarikanath Dhungel and other claimants. Axiata considers that CGT should not be applicable on offshore transfers of assets, and even if applicable any balance not paid in CGT should be paid by the seller, i.e., Telia.

## Judicial Activism: the Case of the Kenya-Mauritius Double Taxation Deal

In 2014, Kenya signed a Double Taxation Avoidance Agreement (DTAA) with Mauritius in an effort to promote foreign direct investment (FDI) flows into the East African nation. The agreement sought to put the competitiveness of Kenyan companies at par with those of other African countries that already had tax treaties with Mauritius and to streamline tax effectiveness.

On analysing the treaty, Tax Justice Network Africa (TJNA) found that the DTAA would undermine tax revenue mobilisation while delivering little benefit on the competitiveness front. More critically, key aspects of the treaty were found to be problematic, starting with definition of terms within the DTAA. The definition of what it means to be 'resident', for instance, opens the treaty to abuse by conduit companies primarily formed to siphon money out of the country.

Secondly, the treaty included clauses on issues such as business profits, dividends, interest, capital gains tax and others that are inconsistent with the UN Model Double Taxation DTAA negotiations between developing and developed countries. The clauses and the stipulations within them directly weaken Kenya's ability to achieve the much-needed revenue targets.

Thirdly, Kenya's ability to tax the profits of foreign enterprises is further limited if the foreign firms set up a subsidiary within Kenya that trades with a parent company in Mauritius as its host country or country of origin. This legally allows foreign companies to avoid sales taxes contrary to the UN Model Convention rules.

The exclusion of potential sources of revenue and creation of loopholes from taxes such as Capital Gains Tax (CGT) through swapping of assets with no real value created would allow deceitful reporting on sales activities.

This violates accounting principles and encourages a lot of more speculative ventures over productive activity that Kenya desperately needs for its structural transformation in attaining the SDGs.

## Court Ruling

Notwithstanding these technical arguments,

TJNA further questioned the constitutionality of the DTAA with respect to public participation. The TJNA has also targeted Kenya and Mauritius' adherence to the Treaty Making and Ratification Act of 2012 by lodging a case in the High Court of Kenya against the Government of Kenya (GoK) in 2014.

The Kenyan government's failure to subject the DTAA to the Treaty Making and Ratification Act (2012) was in breach of Articles 10 (a, c, and d) and 201 of the Kenyan Constitution. It asked the Court to order the Cabinet Secretary to withdraw the legal notice 59 of 2014 and commence the ratification process afresh in line with provisions of the Treaty Making and Ratification Act (2012).

The case sought to demonstrate that the Government of Kenya's (GoK) decision to sign the agreement carried both technical risks as well as constitutional shortcomings for Kenya. The principal aim of this suit was to show the court that there are inherent risks undermining Kenya's ability to tax both individuals and multinational corporations (MNCs) because of the DTAA, therefore harming current tax revenue collection efforts.

In March 2019, the High Court ruled that the DTAA that Kenya signed with Mauritius was void in its breach of Section 11 (4) of the Statutory

Instruments Act 2013. But the High Court limited its judgement to the constitutionality of the arguments presented by TJNA.

It, however, neither dismissed nor disagreed with technical arguments about the potential revenue losses that may accrue from the DTAA. The High Court stated that it was important to show how much the country stands to lose after signing the agreement, with examples of companies that are evading taxes.

## Lessons Learnt

The High Court ruling was a significant outcome for the examination of the DTAA issue in Africa. It set a precedent for further scrutiny of DTAAAs on a technical and constitutional basis for consideration across the continent and other developing countries.

It offers hope for public litigation as a policy advocacy strategy in speaking out against the different methods of capital flight from Africa in current times. The High Court ruling was also a call on civil society actors to gather evidence that supports any technical arguments made.

Going forward, civil society first needs to continue pointing out both technical and legal aspects of the challenges posed by DTAAAs in their public interest litigation and advocacy. This should be

explicit and clear when submitting to court and in the mobilisation of public awareness.

## Asset Recovery Initiatives

Asset recovery is a process defined under the UN Convention Against Corruption (UNCAC) in reference to recovering the proceeds of corruption. It has many processes including tracing, freezing, confiscation, and repatriation of proceeds stolen in foreign jurisdictions—making it a complicated and lengthy process. Coordination and cooperation between multiple agencies is a fundamental aspect of any asset recovery initiative. One of the most notorious cases was that of Sani Abacha, former president of Nigeria that involved a recovery of \$1.2 billion, a process that involved assistance from multiple jurisdictions including Switzerland, Jersey, and Liechtenstein. To recover Nigerian assets, the Swiss government designated the Abacha family a “criminal organisation”, allowing it to bypass the need for a conviction.

One key limiting factor is that only states are seen as victims rather than citizens. First, a victim country must succeed in tracing the stolen assets. Second, the victim country must request cooperation from authorities in the jurisdictions where the assets reside to seize the assets; these requests usually come in the form of a Mutual

Legal Assistance request. Third, legal processes must usually be initiated in the requested country in order to confiscate the assets. Following this, requested authorities must repatriate the assets back to the requesting country.

Many in civil society estimate asset recovery initiatives to be extremely ineffective due to the constraints put on the process. The lack of public beneficial ownership data or public company reporting data to better understand who may be benefiting from economic activity—and whether corruption was involved also adds to the problem. In very few cases, such as the proceeds of the late Philippine president Marcos, lead to a process of reparations where victims are paid out damages from the stolen assets recovered from foreign jurisdictions<sup>30</sup>.

## Tax and Budget advocacy to tackle IFFs

Fiscal policies have various avenues that can lead to IFFs either by accident or by design. Parliaments are sometimes manufacturers of tax loopholes, incentives ripe for abuse or other matters to appease special interest groups and foreign investors alike. It is not known what special deals, if any, some companies have been given, although the government has committed

to publishing details of agreements signed with companies in the mining sector. Various estimates have been made on revenue losses from tax incentives in recent years. Estimates in Tanzania suggest that incentives given to corporations (only) may amount to at least \$300 million, and perhaps much more.<sup>31</sup>

Dedicating precious resources during a short time window for the intensive budgeting phase is a crucial element. Making tax expenditure visible in binding national expenditure budgets is absolutely crucial in the narrative of tax justice and transparency, as well as improving revenue forecasting to make tax revenue more predictable. Including IFF estimations as annexes in national budget reports can be powerful metrics, much like the tax incentive estimates presented in budgets. Likewise, on the revenue side, demonstrating the biases and shortfalls of tax policy are equally important and thus estimates of the ‘tax gap’ are also important to account for the estimated uncollected revenue from various taxes and measures to combat such tax gaps.

Budget monitoring can also be sector specific such as focusing on health, education or area specific such as social protection budgets, or budget allocations for agriculture or water and sanitation. Some budget monitoring groups

engage in cross-cutting budget monitoring, in particular women's budget groups seek to analyse the impact of the budget on attainment of women's rights and gender justice. Amidst a context of women's economic marginalisation and decreasing resources for public services that have rendered them even less accessible to women, women's rights and the gender equality agenda are just some of the casualties of illicit financial flows as exemplified by a recent study by AWID<sup>32</sup> seen on Page 43.

The emerging feminist narrative on IFFs therefore demands changes at various levels, including-

1. The basic concept of IFFs and their disproportionate gender impact, in relation to the drain in developing countries of critical resources, for the advancement of women's human rights
2. The current legal and political frameworks that allow multinational corporations to benefit from tax abuse to the detriment of people and planet.
3. Policy recommendations, from a feminist perspective, on how to demand transparency and corporate accountability in order to curb illicit financial flows.

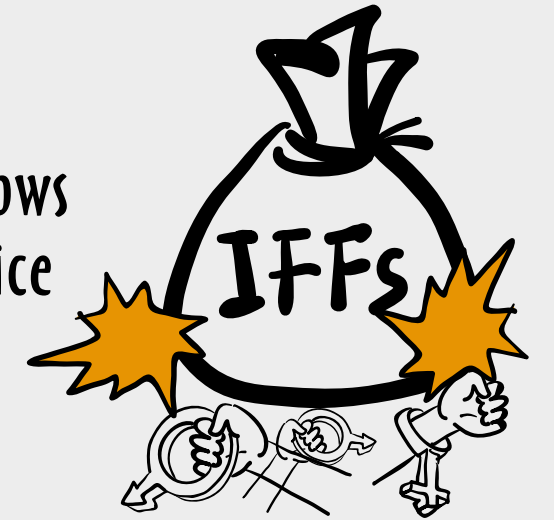
Curbing IFFs and ensuring that actions on IFFs lead to positive outcomes for the realisation of all human rights require the political will by governments and multilateral institutions, the presence of strong legal and normative frameworks, and effective and transparent governance mechanisms. Vital to all of these is a vigilant citizenry who call on governments and international bodies to be accountable, monitor the implementation of commitments, represent peoples' interests in decision-making processes, and exert public pressure to effect needed changes in policies or structures.

## Journalist Collaboration

Providing training for journalists in IFF is a key component in the strategic collaboration between civil society groups and journalists. Investigative techniques, data mining and source-protection are all important components of this training. Additionally, civil society can aid journalists in making sense of large leaks of information. On the other hand, journalists can use reports derived from leaks to extend the relevance of the news for a period of time. Finally, civil society can take advantage of the juncture created by the reporting to educate society on IFFs and promote the transparency-focused solutions.

## Global Impacts of illicit Financial Flows on Women's Rights and Gender Justice

Gender impacts of IFFs tend to be understood and studied at the national and even local level, rarely in their global impact as an obstacle to the realization of women's rights and gender justice.



- 1 **Impact on delivery of social service**  
Failure to mobilize public resources affects public service delivery, increasing women's unpaid care burden.
- 2 **Unemployment and under investment in the economy**  
Lack of public investment leads to lack of employment creation and greater unemployment, hitting women particularly hard.
- 3 **Regressive fiscal policies**  
IFFs often trigger regressive tax policies that have a negative effect on informal workers and people living in poverty—the majority of whom are women—as they spend a large part of their income on taxes for the essential goods and services they consume.
- 4 **Reliance on debt and development cooperation**  
Hidden wealth increases over-dependence on overseas development assistance between developed and developing countries under strict conditionalities, hindering self-determined development priorities including those to mitigate gender inequality.
- 5 **Threat to women's peace and security**  
IFFs thrive on conflict and criminal activity providing financial resources behind conflict and militarization that affect women disproportionately.
- 6 **Resourcing for women's rights and gender justice**  
Hidden resources of illicit financial flows contravene the obligation of States to mobilize the maximum available resources for the realization of human rights, including women's rights.

Several collaborative efforts are already underway in Latin American countries. The most successful examples are leaks.pe<sup>33</sup> and mexicoleaks.mx<sup>34</sup>, where a group of alternative media outlets establish a secure platform for whistleblowers. Many reports are directly related to IFFs. At a regional scale, the promoters will most likely collaboratively scale the initiative to a regional platform. Public policy initiatives derived from this collaboration will most likely lead to incentives schemes where IFFs can be made visible due to whistleblowing activities.

## The Value of Alternative Processes

Existing mechanisms rely on the state on curbing illicit financial flows that are perpetuated by large-scale actors such as transnational corporations and wealthy elites who arguably also have substantial political power and influence to also lobby to maintain illicit financial flows as they are in place. The political economy of illicit financial flows is such that it requires looking beyond state governance and creating non-state governance and accountability processes which are aimed at larger public interest.



# End Notes

- 1 UN Women. Commission on the Status of Women. <http://www.unwomen.org/en/csw>
- 2 The 1995 BPfA is the key global policy document on gender equality which was adopted in 1995 during the Fourth World Conference on Women. Agreed Conclusions and recommendations at the CSW are forwarded to the ECOSOC for follow-up. See here: <http://www.unwomen.org/en/csw>.
- 3 As of October 2019
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- 5 UNESCAP (2019). Strengthening Regional Tax Cooperation in Asia and the Pacific. Second Session Committee on Macroeconomic Policy, Poverty Reduction and Financing for Development
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- 10 The terms of his mandate are contained in Human Rights Council resolution 25/16, in which he is requested to pay particular attention to the effects of foreign debt on the full enjoyment of all human rights, especially in developing countries. He is also asked to examine the States' capacities to design and implement policies and programmes that respond to the requirements for realising social rights.
- 11 Available at: <https://www.ohchr.org/EN/Issues/Development/SRDevelopment/Pages/SRDevelopmentIndex.aspx> [Accessed 30 Dec. 2019].
- 12 Ohchr.org. (2020). OHCHR | Core International Instruments. [online] Available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> [Accessed 4 Jan. 2020].
- 13 Statement (2018). Juan Pablo Bohoslavsky, Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights. 73rd session of the United Nations General Assembly, Item 74 (a-d). New York. 22 October 2018.
- 14 6A/HRC/26/28
- 15 Guiding principles on extreme poverty and human rights (A/HRC/21/39), para. 92.
- 16 This was a recommendation contained in official reports by the UN Special Rapporteur on Extreme Poverty and Human Rights by Magdalena Sepúlveda Carmona.
- 17 Ohchr.org. (2020). OHCHR | Core International Instruments. [online] Available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> [Accessed 4 Jan. 2020].
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# About Financial Transparency Coalition

The Financial Transparency Coalition (FTC) is a global civil society network working to curtail illicit financial flows through the promotion of a transparent, accountable and sustainable financial system that works for everyone. For more information, kindly visit: <https://financialtransparency.org/>