



6 March 2019

Commentaries to the OECD call for public input on the tax challenges of digitalisation, and possible solutions

The *Initiative for human rights principles and guidelines in fiscal policy in Latin America* welcomes the opportunity to contribute to this public consultation.¹ The starting point of our contribution is the **close connection between the resources that States can collect through taxation, and its capacity to realize human rights**. This connection is twofold: States need resources to implement inclusive public policies, and taxes are essential for redistribution (including of income and wealth) and to build more egalitarian societies. We have explored this connection in detail previously.²

We share the OECD's call in the public consultation document on the necessity of taking concerted global action to stop tax avoidance and the race to the bottom of corporate tax rates. These practices not only deprive States of valuable resources to realize human rights, but also lead to a shift of the tax burden from multinational enterprises to small and medium enterprises, and eventually to the rest of the population via indirect regressive taxes.³

The results of said practices are particularly perverse in Latin America, the most unequal region of the world. Fiscal policy in Latin America is neither performing its equalizing function, nor facilitating a shift to a model of sustainable development. While the average corporate income tax rate in the region fell from 43.9% in 1985

¹ We are a group of organizations that promote the adoption of human rights principles and guidelines in the design of fiscal and tax policies in Latin America. The Initiative is formed by the following networks and organizations: Center for Economic and Social Rights (CESR), Asociación Civil por la Igualdad y la Justicia (ACIJ), Centro de Estudios de Derecho, Justicia y Sociedad (Dejusticia), Centro de Estudios Legales y Sociales (CELS), Fundar - Centro de Análisis e Investigación, Instituto de Estudios Socioeconómicos (INESC) and the Red de Justicia Fiscal de América Latina y el Caribe (RJFALC).

² CESR, ACIJ, Dejusticia, CELS, FUNDAR, Grupo FARO, INESC and IBP (2015), *Política Fiscal y Derechos Humanos en las Américas*, report written for the Inter American Commission on Human Rights' thematic hearing on fiscal policy and human rights", 156^o period of sessions, 2015.

³ So is recognized by the OECD, as it understands that: "[...] global action is needed to stop a harmful race to the bottom, which otherwise risks shifting taxes to fund public goods onto less mobile bases including labour and consumption, effectively undermining the tax sovereignty of nations and their elected legislators. Unilateral measures taken in response can lead to double taxation and may even result in new forms of protectionism. Developing countries, often with smaller markets, may also lose in such a race and become even more dependent on natural resource taxation to finance their public needs, while multiplying tax free zones and other incentives to attract foreign direct investment". OECD. 2019. "Addressing the tax challenges of the digitalization of the economy", par. 90.

to 26.8% in 2015, the average general VAT rate rose from 10.6% to 15.2% during the same period.⁴ Depending more heavily on indirect regressive taxes has a disproportionate impact on people living in poverty and also on women, children, indigenous peoples and people of African descent, who are overrepresented among the population with lower income.⁵

We believe that this issue requires multilateral solutions, in a context in which all countries can participate equally and with active civil society engagement. While the OECD has advanced an important agenda of cooperation in tax matters, decisions in this field call urgently for the creation of an international tax body with adequate representation of lower income countries.

In any case, in any multilateral context States must act in accordance with a primary obligation in international law: **the obligation to create a global context that enables the full realization of the rights recognized in international human rights instruments.**⁶

In its authoritative interpretation of relevant international human rights law, the Committee on Economic, Social and Cultural Rights –the United Nations body that monitors the implementation of the International Covenant on Economic, Social and Cultural Rights by its 169 State Parties– has established that:

*...States should combat transfer pricing practices and deepen international tax cooperation, and explore the possibility to tax multinational groups of companies as single firms, with developed countries imposing a minimum corporate income tax rate during a period of transition. Lowering the rates of corporate tax solely with a view to attracting investors encourages a race to the bottom that ultimately undermines the ability of all States to mobilize resources domestically to realize Covenant rights. As such, this practice is inconsistent with the duties of the States parties to the Covenant. Providing excessive protection for bank secrecy and permissive rules on corporate tax may affect the ability of States where economic activities are taking place to meet their obligation to mobilize the maximum available resources for the implementation of economic, social and cultural rights.*⁷

Therefore, according to international law States must cooperate to establish fair global rules regarding corporate taxation. As the process that triggered this public consultation shows, some key aspects of global corporate taxation rules are no longer fit for purpose. Examples include the presence of a physical establishment as the criterion to determine where a company should pay taxes, and the notion that multinational affiliates can be treated as separate entities that make transactions at market prices (the *arm's length principle*). These rules are inadequate to ensure multinational enterprises in the digital era pay taxes where they “create value”, and are also inadequate to meet broader justice notions such as those contained in international human rights law.

In the search for a consensus on how to replace existing rules, **States must keep in mind that the debate about how to allocate taxing rights among jurisdictions is not a purely technical matter. On the contrary, it has**

⁴ Economic Commission for Latin America and the Caribbean (ECLAC), “Panorama Fiscal de América Latina y el Caribe 2018. Los desafíos de las políticas públicas en el marco de la Agenda 2030”, p. 57. Based on D. Morán and M. Pecho, “La tributación en los últimos cincuenta años”, CIAT: 50 años en el quehacer tributario de América Latina, Panama City, Centro Interamericano de Administraciones Tributarias (CIAT), 2017.

⁵ See CESR, Oxfam, INESC, Conectas Derechos Humanos, Plataforma de Derechos Humanos (DHESCA Brasil), Justiça Global, Ministerio Público de la Defensa de la Ciudad Autónoma de Buenos Aires, ACIJ, CELS, Dejusticia, Foro Salud, APRODEH (2018). [Política Fiscal y Garantía de los Derechos Económicos, Sociales y Culturales en América Latina](#), report written for the Inter American Commission on Human Rights’ thematic hearing “Control of Public Spending, Fiscal Policies and Economic, Social and Cultural Rights Guarantees in Latin America”, 168th period of sessions, May 2018.

⁶ Universal Declaration of Human Rights, article 28: “[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”

⁷ Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (E/C.12/GC/24), par. 37.

substantial distributive consequences and must be tackled considering its inevitable connection with human rights norms.

These norms provide some **basic justice requirements** to analyse the issues contained in the consultation, such as:

- The need to establish rules that allow States, especially those with lower incomes, to mobilize the maximum available resources in a sustainable, progressive and equitable way in order to discharge their human rights obligations.⁸ Rules may require the adoption of minimum policy standards to ensure that States will make decisions among a range of alternatives that respect the rights recognized in international instruments and in their own constitutions.
- The need to protect States' fiscal sovereignty, understood as the capacity of each country to take legitimate decisions about their tax burden and its distributive and regulatory impacts, as long as they comply with their extraterritorial human rights obligations⁹ and their own constitutional arrangements. Rules must be established so that the fiscal space and the power to tax of some States is not unduly restricted due to pressures created by policies adopted by other States. An example of such rules would be the adoption of a global effective minimum corporate tax rate and other coordination mechanisms that ensure that unilateral decisions of "tax haven" jurisdictions do not create pressures that erode other States' capacity to legitimately decide on their tax burden and their socially agreed distributive policies. Another example is establishing sanctions for the adoption of such non-cooperative behaviours and mechanisms, to evaluate and prevent the 'spill over' effects of domestic tax reforms that contradict extraterritorial human rights obligations.

In relation to the proposals contained in the public consultation document on how to determine the jurisdiction in which multinational enterprises should pay taxes, we share and support the analysis of the Independent Commission for the Reform of International Corporate Taxation (ICRICT), regarding the need to move towards a model of unitary taxation (multinational enterprises should pay taxes as a unit and not as independent companies), based on a simple formula that distributes the tax base according to objective factors such as sales, employees and resources used by the company in each country.¹⁰

Considering the challenges of the digital economy, among those options being considered, we believe this is the only one that meets the justice requirements derived from the human rights framework. Paired with a global effective minimum corporate tax rate of 20-25%, such a proposal could put a brake on the 'race to the bottom', and eliminate many incentives for multinational enterprises to transfer their profits to low tax jurisdictions. The definition of the minimum effective rate should be informed by the need to overcome the financing gap to ensure a universal social protection floor and to comply with the 2030 Sustainable Development Agenda. Both are key steps to realize human rights and reduce inequality.

Furthermore, for civil society to have an active role in the advancement of the goals set in the OECD's consultation -and for them to be successful- it is essential to secure transparency and access to fiscal information. Secrecy favours systems that are prone to corruption, evasion and avoidance, as it enables illegitimate privileges for a few, hinders information exchange with other countries, and eventually reduces

⁸ International Covenant on Economic, Social and Cultural Rights, article 2.1: "[e]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

⁹ International Covenant on Economic, Social and Cultural Rights, article 1.2: "[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence".

¹⁰ ICRICT, 2019. [The Fight Against Tax Avoidance](#). BEPS 2.0: What the OECD BEPS Process has achieved and what real reform should look like.

resources in a way that may compromise States' capacity to discharge their obligations. In turn, without complete, relevant and disaggregated information is not possible to evaluate fiscal policy's rationality, justice and equity.

Domestic legislation often provides that information on tax payers' wealth, income and accounts is protected by secrecy and is therefore not accessible to the general public or to other tax administrations. These regulations impede knowledge about, for instance, who the beneficiaries of tax privileges are and the amount of their benefits, although such privileges are similar in nature to other public resource transfers -such as direct public spending- to which secrecy rules do not apply. Furthermore, secrecy regulations contradict international standards on access to information, and principles such as those of maximum disclosure, proactive transparency, accountability, control of public administration and publicity of governmental acts. In cases of secrecy, it is also impossible to know whether tax regimes respect other principles such as those of equality and non-discrimination, proportionality and reasonableness.

As a tool to fight evasion and avoidance, States should publish all differential tax treatments established by their tax system, such as exemptions, benefits, or amnesties. Relevant information should include their effective dates, applicable evaluations, their beneficiaries and their cost (with information disaggregated by beneficiary, sector and type of benefit). At the same time, States should require the submission of detailed reports on the profits that multinational enterprises earn and the taxes they pay in each of the jurisdictions where they operate. They should also advance towards a unified and public register of beneficial ownership, as proposed by ICRICT.

In summary, we urge the OECD to reaffirm that States' compliance with their human rights obligations, including their duties of transparency and accountability, must be the justification and basis of any adopted policy. We also encourage the OECD to evaluate the different alternatives proposed by the members of the BEPS Inclusive Framework in light of their impact on States' ability to mobilize the maximum available resources to realize human rights.

Finally, we ask the OECD to consider in more detail the proposal regarding the idea of "significant economic presence" that could be implemented under a standardized multi-factor global formulary apportionment. This method must consider tax authorities' capacities in Global South countries. In the design and implementation of the revised rules on nexus and profit allocation and in the two global anti-base erosion proposals (the "income inclusion rule" and a "tax on base eroding payments", which we support), it is essential that the previously described justice requirements - derived from international human rights law - are operationalized and incorporated in a cross-cutting manner.

We thank you for your consideration,

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