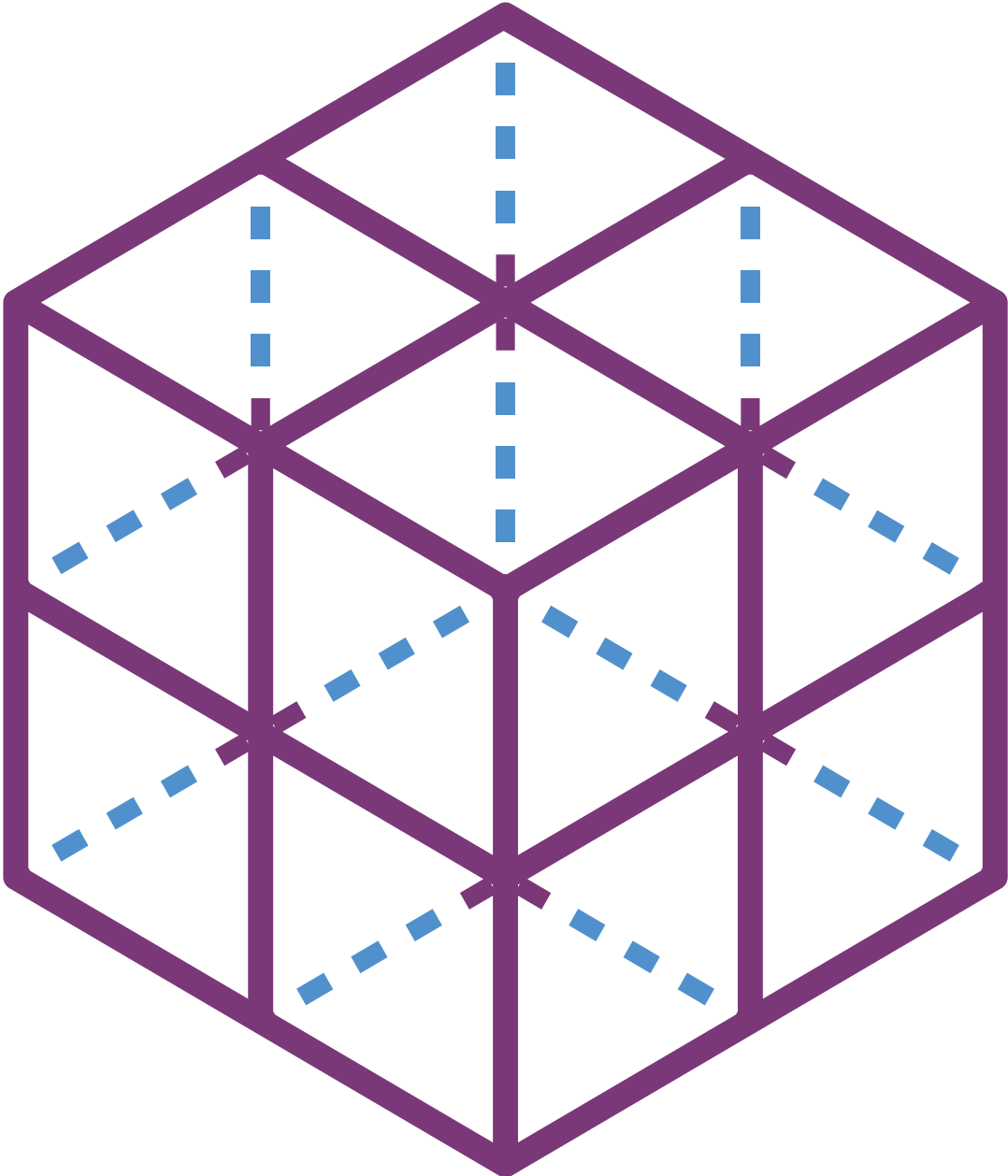


**FINANCIAL  
ACCOUNTABILITY  
TRANSPARENCY &  
INTEGRITY**

**FACTI PANEL INTERIM REPORT**  
SEPTEMBER 2020



## ABOUT THE FACTI PANEL

The High-Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda (FACTI Panel) was convened by the 74th President of United Nations General Assembly and the 75th President of the Economic and Social Council on 2 March 2020.

The objective of the FACTI Panel is to contribute to the overall efforts undertaken by Member States to implement the ambitious and transformational vision of the 2030 Agenda for Sustainable Development. It is mandated to review current challenges and trends related to financial accountability, transparency and integrity, and to make evidence-based recommendations to close remaining gaps in the international system.

The Panel is co-chaired by H.E. Ibrahim Assane Mayaki, former prime minister of Niger, and H.E. Dalia Grybauskaitė, former president of Lithuania. The members include Annet Wanyana Oguttu, Benedicte Schilbred Fasmer, Bolaji Owasanoye, Heidemarie Wiczorek-Zeul, Irene Ovonji-Odida, José Antonio Ocampo, Karim Daher, Magdalena Sepúlveda, Manorma Soeknandan, Shahid Hafiz Kardar, Susan Rose-Ackerman, Tarisa Watanagase, Thomas Stelzer, Yu Yongding and Yury Fedotov. The Panel members have participated in a personal capacity and are not expressing endorsements or commitments on behalf of any institution with which they have a relationship.

The Panel is supported by an independent secretariat, hosted by the United Nations Department of Economic and Social Affairs, Financing for Sustainable Development Office led by its Director, Mr. Navid Hanif. Gamal Ibrahim is the chief of the secretariat. Staff of the secretariat include Peter Chowla, Maud Perdriél-Vaissière, Benda Gu, and Sarah Maria Rosaria Aguirre-Degidon. The secretariat has also been assisted by consultants Alex Marshall, Andrea Davis, Antonina Poliaková, Claire Lukacs and Kathryn Donovan. Additional design and technology work was provided by Jennifer Esther Garcia and Michelle Ng. Secretariat interns are Julian Christopher Atanassow and Ujjaini Rao Desirazu.

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The following individuals participated in drafting background papers for the report: Leyla Ates, Martin Hearson, Joy W. Ndubai, Tovony Randriamanalina, Andres Knobel, Michael Findley, Daniel Nielson, Jason Sharman, Abiola Makinwa, Fatima Kanji, Richard Messick, Valentina Carraro and Hortense Jongen.

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## FURTHER INFORMATION

Information about the FACTI Panel and downloads of this report, including terms of reference, agenda, meeting summaries, inputs and related background papers can be accessed at <https://www.factipanel.org/>.

# FOREWORD



Even before COVID-19 disrupted lives and economies, countries faced widespread cross-border corruption, tax evasion and other harmful tax practices. Sophisticated money-laundering complicated their efforts to recover the proceeds. These abuses threaten Governments' ability to provide basic goods and services, and drain resources from sustainable development.

In these "normal" times the 74th President of the United Nations General Assembly and the 75th President of the United Nations Economic and Social Council jointly appointed us to chair the High-Level Panel on International Financial Accountability, Transparency and Integrity for Achieving the 2030 Agenda (FACTI Panel).

We firmly believe that the current crisis has made their initiative even more urgent. The pandemic has made it harder to reach the Sustainable Development Goals. It is more important than ever to step up our collective efforts against financial crime and tax abuses. The world can shift towards a more sustainable and resilient path.

The FACTI Panel has identified gaps, impediments and vulnerabilities in the international system that allow abuses and related outflows. We take note of the many international instruments and initiatives to address financial accountability, transparency and integrity; but we also note that implementation has fallen short. In some cases, implementation has become a matter of ticking boxes, while in others even the ticks are missing. We can do better.

Yet even perfect implementation would not solve all problems. Those intent on abusing tax and financial systems and avoiding rules and regulations would still have ample opportunity, and great reward for their efforts. We need to explore new and creative solutions to make systems more comprehensive and robust, and ultimately build a coherent ecosystem of institutions and frameworks for transparency, accountability and integrity.

Inadequate global governance holds back progress towards the common goal of sustainable development. The Panel finds that lack of trust and inclusivity pervades our systems, undermining implementation of existing rules and preventing better ones from being made. Countries must come together to agree on comprehensive solutions.

The issues at hand are global. They call for global cooperation and engagement by all stakeholders, including non-state actors as well as governments. The private sector, civil society and the media all have a contribution towards building peaceful and inclusive societies, with access to justice for all and accountable and inclusive institutions at all levels.

We urge all stakeholders to bring creative ideas and open minds to work with a common purpose on lasting solutions, which we can propose in the final report.

Ibrahim Assane Mayaki

Dalia Grybauskaitė



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# EXECUTIVE SUMMARY

## Draining resources from development

Tax avoidance and evasion diminish national revenues, while corruption and financial crime divert resources meant for investment in sustainable development. These abuses offset the positive impact of public and private investment and international assistance. They erode countries' ability to provide basic services and undermine global efforts to achieve the objectives of the 2030 Agenda for Sustainable Development.

This drain on resources does more than financial damage. It erodes trust in both social contracts as well as international governance systems, enhances inequalities within and between nations and also undermines their ability to respect, protect and fulfil human rights.

The Panel's report addresses these linked challenges to financial accountability, transparency and integrity.

Illicit transactions are found everywhere, but they have a much heavier impact on developing countries. They undermine public service delivery, productive investment, public trust, the integrity of institutions and the rule of law, within and across borders. The impacts are greater on women and girls.

- **Damage to the public interest far outweighs the short-term profit for abusers and their enablers.**
- **The COVID-19 pandemic and the rapid digitalisation of economic activity sharpen the challenges to financial integrity and accountability.**

## Stopping the drain, redirecting resources to development

Member States have already pledged to enhance revenue administration; improve transparency; promote good governance; identify, assess and act on money-laundering risks; significantly reduce illicit financial flows; and deter, detect, prevent and counter corruption and bribery. The joint aim is to finance sustainable development and achieve the SDGs.

A web of existing international instruments has grown organically over time, responding to a wide variety of interests in the fields of tax cooperation, anti-money-laundering, and anti-corruption efforts. Despite excellent examples of cooperation and good practice, there are widely divergent views on how to meet the remaining challenges. The result is unsatisfactory progress and failure to set priorities. Each part of this web offers opportunity for joint action.

- **International instruments lack co-ordination, leave gaps and may overlap and even conflict with each other.**
- **There are many gaps around inclusion, implementation and enforcement.**
- **The aim must be to improve implementation, close gaps, reduce vulnerabilities, remove impediments, and address systemic shortcomings.**

### Estimates of the drain on resources

- \$500 – \$600 billion corporate tax revenue a year lost from profit-shifting by multinational enterprises
- \$7 trillion of private wealth is hidden in haven countries
- 10% of world GDP may be held in offshore financial assets
- \$20 – \$40 billion a year estimates in bribes received
- 2.7% of global GDP in money-laundering by criminals

## Systemic challenges, global solutions

The Panel calls for a common and shared understanding about problems and solutions: lack of financial accountability, transparency and integrity is a global problem that needs global solutions, while taking into account specific country contexts.

The Panel notes that all aspects of this problem require action and ownership in developed and developing countries; in source, transit, and destination countries; in public and private sectors; and in small and large countries alike. In this, the Panel begins where the African Union High-Level Panel on Illicit Financial Flows from Africa concludes, that this is a systemic problem that requires better global coordination.

Financial integrity systems are not a mere sum of their parts: a weak link anywhere in the system can undermine the system as a whole, allowing resources to be drained through the weak spot.

- **The Panel therefore calls for total acceptance that the shortcomings are systemic and require systemic responses.**
- **Success calls for a legitimate and coherent ecosystem of instruments and institutions dedicated to financial accountability, transparency and integrity.**

## Challenging vested interests, building coalitions for reform

International norms, and their implementation in the areas of financial accountability, transparency and integrity are shaped by history, power relations and country-specific characteristics, including the political context. They are, in other words, path-dependent.

Stronger implementation and more legitimate setting of international norms call for more than technical capacity. Systemic change threatens groups with vested interests in the system and their powerful enablers. These vested interests and enablers may have power to influence policies. Systemic change equally demands stable social forces to defend and build on progress.

Non-state actors—including the private sector, civil society and the media—working in concert can create momentum and generate the political will vital to establish and maintain financial integrity. This applies equally in all countries, including havens where illicit proceeds are hidden. Investigative journalists and whistle-blowers need support and protection for their rights in all jurisdictions.

- **Member States working with other like-minded forces of change can set future directions through deliberate action.**

## Including all countries, but meeting diverse needs

Countries, particularly developing countries and those with small economies and populations, face many limitations which reinforce each other. Government agencies are already stretched.



Techniques to disguise illicit transactions – designed by lawyers, accountants, financial institutions and other enablers – are increasingly sophisticated, prompting ever more complex global standards. Yet these complex standards are often hard to apply locally for countries with low capacity. They are also sometimes set in non-inclusive forums, raising questions about national sovereignty.

- **Though abuses hit developing countries hardest, they sometimes do not participate in setting international norms, weakening acceptability and implementation.**
- **International standards should recognise countries' different needs; it is important to build national capacity, and to collaborate on a regional basis.**

## Adjusting to a changing world

Open financial systems and new technologies make it more difficult to track hidden and secret transactions. Digitalisation of the economy reduces revenue collection when international tax norms retain archaic structures and practices. At the same time, new technologies can help combat financial crime and tax abuses. With revised policy and regulatory frameworks, digitalisation will open the space for easier cooperation of the public and private sectors and new initiatives to collect, share and use information.

The high probability of more catastrophic events such as the COVID-19 pandemic calls for better legal and institutional frameworks with more resilient policies, better implementation and stronger international cooperation.

- **Detection and enforcement methods, regulations and tax systems need sufficient flexibility to allow nimble responses by law enforcement and policy makers to constantly evolving methods of draining resources.**

## Cooperation in tax matters

Two different model tax treaties have developed over time, but there remain worries that the demands of new tax norms, which seek to address tax avoidance and evasion, might overwhelm developing countries, especially those with relatively weaker capacity to negotiate.

Rapid digitalisation presents particular challenges for tax reform, given the ease with which multi-national corporate assets and profits can be moved among jurisdictions. Companies' reports to governments on their activities in each location have potential to help countries tax income fairly, but the reports' deficiencies greatly reduce their usefulness. Meanwhile trade mis-invoicing involves significant loss in revenue.

Lower-income countries are facing norms developed largely without their input; agendas set by G20 and OECD at the system level; and their own capacity limitations. Collective efforts by

all countries will be needed to close gaps in disclosure and transparency. Enhanced support will be needed from international institutions and donor countries.

- **International tax norms are not well adapted to developing countries' needs and circumstances, highlighting the need to develop a more coherent, nuanced and equitable approach to international tax cooperation.**
- **Developing countries must have full information and participate equally in crafting and agreeing norms for tackling tax avoidance and evasion in a rapidly changing world.**
- **Efforts to improve tax information are severely impeded by the absence of a neutral and authoritative body with responsibility for collating and analysing tax data (including gender-disaggregated data).**

## Accountability, public reporting and anti-corruption

Corruption affects all countries; it results in loss of resources, weakens service delivery and undermines trust in governments and the social contract. It is important to consider both where the money comes from and where it goes.

The United Nations Convention against Corruption (UNCAC) came into force in 2005 with legally binding provisions and a global footprint. Yet perceptions about the volume of corruption have not changed. Reviews found gaps and shortcomings in the domestic frameworks of at least 74 per cent of States.

Grand corruption involving vast quantities of assets continues to make headlines globally. The outlines of grand corruption often become public knowledge, but knowledge does not always translate into accountability. Preventing privilege and impunity from becoming embedded calls for more than just legislative changes, it needs sustained domestic demand for anti-corruption reform.

More than 200 jurisdictions are implementing the Financial Action Task Force (FATF) recommendations against money-laundering, placing compliance requirements on a wide range of businesses. Yet governments in haven countries, most frequently developed countries, have little incentive to block the inflow resulting from tax abuses, corrupt practises and other crimes. Banks find it profitable, and enablers such as lawyers and accountants often operate without effective oversight.

Exposing the real or "beneficial" owners of assets can prevent or reveal global financial crime or tax-abuse schemes. Beneficial ownership information is therefore a critical tool, but few countries comply fully with global standards, sometimes by design. There are weaknesses in information collection and verification, and there are systemic difficulties in accessing information.

- **There are major gaps in the regulation and supervision of the enablers of corruption, tax abuses and money-laundering, with systemic implications from lapses in haven countries.**
- **Cross-border access to beneficial ownership information is too difficult; major financial centres and developed countries should take more responsibility.**

## International cooperation and settling disputes

The tax dispute resolution framework is inadequate, creating uncertainty for governments, business, and other taxpayers. Concerns by countries have arisen relating to sovereignty, cost of arbitration, weak capacity, and lack of experience with overall international tax dispute settlement. Current methods of coercing compliance with tax norms also undermine trust and faithful implementation.

Foreign bribery is a two-sided affair that can cause damage out of proportion to the amounts of bribes involved. A \$1 million bribe can easily create \$100 million worth of damage, in the form of additional costs and poor investment decisions. Non-trial resolutions are increasingly used to resolve foreign bribery cases, yet there are no international guidelines on their use and thus no safeguards to ensure they best serve the interests of justice.

Moreover, there is little cooperation with authorities in demand-side countries, which may hinder prosecution of the corrupt public officials. This further prevents potential claims for damages. In practice, compensation is quite exceptional, leaving the victims of corruption behind.

Cooperation on confiscating and returning the proceeds of corruption is far from effective. The process remains extremely burdensome and lengthy for countries that saw their resources drained—especially those that are seeking to recover assets stolen by formerly entrenched kleptocratic rulers. It is also difficult to repatriate assets to the country of origin in situations where there is no trust between the jurisdictions involved.

Peer review is a well-established mechanism to promote compliance with norms and standards, preventing disputes between countries. The reviews can allow peer and public accountability and enhance trust. However, there are gaps and weaknesses in the current review and follow-up mechanisms.

- **A systemic approach is needed to address structural deficiencies in international frameworks for settling tax disputes; and to allay the concerns of less powerful countries on methods of coercing compliance with tax norms.**
- **Resolving foreign bribery cases should not lead to impunity for corporate wrongdoers nor for corrupt officials; the ultimate victims of corruption should be properly compensated.**
- **Returning resources to countries that are victims of corruption should be more transparent, easier and faster, while still maintaining accountability.**
- **A lack of trust constrains international cooperation; strengthening the way countries check up on each other, particularly on international corruption commitments, can improve trust and strengthen the positive impact of international agreements.**

## Conclusions and next steps

Addressing gaps and systemic shortcomings requires a basic understanding among all stakeholders that there are no silver bullets or single measures that will enhance financial accountability, transparency and integrity. This interim report indicates a suggested path to reach the common destination, and indicates the following likely areas of recommendations by the Panel:

Cross-cutting issues	Cooperation in tax matters	Accountability, public reporting and anti-corruption	International cooperation and settling disputes
<ul style="list-style-type: none"> <li>■ Governance</li> <li>■ Capacity</li> <li>■ Systemic thinking</li> <li>■ Role of non-state actors</li> </ul>	<ul style="list-style-type: none"> <li>■ Architecture for cooperation</li> <li>■ Taxation of the digital economy</li> <li>■ Financial reporting and information exchange</li> <li>■ Data production and publication</li> </ul>	<ul style="list-style-type: none"> <li>■ Addressing impunity</li> <li>■ Regulation of enablers</li> <li>■ Beneficial ownership</li> <li>■ Capacity building</li> </ul>	<ul style="list-style-type: none"> <li>■ International tax dispute settlement</li> <li>■ Non-trial resolutions</li> <li>■ Foreign bribery and compensation</li> <li>■ Confiscation of assets</li> <li>■ Return and disposal of assets</li> <li>■ Implementation and peer review</li> </ul>

The Panel's final report, to be published in February 2021, will advance specific recommendations based on the areas identified above and other issues emerging from its work in the next six months. The Panel will focus on recommendations which are technically feasible, politically viable, and have direct bearing on releasing resources for the Sustainable Development Goals. The Panel plans to present its recommendations according to a realistic timeframe for implementation, specifying proposals for immediate action, those that require more time to formulate the response, and those that need a longer time to achieve.

# PART I: FINANCING THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT AND ITS CHALLENGES

## Achieving the Sustainable Development Goals—towards a global enabling environment

The 2030 Agenda for Sustainable Development is a plan of action to achieve a more sustainable and resilient future for everyone. The 17 Sustainable Development Goals (SDGs) respond to agreed global challenges. Each one relates to all the others, and implementation of one contributes to progress in all. Meeting the goals by 2030 includes a pledge to ensure no one is left behind.

In the 2030 Agenda for Sustainable Development, political leaders set clear goals for policy makers and non-state actors alike. Alongside goals on ending poverty and reducing inequality, among others, they called for peaceful and inclusive societies for sustainable development, access to justice for all and the building of effective, accountable and inclusive institutions at all levels. They also set a goal for the means of implementing the 2030 Agenda, and called for stronger resource mobilization at all levels, including through international support to developing countries, to improve domestic capacity for tax and other revenue collection. The United Nations Secretary General has determined that the SDGs “demand nothing short of a transformation of the financial, economic and political systems that govern our societies today to guarantee the human rights of all.”<sup>1</sup>

All sources of financing—public and private, domestic and international—are needed. The 2015 Addis Ababa Action Agenda on Financing for Development provides a new framework by aligning all financing flows and policies with economic, social and environmental priorities. Success depends not only on national policies and regulations, but also on the international enabling environment.

## Generating resources—a challenge for all, especially the least equipped

Additional annual investment needed to achieve just a few of the sustainable development goals is on the order of trillions of dollars by 2030.<sup>2</sup> The global economy is big enough: world gross product is estimated at over \$87 trillion<sup>3</sup> and global gross financial assets at \$200 trillion<sup>4</sup>. However, just as we begin the decade of actions, global challenges are multiplied for the international economic and financial system to deliver on the SDGs, and the transition to sustainable development has not yet reached the required speed or scale. All countries face the challenge, but the impact is most severe on the countries least equipped to raise resources.

At the same time, insufficient financial accountability, transparency and integrity erodes the ability of States to raise revenue and directly undermines the efforts of the global community to successfully achieve the SDGs. Diminished revenues from tax avoidance and evasion and diverted resources from corruption and financial crime offset the positive impact of public and private investment and international assistance. Private investment and international assistance

will still be sorely needed, but they can be more effectively utilised when financial integrity is enhanced based on countries' priorities and needs. The drain of resources motivates the Panel's mandate to explore further actions needed by the international community to enhance financial accountability, transparency and integrity to achieve the 2030 Agenda.

## Draining resources from development

Complex chains of hidden, secret, fraudulent and opaque transactions move resources across borders and away from where they are most needed (see Box 1). These transactions involve intricate networks of companies and other legal vehicles across many jurisdictions, causing resources to flow out of both developed and developing countries and into havens. This reduces available resources for investment in essential public goods and services, undermines the social contract, and weakens domestic financial systems and economic potential. Tax avoidance and evasion, money-laundering, smuggling and corruption constitute the main activities that lead to these flows, undermining financial accountability and integrity.

Given the hidden nature of the activities, the Panel views estimates as useful signals of scale but not precise indicators for targeted action. For example, the Panel notes the estimates that the global loss to governments from profit-shifting by multinational enterprises may be \$500 to \$600 billion a year.<sup>5</sup> Academic estimates say that around \$7 trillion of private wealth is hidden in haven countries;<sup>6</sup> the equivalent of 10 per cent of world GDP may be held in offshore financial assets.<sup>7</sup>

Corrupt money associated with bribes received by public officials in developing and transition countries was estimated at \$20 billion to \$40 billion per year.<sup>8</sup> Money-laundering by criminals, including drug traffickers and organized crime, has been estimated to be around \$1.6 trillion, or 2.7 per cent of global GDP.<sup>9</sup> The estimates from the report of the High-Level Panel on Illicit Financial Flows from Africa showed that outflows from Africa are large and were increasing.<sup>10</sup> The lack of financial integrity also has different impacts on men and women (see Box 2).

While these opaque transactions are found in all countries, they have a much heavier impact on developing countries. Abusers from developing countries and those from developed countries but operating in developing countries use professional enablers such as lawyers and accountants, shell companies, fraudulent trades and other financial engineering to conceal the sources of resources and their ownership. They move the resources into haven countries—jurisdictions where they escape taxation or other scrutiny, especially from the home jurisdictions. Those that benefit from these transactions are typically the elite, whether through disproportionate ownership of multinational enterprises and thus the beneficiary of tax avoidance, the hiding of offshore wealth or laundering of the proceeds of corruption.

### Box 1: Concepts and terminology

In this paper, cross-border transactions which illegitimately divert resources away from sustainable development will often be referred to as a resource drain. There are many competing terms in use for these opaque transactions, which are frequently, including in the United Nations context, referred to as illicit financial flows (IFFs). Although the Panel recognizes this terminology, there is no universally accepted definition of the term. This can reduce clarity and impede understanding for some. The report attempts to use precise terminology for specific activities, such as "money-laundering" or "tax avoidance", while at other times referring overall to the lack of financial integrity or lack of financial accountability for referring to the totality of the Panel's mandate.

Given their relative lack of regulatory and enforcement capacity, smaller resource bases and less-developed markets, developing country authorities have less ability to penetrate the webs of secrecy used by businesses, the powerful and their enablers in the transit and haven countries. Acting on their own, most developing countries lack the geo-political power to cajole havens into revealing the assets, let alone returning them.

## Undermining the social contract

Illicit transactions contribute to public distrust and political discontent. Governments are less able to invest in public goods and sustainable development, thus also undermining their ability to respect, protect and fulfil human rights. The resource drain also threatens equity, fairness and justice.

That so many have succeeded in these abusive activities for so long only encourages more people to attempt tax avoidance and evasion, bribery, money-laundering and corruption at all levels. This further undermines not only the national tax base but the integrity of institutions and the rule of law. It entrenches impunity and institutionalises the abuse. Even the elite who benefit from the current system may eventually find that the breakdown of national social contracts worsens their quality of life.

Inequalities and unfairness are not confined to national borders. The lack of financial integrity in one jurisdiction can impoverish all the other diverse members of the global community. Illicit activity does more than financial damage, it undermines trust in international governance systems while also enhancing inequalities within and between nations. The poorest and most vulnerable will be left even further behind. In the long run, even the most powerful nations and richest people could be demonstrably worse off without an effective multilateral system for financial accountability, transparency and integrity.

## Compounding the challenges

The COVID-19 pandemic has exposed deficiencies in development paradigms that have severely reduced the capacity of the State to generate domestic resources for social investment. Worst-case projections by the United Nations find that economies in emerging countries could contract by 3.2 per cent, and 0.9 per cent globally in 2020.<sup>11</sup> Foreign direct investment flows could decline by up to 40 per cent during 2020–2021.<sup>12</sup>

### Box 2: Gendered impacts of the problem

Women make more use than men of public services such as health care and education, especially as primary caretakers and providers of unpaid care work. They need to ensure access to these public services for themselves and those they care for.<sup>a</sup> Financial integrity challenges thus have gendered impacts, particularly via their impact on service delivery.

Research has concluded that women are disproportionately affected by corrupt systems,<sup>b</sup> but because they have lower average incomes are less likely to have the resources to pay bribes.<sup>c</sup> This may even create a trend of sexual extortion along gendered lines.<sup>d</sup> States have often increased the use of goods and services taxes (such as value-added taxes) as a source of easily generated revenue. The regressive effects of these taxes fall more heavily on women and girls.

In addition, international tax norms can give MNEs a competitive advantage over domestically owned firms, particularly small and medium-sized enterprises. While women are underrepresented among enterprise ownership in general, they have a relatively larger presence in smaller enterprises, and thus are comparatively more disadvantaged by an uneven playing field.<sup>e</sup>

<sup>a</sup> Wilson Center, "Link Between Corruption and Inequality," 2020

<sup>b</sup> UNODC, "Corruption and Gender," 2018.

<sup>c</sup> UNIFEM, "Corruption, Accountability and Gender: Understanding the Connections," 2010.

<sup>d</sup> Mary-Ann Ajayi and Emeka Polycap Amechi, "Corruption in Nigeria: Protection of Women and Children," *African Journal of Criminal Law and Jurisprudence* 3 (2018).

<sup>e</sup> Sandra Fredman, *Taxation as a human rights issue* in Philip Alston & Nikki Reisch, *Tax, Inequality and Human Rights*, OUP, 2019, p. 94.

This unprecedented economic fallout distracts and overwhelms countries' ability to maintain financial integrity. In a time of falling revenue, demand continues to rise for necessary expenditure, including health care, social services and economic development. To speed their pandemic-related responses, countries have weakened or eliminated administrative controls and accountability, with higher risks of revenue losses, corruption, and budget shortfalls.<sup>13</sup>

The pandemic has also brought increased reliance on digitalised economic activities. Yet over the last decade, digitalisation was already straining the ability of governments to tax fairly and maintain a level playing field for businesses. New financial technologies also provide new platforms for hidden, secret or anonymous transactions.<sup>14</sup>

## Are international instruments fit for purpose?

A complex web of agreements, initiatives, programmes, conventions and treaties, both within and apart from the United Nations system, has developed to address different aspects of financial accountability, transparency and integrity. Each instrument addresses part of the problem. But there are also many questions around inclusion, implementation and enforcement, especially given the limited capacity of many of the most severely affected jurisdictions.

The Panel's mandate is to review global co-operation on financial accountability, transparency and integrity, and recommend further actions by the international community to help finance the 2030 Agenda.

This report reviews the existing mechanisms, frameworks and institutions—all of which provide the starting points for further joint action by Member States. No framework or institution is complacent about its achievements so far; yet there is still room for improvement in the implementation, inclusiveness, and design of the international legal and institutional architecture and related commitments.

The rest of this report sets out the Panel's findings. Part II describes some cross-cutting conclusions related to achieving international financial integrity. Part III provides the Panel's specific findings in relation to the gaps, vulnerabilities, impediments, and systemic shortcomings in the existing frameworks, organised according to the three clusters in which the Panel worked.<sup>15</sup> Part IV suggests a path forward.



## Notes

- 1 United Nations (2020) *The Sustainable Development Goals Report 2020*, <https://unstats.un.org/sdgs/report/2020/>.
- 2 UNCTAD (2020) *World Investment Report 2020*, Chapter V, [https://unctad.org/en/PublicationChapters/WIR2020\\_CH5.pdf](https://unctad.org/en/PublicationChapters/WIR2020_CH5.pdf).
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## PART II: ACHIEVING INTERNATIONAL FINANCIAL INTEGRITY AND PREVENTING THE DRAIN OF RESOURCES

In a number of documents and forums at global, regional and national levels, Member States have expressed their concern about the lack of international financial accountability, transparency and integrity and its impact on sustainable development progress.

In the Addis Ababa Action Agenda for Financing for Development,<sup>16</sup> Member States pledge to enhance revenue administration; improve transparency; promote good governance; identify, assess and act on money-laundering risks; significantly reduce illicit financial flows; and deter, detect, prevent and counter corruption and bribery. Since adopting the 2030 Agenda for Sustainable Development in 2015, the General Assembly has agreed by consensus on four resolutions on illicit financial flows,<sup>17</sup> two resolutions on preventing and combating corrupt practices,<sup>18</sup> and three resolutions on the United Nations crime prevention and criminal justice programme.<sup>19</sup>

Nevertheless, the Panel finds large areas of uncertainty among governments about next steps. While there are excellent examples of cooperation and good practices among many countries (some of which are highlighted in this report), countries have widely divergent views both on the challenges and on the mechanisms to meet them. In the Panel's view, this contributes to slow progress and failure to set priorities.

### Towards a shared understanding of problems and solutions

The world needs a common understanding about problems and solutions, starting with acceptance that the issues are systemic. Corruption, for example, involves entrenched power structures, societal relations and social norms, which together form a system of incentives for wrongdoing. Similarly, abusive tax practices arise out of fiscal systems characterized by weakness of social contracts; perceptions of a lack of fairness and social trust; incentives that divert taxpayers away from society's goals, and political systems that may be captured by powerful groups. In all cases, lack of transparency facilitates malpractice, because when actions remain hidden and people are not held accountable, bad-faith actors feel emboldened and empowered.

Financial integrity requires a whole ecosystem: economic and financial institutions, social norms, and governance arrangements supported by policy makers, public officials, businesses of all sizes, civil society, households and the public at large. All segments of society need to feel invested in equality, fairness and accountability. The issues are systemic, systemic solutions are needed.

### Key crosscutting conclusions

- International community needs a shared understanding of problems and solutions.
- The COVID-19 pandemic and digitalisation of economies are exacerbating challenges.
- The shortcomings are systemic and require systemic responses.
- A legitimate, coherent ecosystem of instruments and institutions needs coordination
- Future directions can be set by deliberate actions by Members States.
- Active participation of non-state actors is a necessity to fortify political will, tackle vested interests, and build coalitions for reform.
- Peer review needs to be strengthened and made fairer, so that countries are held accountable.
- Policymakers need to be nimble to confront evolving methods of draining resources.

The Panel's mandate is to explore further actions in financial and beneficial ownership transparency; tax matters; bribery and corruption; money-laundering; confiscation and disposal of the proceeds of crime, and the recovery and return of stolen assets. For practical reasons, Panel members agreed to organize their work around three main areas: tax cooperation; transparency, public reporting and anti-corruption measures; and co-operation and settling disputes.

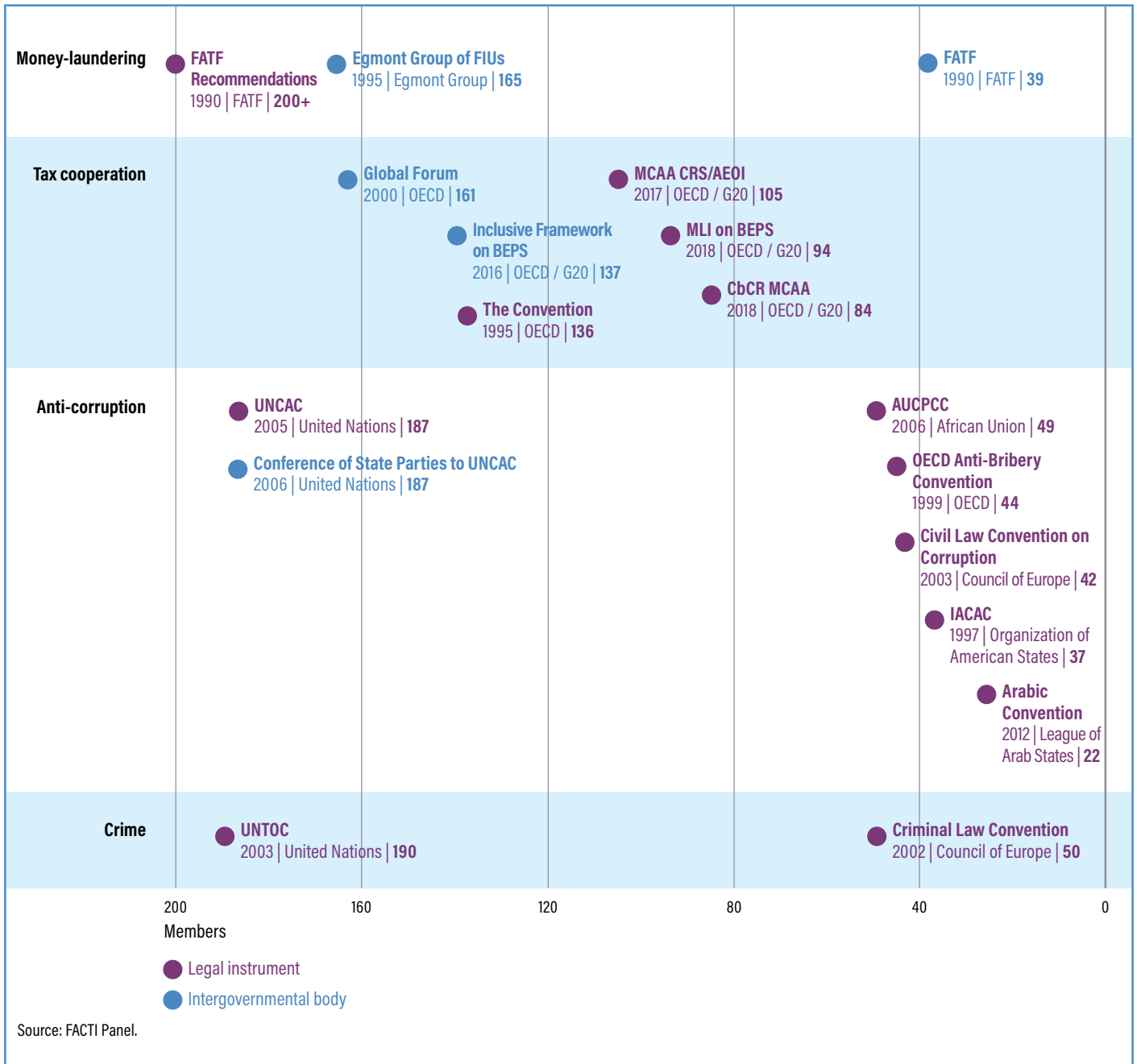
In these areas, a complex web of intergovernmental initiatives, programmes, agreements, conventions and treaties has developed organically over time and based on historical relationships. An array of recent efforts has sought to address some of the financial integrity challenges, with new impetus following the 2008 financial crisis. In particular, popular pressure has increased on Governments to address the fairness and integrity of revenue systems. Figure 1 presents a schematic diagram of many initiatives.<sup>20</sup> These instruments each address part of the problem, sometimes in functional, institutional and geographical silos.

Assessing these international instruments and institutions, the Panel has found that because they developed organically and over time, existing arrangements have a variety of governance mechanisms and respond to a wide variety of interests among different actors. This has contributed to the perception of conflicts among institutional arrangements. The Panel also finds that they lack coordination, leave gaps and may overlap and even conflict with each other.

In addition to specific technical and political gaps, vulnerabilities, impediments and structural challenges, which are discussed in Part III, the Panel has identified some critical cross-cutting issues and challenges. The very variety of institutional arrangements presents, at a minimum, challenges of coordination. As discussed below, there are questions of legitimacy, and also practical questions about implementation and enforcement.

Many of the most severely affected jurisdictions have especially limited capacity for engaging in international cooperation, as well as in implementation and enforcement. They frequently also have the least structural power, which affects not only their ability to shape the process of setting norms, but their ability to prevent and prosecute crimes or combat abusive practices.

Figure 1: Selected existing mechanisms for financial accountability, transparency and integrity



The Panel finds that these limitations are interrelated. To address these limitations requires acceptance, first of all, that there are no silver bullets or single measures to resolve all financial integrity challenges. This leads directly to the Panel's conclusions about the nature of solutions and the importance of broad and systemic thinking about the road ahead.

## A global problem, calling for a global response by all actors

As outlined in Part I of this report, creating an ecosystem of financial integrity calls for shared global action by Governments and non-state actors, with accountability within and across national boundaries. The Panel already emphasised that all aspects of this problem require action in developed and developing countries; in source, transit, and destination countries; and in small and large countries alike. In this, the Panel begins where the High-Level Panel on Illicit Financial Flows from Africa concludes, that this is a systemic problem that requires better global coordination.<sup>21</sup>

To track, stop and reverse the drain of resources is a formidable task because of the multiplicity and interlinkages of actors, sources and channels. Relevant actors, both domestically and in other countries, include state institutions, public officials, private companies, professional service providers and financial institutions, all with their own motivations.

The role of the private sector remains critical, both as initiators of opaque transactions and as stakeholders who stand to benefit from global financial accountability, transparency and integrity. In the Panel's consultation with a wide spectrum of private sector stakeholders, the vast majority said they would welcome stronger financial accountability, transparency and integrity regulations if all businesses are held to the same standards.<sup>22</sup> The importance of civil society—including the media and NGOs—in addressing those global challenges should not be neglected either (see Box 3).

Working in concert, non-state actors—including the private sector, civil society and the media—can challenge the vested interests that benefit from the existing gaps in financial integrity. As momentum is built by stable national social forces, it will fortify the political will which is vital to establish and maintain financial integrity. This applies equally in all countries, including havens where illicit proceeds are hidden or which allow taxpayers to escape taxation. This is also true internationally, as vested interests such as banks and other enablers

### Box 3: Contributions of civil society organisations (CSOs)

At the domestic level, and at the international level through global networks, CSOs are critical to promoting financial accountability, transparency and integrity.

CSOs in both developing and developed countries monitor their states' compliance with international norms and standards. They have done essential work in exposing egregious abuses that would have otherwise probably gone unpunished. Civil society can also raise public awareness, keeping up the momentum and generating or strengthening political will to change the rules of the game and ultimately create financial integrity.

Global CSO networks such as the UNCAC Coalition or the Global Alliance for Tax Justice have been powerful advocates for comprehensive and robust international frameworks. The Publish What You Pay campaign was instrumental to the launch of the Extractive Industries Transparency Initiative (EITI).

CSOs have also assessed and tracked compliance, and proposed methodologies for estimates of trade mis-invoicing, financial secrecy and other topics of concern.

may wield disproportionate influence in international settings, while the small businesses and local civil society organisations do not have as much capacity to sway international norm setting processes.

## More than the sum of its parts: a whole-system approach

A weak link anywhere in the system of financial accountability, transparency and integrity can undermine all other parts of the system, allowing resources to be drained through the weak spot. A whole-system approach is needed to examine the increasing use of sophisticated and complex financial and commercial arrangements to disguise the money trail.

The Panel reviewed the international institutional and legal frameworks intended to ensure that countries are implementing agreed standards. However, global rules and their implementation are still subject to domestic politics,<sup>23</sup> so that institutional arrangements must grapple with domestic as well as cross-border tensions. In a time of global interdependence there are complex issues regarding sovereignty, including how best to apply global norms to local contexts and local resistance to globally negotiated coercive measures.

## Enhancing integrity, building capacities

### Towards a sustainable and resilient path

The discussion in Part I of this report affirms the SDGs as the ultimate destination of transparency, accountability and integrity efforts. However, the Panel recognises that every destination requires a path. A unique feature of the 2030 Agenda compared to previous global agendas is the outline of a path towards its goals—finance, capacity building, policy coherence, partnership, technology and data.

The Panel has heard from a variety of stakeholders over the past few months about the need for change and the importance of engaging each other; but there has also been a worrying lack of consensus on how to achieve the 2030 Agenda's demand for equity and universality, leaving no one behind.

### Building the capacity to change power relations

The Panel is clear that building the capacity to implement change is more than a technical question. It is shaped by history, power relations and country-specific characteristics, including the political context. It is, in other words, path-dependent.

It is important in each case to understand the historical context and evolution of the international norms in financial accountability, transparency and integrity. For example, long before the current approach to country-by-country reporting by multi-national corporations, the United Nations in the 1970s debated and rejected a proposal for public country-by-country reporting.<sup>24</sup>

The Panel also recognizes that change processes are not linear, and that policy makers work within a series of assumptions about the world that limit their range of action. There is a need for deliberate actions to interrupt continuity of entrenched systems that fail to perform in the common interest. Meanwhile, vested interest groups and other powerful enablers resist change. These groups also have resources at their disposal to spend on influencing national and international deliberation to their benefit. The Panel understands that systemic change implies disruption: but maintaining systemic transparency and integrity following a breakthrough depends on stable forces that can defend and build on the progress made.

Financial integrity will require effective policy implementation by a large number of different public actors within a single country—revenue authorities, customs agencies, anti-corruption bodies, law enforcement and prosecutors, and financial intelligence units, among others. Capacity gaps can show themselves in any of these. For example, a global survey by the World Customs Organization<sup>25</sup> found that 62 per cent of customs administrations still had limited mandates to address trade-based money-laundering and tax evasion. Member States are regularly exhorted to take a whole-of-government approach so that their different national agencies cooperate and coordinate effectively—but when an agency already does not have sufficient capacity, asking it to use scarce resources to coordinate with a half dozen others may not improve matters.

Member States also have to consider possible trade-offs and unintended consequences of action. Not all countries are affected equally, and their economic and social structures will determine which aspects of the financial integrity agenda are most relevant. For some countries the resources saved by taking action might be insufficient for SDG investment. Focussing on financial integrity challenges might take such large resources and amounts of political will that it could undermine the path for transformation. Countries should also be alert to unintended consequences, such as adverse impacts on access to financial services by small business owners' and the informal sector.<sup>26</sup> International assistance with capacity building resources can help address some of the risks, as can careful whole-of-government approaches to policy planning.

#### Box 4: Need for agreed global standards, accounting for different country situations—discussions with Caribbean Association of Banks

In a virtual consultation with the Caribbean Association of Banks (CAB), the Panel heard how the global push for strict regulation and standardization for industry practices as a result of the 2008 financial crisis had made an adverse impact on the Caribbean banks. Repeated regulatory changes and large associated compliance costs strained the smaller banks. Several domestic banks had lost correspondent banking relationships as a result of the evolution in international standards and perceptions of riskiness. Mainly international banks could retain their relationships, albeit at increased costs.

The CAB noted that the region's reputation as a tax haven, not improved by blacklisting by the European Union, makes it difficult to attract investors. While CAB could monitor regulatory changes on behalf of their members, and help limit the cost of compliance by fostering collective action on technological solutions, that was not sufficient. They called for a common interpretation of global standards that correspondent and respondent banks can easily meet, and which would recognise the differences in capacities of banks in small countries when adapting to new regulations.



## Coordination to address challenges

States cooperate and coordinate most effectively when they share responsibilities and accountability. States already have obligations at domestic, international and collective levels, stemming from the instruments the Panel identified earlier.

Looking across the clusters of its work, the Panel finds that neither national action nor uniform implementation of rigid international rules are sufficient. Interagency collaboration at the national level should be enhanced, both through regional and international experience sharing, and through multilateral efforts to build capacity. Equally, multilateral efforts in tax cooperation, corruption and asset recovery and return need to cater to different national structures and requirements.

Regional collaboration, although currently underdeveloped, is important. A number of regional mechanisms already exist, such as the regional tax organisations (e.g. the African Tax Administrators Forum and the Inter-American Center of Tax Administrations); regional money-laundering cooperation (e.g. the European Commission's supranational risk assessments); and asset-recovery interagency networks.

Regional integration arrangements in developing countries could introduce their own standards related to their contexts. For example, to prevent harmful tax competition, African countries could develop rules governing tax incentives. Box 5 highlights the role of the African Union's African Peer Review Mechanism, which is a unique instrument for voluntary country reviews, including on corruption and money-laundering. Some industry-specific voluntary initiatives have shown the value of the making rules tailored to certain sectors.

Compliance in international affairs depends on a choice of three options: when actors are coerced; when they perceive compliance to be in their self-interest, or when the actors feels the rules are legitimate.<sup>27</sup> In the area of international financial integrity, generating rules sufficiently coercive to prompt universal adoption would be unacceptable and impossible in practice, though attempts at

### Box 5: Regional peer review: Experience of APRM

The African Union's African Peer Review Mechanism (APRM) is a voluntary regional peer review mechanism established by the African Heads of State and Government in 2003 to help African countries to adopt and internalise the principles of accountability, transparency and integrity by investigating typical governance ailments and proposing remedies.

The APRM process is unique in its scope. The APRM questionnaire covers simultaneous evaluation in four distinct pillars: democracy and good political governance, economic governance and management, corporate governance and socio-economic development.

The review mechanism is also unique in its breadth as the APRM voluntary nature draws heavily on the mutual trust among the states involved in the review and extends to all levels of government, parliament and the judiciary as well as the private sector and civil society.

In recent years, the high level of integration between the Joint AU-UN Framework for the Implementation of Agenda 2063 and the United Nations 2030 Agenda for Sustainable Development has helped expand the functions of the APRM and enabled effective governance monitoring and tracking.

In the above context, issues related to illicit financial flows and domestic resource mobilisation have been an integral part of the peer review process, explicitly linked in terms of the reporting and monitoring objectives to both the SDGs (specifically Goal 16 on Peace, Justice and Strong Institutions and Goal 17 on Partnership) and Agenda 2063 Aspirations (specifically Aspiration 1 on a Prosperous Africa Based on Inclusive Growth and Sustainable Development, and Aspiration 3 on an Africa of Good Governance, Democracy, Respect for Human Rights, Justice and the Rule of Law).

The APRM Secretariat is also an active member of the African Consortium to Stem Illicit Financial Flows from Africa, led by the African Union. The consortium was established to oversee the implementation of the recommendations of the AU-ECA High Level Panel on Illicit Financial Flows from Africa.

Reference: African Peer Review Mechanism. (n.d.) "APRM Support to the Joint AU-UN Framework for the Implementation of Agenda 2063 and the 2030 Agenda for Sustainable Development," African Union.

coercion related to tax matters have generated controversy (see Part III, Cluster 1). Conversely, rules that are in all States' self-interest will be hard to find, as States can gain by undermining others. This leaves the third option for compliance, generating rules that are legitimate and thus policymakers feel they "ought to be obeyed".<sup>28</sup>

Inclusiveness is crucial for legitimacy—as opposed to mere legality—making norms more likely to be accepted and implemented. States must be able to trust the international norms and standards that bind or otherwise constrain them.<sup>29</sup> All concerned states should be involved in setting the norms, underscoring the importance of universal and inclusive forums.

Developing countries should be heard and involved because the abuses hit them hardest. Yet the Panel finds that developing countries remain out of the decision-making process of many international norms and standards (see Box 6).<sup>30</sup> The Panel agrees that the lack of universality in norm setting is a major shortcoming, and one that will need to be addressed.

To ensure no one is left behind, global human rights obligations should be integrated into financial integrity efforts. Human rights obligations have no borders.<sup>31</sup> For example, in 2016 the Committee on the Elimination of Discrimination against Women (CEDAW) recommended assessments of "the extraterritorial effects of financial secrecy and corporate tax policies on women's rights and substantive equality".<sup>32</sup>

## Strong and efficient peer review mechanisms

For widespread implementation, inclusiveness in norm setting may be necessary but not sufficient. Countries have other pressing domestic policy priorities; States must also be held accountable for implementation. Peer review is one well-established approach, which can buttress the feeling that the rules are legitimate and can also build in elements of coercion.<sup>33</sup> Peer review includes five stages: information collection; evaluation; formulation and adoption of country reports and recommendations; dissemination of results, and follow-up.<sup>34</sup>

Many peer review mechanisms have been established regarding financial integrity issues, including for regional agreements (see Table 1 for a selection of mechanisms with global scope). They hold considerable potential to strengthen accountability, alongside other measures. Many peer review mechanisms also include guidance about technical assistance needs, often in collaboration with capacity-building programmes from international, regional and nongovernmental organisations, and development partners. Most peer reviews promote technical cooperation and peer learning through the exchange of good practices among states. The Panel finds five components critical for effective peer review: comprehensiveness; inclusiveness of all relevant stakeholders; impartiality; transparency, and monitoring. Not all the mechanisms listed are sufficient across the five components (see Part III, cluster 3).

### Box 6: Lack of inclusive global governance in tax matters

There is still no single globally inclusive intergovernmental forum for setting norms in tax matters. The process of setting international tax norms and standards is largely led by the OECD and the G20, though the UN Committee of Experts on International Cooperation in Tax Matters has a role through its model treaty and innovative approaches.

The OECD/G20 have designed two important frameworks to address tax cooperation, the Inclusive Framework on BEPS and the Global Forum on Transparency and Exchange of Information for Tax Purposes. Developing countries are only invited to participate in these frameworks on the condition that they agree to implement the underlying standards and norms, although most of them were excluded from the process of negotiation and elaboration. In these circumstances, developing countries may not consider international norms on tax matters as legitimate; norms may also be irrelevant in developing-country contexts. Lack of inclusiveness in setting international norms results in implementation gaps and weakens the global fight against illegal and harmful tax practices.

## Adjusting to a world of increased volatility and new technologies

Before COVID-19 and the major economic disruptions it has caused, resources were already draining out of public coffers—the misuse of funds, the abuse of tax systems, and making off in secret with ill-gotten gains are as old as civilisation.<sup>41</sup> The liberalised economic and financial systems of the past three to four decades<sup>42</sup> have supported more cross-border investment but also enabled hidden and secret transactions on a larger scale.

Member States have tried to create and adapt international frameworks to respond to the new liberalised environment. Yet the Panel finds that international legal and institutional frameworks have not kept pace with the speed of techniques to avoid regulatory, law enforcement and tax scrutiny. Even as liberalisation of trade and investment has slowed, and even reversed in some places, the abuse of new technologies has continued to grow.

Table 1: Selected peer reviews in the area of financial integrity

Instrument	Information collection	Evaluation	Formulation and adoption of reports	Dissemination of results	Follow-up monitoring
<b>IRM of the UNCAC</b>	Self-reporting; country visits (optional)	Review team of two countries (supported by UNODC Secretariat)	Adopted by means of constructive dialogue	Online publication of the executive summary; publication of the full report (optional)	No
<b>OECD Working Group on Bribery</b>	Self-reporting; country visits	Review team of two countries (supported by OECD Secretariat)	Adopted by the WGB (consensus minus one)	Online publication of review reports	Yes
<b>FATF Recommendations</b>	Self-reporting (technical review); country visits	Assessment team of experts trained by FATF (supported by FATF Secretariat)	Formulated by the assessors; FATF Plenary can overrule the assessors' conclusions (consensus minus one)	Online publication of the review report; country ratings	Yes
<b>Global Forum</b>	Self-reporting; reporting by other member states of the Global Forum; country visits <sup>35</sup>	Two expert assessors (supported by the Global Forum Secretariat which drafts the report)	Adopted by the Peer Review Group (consensus <sup>36</sup> )	Online publication of the review report	Yes
<b>Inclusive Framework on BEPS minimum standards<sup>37</sup></b>	Self-reporting; reporting by other Inclusive Framework members states; reporting by other organisations <sup>38</sup> ; no country visits	The Secretariat drafts the country report.	Approved by relevant reporting group or forum/the Inclusive Framework on BEPS (consensus minus one) <sup>39</sup>	Online publication of the annual report, which includes all country evaluations	Partial <sup>40</sup>

## Digitalisation

The international system has already recognised that digital technologies impact across all the SDGs<sup>43</sup> and that existing policy and regulatory frameworks cannot deal effectively with the new realities.<sup>44</sup>

New technologies and digitalisation impact on money-laundering and taxation of increasingly digitalised businesses.

New technologies provide new means for criminals to divert funds and hide their sources. For example, the anonymity and cross-border reach of crypto-assets (such as bitcoin)<sup>45</sup> raise concerns around financial integrity. Crypto-assets are used to conceal or disguise for example the retail trade in illicit drugs through anonymous marketplaces.<sup>46</sup> In 2019, the FATF updated its standards, calling on jurisdictions to include virtual asset service providers in anti-money-laundering and combating the financing of terrorism (AML/CFT) regulations.<sup>47</sup> Yet one year after adoption, 35 per cent of the 54 Financial Action Task Force (FATF) members had not brought the new standards into national laws.<sup>48</sup>

At the same time the growth of electronic commerce and the transformation of business models by digital technologies is disrupting the ability of States to raise resources, with the problem more acute for countries with low-capacity tax administrations. Both indirect and direct taxation are affected, tilting markets unfairly in favour of businesses and business models that avoid contributing to public finance. Residency rules for businesses, which traditionally trigger taxation rights and were first developed more than 100 years ago,<sup>49</sup> are made ineffective by digital technologies. There is broad consensus that current international tax norms produce perverse effects when applied to digitalized business models. However, there is still no global consensus on how to address the tax challenges of digitalisation of the economy, despite years of work in policy making forums (see Part III, cluster 1).

On the other hand, digital technologies are opening up the space for authorities to monitor and enforce financial accountability and transparency more effectively. The initiatives for automatic exchange of tax information, creation of public beneficial ownership registries, and filing suspicious transaction reports would not be possible without digital technologies. Across the financial integrity landscape, automation can complement traditional supervision and enforcement. Algorithms and artificial intelligence are able to process large volumes of data to highlight risks and pick out the most suspicious activities for extra scrutiny. As the Panel decides on recommendations, it will think about the need to bring new technologies into authorities' arsenals.

## COVID-19 disruptions and resilience

COVID-19 has also dramatically accelerated the digitalisation of economies, as some aspects of physical economic infrastructure go unused because of health risks. An increasing proportion of economic activity in certain sectors was already moving online, but physical lockdowns have increased this trend, at least in the short term.

COVID-19 has been a reminder of global uncertainty and volatility, as well as spurring further change. The COVID-19 experience is demonstrating the need for a flexible response, as well as vigilance in the face of emerging geopolitical and climatic threats. Facing disease spread, governments should use emergency spending and in April, the IMF advised countries to undertake spending but “keep the receipts”.<sup>50</sup>

The Panel has noticed that three types of emergency responses, while remaining essential, seem to provide especially large opportunities for malfeasance. First, people with connections and the inclination for bribery can circumvent normal procurement processes during emergency purchases of health care supplies to overcharge, supply sub-standard products, or simply sign contracts and take payments for which products are never delivered. Second, income support to individuals can be subject to corruption or theft, especially where robust and accountable social protection systems are missing. Third, support to the private sector can be manipulated for political or private gain, as well as straightforward fraud and abuse.

These trends are reminiscent of the aftermath of natural disasters, when humanitarian relief has been the target of financial crime.<sup>51</sup> The resources subject to capture may be a small proportion of overall expenditure, but repeated events indicate that countries do not have adequate financial integrity policy frameworks to secure this essential spending at times of great need.

Effective public revenue generation is therefore of critical importance to building systems better able to withstand COVID-19 and future shocks. These shocks stress the importance of strong, stable, resilient domestic financial systems, which facilitate inclusive economies, and provide for public goods such as universal health coverage. To be able to invest in stronger health systems and resilience in the face of new threats to sustainable development, the only way is a new understanding and willingness to work together globally to stop the drain on resources.

## Notes

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- 32** CEDAW Concluding Observations on the combined fourth and fifth reports of Switzerland (CEDAW/C/CHE/CO/4-5) 18 November 2016, para. 41.
- 33** Peer review is "the systematic examination and assessment of the performance of a state by other states"; see Pagani, F. (2002) "Peer Review as a Tool for Co-operation and Change," *African Security Review*, 11(4), pp 15-24.
- 34** Conzelmann, T. & Jongen, H. (2015) "The Power of the Peers: Assessing the Authority of Peer Reviews in Curbing Corruption," presented at the workshop "Authority in International Organizations," WZB Berlin, 10-11 December 2015.
- 35** In exceptional cases, the reviewing team can decide that a country visit is not needed (OECD, 2016, point 38, p.8).

- 36** No individual jurisdiction can block the report's approval., similar to the consensus minus one principle.
- 37** Action 5: Harmful tax practices; Action 6: Prevention of tax treaty abuse; Action 13: Country-by-Country Reporting; Action 14: Mutual Agreement Procedure
- 38** Only for some minimum standards, the OECD reports information as secretariat for the multilateral Convention for Mutual Administrative Assistance in Tax Matters and the CbC Reporting Multilateral Competent Authority Agreement. Civil society and the private sector can provide information on states' policy practices, but they cannot participate in the peer review.
- 39** Minimum standard 14 reports automatically adopted within three weeks, unless Member States object in writing. In these cases, the report is discussed at the next meeting and collectively adopted.
- 40** Minimum standard 6 does not have follow-up, probably because it is a very recent mechanism.
- 41** See for example, Ronald Kroeze et al (eds) (2020) *Anticorruption in History: From Antiquity to the Modern Era*, Oxford University Press; Liu, E. (2015) "A historical review of the control of corruption on economic crime in China," *Journal of Financial Crime*, Vol. 23 No. 1, pp. 4-21.
- 42** Encompassing liberalised foreign exchange regimes, liberalised capital accounts, and liberalised goods and services trading.
- 43** United Nations (2019) *The Age of Digital Interdependence: Report of the High-Level Panel on Digital Cooperation*.
- 44** United Nations (2020) *Financing for Sustainable Development Report 2020*.
- 45** Private assets that depend primarily on cryptography and distributed ledger or similar technology.
- 46** See for example the Silk Road case in *United States vs. Ulbricht* (S.D.N.Y. 2015).
- 47** FATF (2019) FATF Recommendations.
- 48** FATF (2020) "12 Month Review of Revised FATF Standards – Virtual Assets and VASPs".
- 49** Kobetsky, M. (2011) "History of tax treaties and the permanent establishment concept," in. In *International Taxation of Permanent Establishments: Principles and Policy*, Cambridge Tax Law Series, Cambridge: Cambridge University Press pp. 106-151.
- 50** IMF (2020) "Keeping the Receipts: Transparency, Accountability, and Legitimacy in Emergency Responses," Fiscal Affairs Department, Special Series on Fiscal Policies to Respond to COVID-19, [https://www.imf.org/\\_/media/Files/Publications/covid19-special-notes/en-special-series-on-covid-19-keeping-the-receipts.ashx?la=en](https://www.imf.org/_/media/Files/Publications/covid19-special-notes/en-special-series-on-covid-19-keeping-the-receipts.ashx?la=en).
- 51** See examples in Bailey, S. et al. (2008) "Preventing Corruption in Humanitarian Assistance," Overseas Development Institute, July, <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/1836.pdf>.





## PART III: IDENTIFYING GAPS, VULNERABILITIES, IMPEDIMENTS AND STRUCTURAL CHALLENGES

At its first meeting the Panel agreed to break its work down into three clusters, while recognising that the issues in each cluster also bear on other aspects of the work. The clusters are not independent silos. As discussed earlier, a weak link anywhere in the system of financial accountability, transparency and integrity can undermine all other parts of the system, and ultimately the achievement of the Sustainable Development Goals. Some tools discussed below, for example beneficial ownership transparency, are relevant to all aspects of financial integrity.

### Cluster 1: Cooperation on tax matters

Effective resource mobilisation and redistribution depend not only on national policies and regulations, but also on appropriate tax norms that can unlock the potential of tax administration and systems in all countries. Tax abuses threatens equity, fairness and justice, which are important pillars of human rights and sustainable development.

The Panel adopts a broad approach to examine tax abuses that covers both tax evasion and tax avoidance. So in addition to the illegal transactions of commercial and personal tax evasion, the Panel addresses international cooperation aimed to address the drain on resources from cross-border tax avoidance, which involves paying less tax by utilizing loopholes in tax laws and exploiting these loopholes within legal parameters.<sup>52</sup> Tax avoidance of multinational corporations frequently takes the form of tax base erosion and profit shifting (BEPS) and is often enabled by loopholes in the governance architecture and weak tax laws, some of which are difficult to interpret and enforce.

Further, the Panel notes that international tax policy lies at the intersection of taxation law and international political economy with strong linkages to trade and investment. An important channel of tax evasion is trade mis-invoicing, which is a deliberate misstatement of the price or quantity of internationally traded goods in the invoices presented to customs. Mis-invoicing can occur both in import and export trade flows, resulting in significant drain on resources, as indicated by the AU-ECA High level Panel on Illicit Financial Flows from Africa and other sources.<sup>53</sup> For example, estimates for trade mis-invoicing in Africa for the period 2000–2016 averaged \$83 billion annually, accumulating to US\$1.4 trillion, equivalent to 5.3 per cent of Africa's period GDP or 11.4 per cent of Africa's period total trade.<sup>54</sup>

**The institutional environment of international tax cooperation is dominated by voluntary forums, bilateral tax treaties and, only more recently, multilateral instruments.** There is no international tax convention to compare with the United Nations Convention against Corruption and United Nations Convention against Transnational Organized Crime, which have nearly universal coverage.

During its consultations in the past few months the Panel heard and read various proposals on how to improve international tax cooperation. These proposals seem to represent two positions, reflecting the lack of consensus in this area.

The first set of proposals urged the Panel to focus on gaps in the existing frameworks in international tax cooperation, particularly, the OECD-housed Global Forum and the Inclusive Framework on BEPS, which have been mandated to work on many pressing international taxation issues. From this point of view, these frameworks have embraced the need for inclusiveness, opening up sufficient space for participation to include developed countries, emerging economies and developing countries. Changes to the architecture of current international norms would risk misallocating resources, duplicating international standards, and multiplying the work of the international organisations. The effect would be to weaken the standards and discourage cooperation among international organisations.

The second set of suggestions urged the Panel to focus on the institutional deficit. Advocates of this approach note that the G20 and OECD have attempted to close the gaps by adjusting the Inclusive Framework; but they are not convinced that the Inclusive Framework can be a substitute for a truly global tax body, such as an intergovernmental UN body, where all countries participate on equal basis in decision making to guide balanced outcomes. They also argue that the UN Tax Committee has not been given the space to explore the full potential of the UN system in this area, nor has regional collaboration among developing countries matured in the area of taxation, especially at political level. Further, they argue that there is need for more coherence in aligning international tax reforms with commitments on sustainable development and its financing, which had already been made within the UN system.

At first glance, it seems that the two positions are difficult to reconcile, though each side makes convincing arguments. Yet, it is not a simple question of choosing whether the existing mechanisms can become fully inclusive, or remaking inclusive institutions under the United Nations. The issues at stake are multi-faceted. Perhaps specific instruments could address the main weaknesses of the status quo, avoiding the need for reformulation. But other formats may not be amenable to expansion or extension. The Panel will discuss this issue with all stakeholders in the next months, with the aim of reaching a common understanding.

In the Panel's view, this **understanding should build on the Addis Ababa Action Agenda's call for international tax cooperation that is "universal in approach and scope and should fully take into account the different needs and capacities of all countries"**.

Two important aspects suggest themselves: First, the extent to which current international tax norms are appropriate to developing-country contexts; Second, impediments to tax information production, sharing, use and publication. The Panel's report also discusses two important, though controversial, mechanisms in current discussions: dispute settlement mechanisms and coercive mechanisms, which will be covered in cluster 3 on international norms and dispute settlements

## Tax treaties and transfer pricing

International norms at the OECD-housed forums and bodies have been in flux for the last decade. Fundamental principles of the international tax rules are currently under negotiation, in particular in relation to the taxation of digitalized economic activity. We are therefore at a critical juncture: while the dominant global standard is being discussed, the potential exists for countries to re-shape the long-term development of international tax norms to promote financial integrity more effectively and respond better to the needs and capacities of developing countries.

The Panel also received a number of proposals with a bearing on the emerging menu of options, including digital service taxes (DSTs), withholding taxes, the concept of “significant economic presence”, fractional apportionment and VAT measures. Some of these might inform the ongoing work at the UN Tax Committee towards a possible new treaty article responding to the challenges of digitalisation.<sup>55</sup> Given the perspective above, the following discussion highlights how the development of international tax norms over time has influenced the current global tax architecture.

There is general agreement that international cooperation is essential to prevent double taxation and double non-taxation, as well as enable enforcement, and curb tax competition. However, the Panel finds that **a more nuanced approach is needed to fully understand the challenges, going beyond the simple framing of “developed versus developing countries”** to examine the role of history and power relations in shaping current international norms.

### Norms and context

For OECD countries, domestic laws and international instruments have developed in parallel. These countries influenced the shape and content of the foundations of the international norms at their inception a century ago. When the OEEC (predecessor of the OECD) assumed the mantle of tax standard setter in the 1950s, it did so on the basis that a group of likeminded and influential countries were better equipped to forge a consensus than a globally representative body – the League and the United Nations having failed in different ways in this early era.<sup>56</sup>

Many developing countries had not yet won their independence when the foundations for international tax coordination were laid. Many newly independent countries inherited bilateral tax treaties from the colonial era, and began to renegotiate their own treaty networks from the late 1960s onwards.

The United Nations emerged almost immediately as a forum for discussion on the inadequacies of international norms for the needs of developing countries. During the 1970s, the United Nations Commission for Transnational Cooperation (UNCTC) was founded and several UN bodies including the United Nations Conference on Trade and Development (UNCTAD) turned their attention to tax avoidance by multinational enterprises or MNEs, in ways that prefigured work at the OECD in recent years: they analysed transfer pricing challenges resulting

from royalty and interest payments, and developed the first proposal for country-by-country reporting.<sup>57</sup> An ad hoc group of experts, now the UN Tax Committee, was created in 1968, first publishing its own Model Convention in 1980.

The focus on tax avoidance by MNEs in the UN reflected the general approach to foreign direct investment in the 1970s. By the 1990s, however, general perceptions had shifted from concern about foreign investors' influence over national policy to countries' increasing efforts to attract them. This shift helped promote "tax competition", including a race to the bottom on tax rates and the spread of harmful tax practices. By the turn of the century, the pendulum had begun to swing back towards addressing weaknesses in international tax norms. There has recently been a greater emphasis on transparency and exchange of information between authorities, revision of transfer pricing rules, and amendments to address treaty abuse.

This expansion in the substance of cooperation has coincided with a proliferation of norm-setting institutions. At the global level, the UN Tax Committee was strengthened following the Addis Ababa summit in 2015, and has expanded its subgroups to cover, inter alia, the extractive industries; the challenges of digitalisation; dispute avoidance and resolution; environmental taxes, and transfer pricing. Its traditional work on the UN Model Tax Convention also continues, with regular updates.

When issues divide developed and developing countries, it can be challenging for developing countries to carve out a distinctive approach, given the Committee's balanced composition and weakly resourced secretariat. Of course, any proposed bilateral provision must have a chance of agreement on the part of the other, often developed, country. For example, in the 1970s the ad hoc committee discussed the issue of a withholding tax on fees for technical services. It was adopted quite widely by developing countries in their treaty practice, but only became a part of the UN Model as Article 12A in 2017. As such, it represented a significant break with the OECD Model by allowing taxation without any physical presence

Apart from the OECD's work on its Model Tax Convention, its focus on international tax cooperation matters can be traced to the 1998 report on "Harmful Tax Competition: an Emerging Global Issue" and its onslaught of tax haven jurisdictions. This culminated in the development of the OECD Global Forum in 2002 which developed international standards of transparency and exchange of information in tax matters. These standards bar jurisdictions from restricting exchange of information because of banking secrecy provisions and are now included in countries' double tax and multilateral conventions.

After the financial crisis of 2007-9, the OECD began to receive a political mandate from the G20 to address base erosion and profit shifting (BEPS). In 2015, the OECD issued 15 BEPS Action measures that are intended to ensure that profits are taxed where economic activities generating the profits are performed and where value is created. Further, OECD opened the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (frequently abbreviated as MAC) to signature by all countries in 2010. In 2016 it created the Inclusive Framework (IF)—which in

December 2019 had 137 members<sup>58</sup>—as well as another binding global convention, and the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (“Multilateral Instrument” or MLI). The IF emerged in part because OECD member states accepted the need for more developing-country engagement in international tax cooperation, but opposed a stronger role for the United Nations, notably when rejecting the developing countries’ proposal to create an intergovernmental UN tax body during negotiations on the outcome of the Addis Ababa Conference on Financing for Development in 2015.

Regional cooperation has also intensified in recent years. Many regional bodies now have their own model tax treaties and multilateral conventions, while the African Tax Administration Forum (ATAF) and Intergovernmental Group of 24 (G-24) have emerged as collective voices for developing countries in international negotiations.

In addition, the African Union (AU) has been involved in raising the profile the role of illicit financial flows in depriving countries of tax revenue. Yet this too has yet to produce radical innovations in international tax norms, whether at global or regional level. In this environment, developing countries could decide to prioritize cooperation in institutions in which they can achieve the most.

The African Legal Support Facility (ALSF) hosted by the African Development Bank (AfDB) supports African Governments in the negotiation of complex commercial transactions related to various areas, especially in the area of natural resources, creditor litigation and other related sovereign transactions and compliance with good governance practices and standards, in all activities it supports.<sup>59</sup>

Further, tax administrations in different parts of the world have established regional tax authority groupings to exchange experiences and to discuss relevant issues with each other. Examples include the Asian Tax Authorities Symposium (ATAS), the African Tax Administration Forum, the Inter-American Center of Tax Administration (CIAT), The Pacific Islands Tax Administrators Association (PITAA), The Caribbean Organisation of Tax Administrators (COTA), and the Centre de Rencontres et d’Études des Dirigeants des Administrations Fiscales (CREDAF). However apart from ATAF, the technical assistance provided focuses mainly on various types of tax administration issues and less on tax policy, tax legislation and tax treaty issues.

**Lower-income countries’ priorities often differ from those of large emerging markets in the G20, and those of international financial centres in developing regions, as well as from those of OECD countries.** A large number of lower-income countries do not participate in the international forums where global tax norms are set. Those that do participate face a triple disadvantage in the negotiations: (1) the starting point for any discussion is a set of tax norms developed largely without their input; (2) the G20 and OECD states still dominate agenda-setting at the system level; and (3) capacity mismatches limit their ability to make the most of opportunities to negotiate.

## Gaps and vulnerabilities in the implementation of international tax norms

### **Tax treaties**

Tax treaties are agreements between states that divide up the right to tax cross-border economic activity. Bilateral tax treaties generally had the principal aim of reducing double taxation, and thus encouraging cross-border investment. There are now over 3,000 in force worldwide, covering 96 per cent of foreign direct investment.<sup>60</sup> Though tax treaties usually provide a basis for exchange of information and mutual assistance in tax administration, these benefits can now be gained without the sacrifice of taxing rights, for example through the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MAC).

The Panel acknowledges recent efforts by both the United Nations and OECD to strengthen the position of developing countries. The model tax treaties are updated in an incremental fashion, with many small changes over time. This can be seen in the changes in the two global models, from 2007 (the 7th edition of the OECD Model) to 2017 (the 4th edition of the UN Model, 10th edition of the OECD Model, and signature of the MLI at the OECD).

Protections from “tax treaty shopping” in the two major models have been significantly strengthened. In the 2017 versions of the same as a result of the OECD BEPS project, which changed the preamble to the treaties to their purpose being the elimination of double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements. Further general and specific measures were included to prevent treaty shopping. Also, the 2017 edition of the UN model introduced a new article (12A) covering the taxation of technical service fees, which have increased in volume in an increasingly services-based global economy. Incorporation of this article in tax treaties would allow countries to levy withholding taxes on technical service fees,<sup>61</sup> protecting them against profit-shifting by using them. The UN Tax Committee and the Platform for Collaboration on Tax (comprising the IMF, the OECD, the UN and the World Bank) have also stepped up their efforts to assist developing countries in areas related to the negotiations of tax treaties.

**Treaty negotiating capacity:** Tax treaties as a form of cooperation also presume strong negotiating capacity. This extends beyond the moment of negotiation, since tax treaty dispute resolution is also a “semi-diplomatic” process,<sup>62</sup> and treaties should be updated on an ongoing basis. Furthermore, some commentators expect tax disputes to increase because of the increased complexity in new international tax norms (see below), the need for subjective judgement to implement the new rules, and the likelihood that countries selectively enforce the rules which they consider favourable to them.

**Systemic imbalance in treaties:** There is also an argument that the tax treaty regime, grounded in international norms embodied by the model treaties, does not adequately cater for developing countries’ economic position.<sup>63</sup> Since developing countries are, almost by definition, capital-importing economies, a system that allocates taxing rights away from capital importers in return for largely procedural gains (harmonization of definitions, dispute

resolution, mutual assistance) is likely to lead to unbalanced outcomes. Empirical evidence on whether concluding treaties raises investment is mixed.<sup>64</sup> prompting some countries to terminate their more disadvantageous treaties. It has also encouraged regional organisations in developing countries such as the African Tax Administration Forum (ATAF) to develop their own tax treaties that aim to enhance tax cooperation between member countries.

### **Transfer pricing rules**

Transfer pricing refers to a method for pricing transactions within related multinational enterprises. The domestic laws implementing these rules contribute to the determination of how much of the profit of a multinational enterprise should be allocated to a jurisdiction for the purpose of taxation.

The arm's length principle (ALP), as interpreted in the OECD's transfer pricing guidelines, is a key international norm affecting the tax base of developing countries. ALP seeks to price internal MNE transactions according to the same prices that would prevail in external transactions between non-related companies.<sup>65</sup> The United Nations Transfer Pricing Manual<sup>66</sup> is intended to educate developing countries about the issues involved in transfer pricing, from the conceptual framework to the effective application of transfer pricing rules. However, the rules have created conflicts and many disputes.<sup>67</sup>

**Complexity of transfer pricing:** The primary objective of transfer pricing rules is to provide the tax administration with the legal and administrative tools needed to protect the country's tax base. However, using the arm's-length principle is difficult, particularly for those developing countries' tax administrations whose under-resourced transfer pricing units are barely functioning, if they exist at all. It can be a very complex task for tax administrations to overcome information asymmetries to challenge an arm's length price determined by the typically well-resourced, highly-integrated MNE. The High-Level Panel on Illicit Financial Flows from Africa noted abusive transfer pricing on a substantial scale in Africa,<sup>68</sup> and African tax administrations have reported that the defects of transfer pricing rules represent one of the highest risks to their tax base.<sup>69</sup> The Panel accepts that developing countries require simpler and more predictable approaches than the existing ones to determine the allocation of multinational's profits to a particular jurisdiction than the existing approaches.

**Absence of information:** One major challenge disproportionately affecting developing countries is the lack of relevant information to apply the ALP, in particular the absence of reliable comparables. This has prompted some developing countries and emerging economies, such as Brazil, to develop their own simplified models that allows the ALP in non-standard ways.<sup>70</sup> A few countries also adapt their application of the TPGs for the purposes of global redistribution.<sup>71</sup>

**The move towards unitary taxation:** one of the most discussed alternatives to the arm's length principle is the unitary approach, treating a MNE's affiliates together as a single firm. It uses a formula to divide up profits, based on factors indicating economic activity, such



as sales, assets, or employees in each jurisdiction. This approach has gained increased support from civil society stakeholders such as the Independent Commission for the Reform of International Corporate Taxation. It also has qualified support from governments, in view of the unitary approach advocated by the G-24 in its proposal to the OECD's BEPS 2 project (discussed below) and the European Commission's proposal for a Common Consolidated Corporate Tax Base in the EU, as well as aspects of unitary taxation in the OECD secretariat's proposals for reforms related to taxation of the digitalised economy (also discussed below). The Unified Approach proposal currently being negotiated at the OECD Inclusive Framework under Pillar One for the first time embraces elements of unitary taxation, although it is intended to apply to a residual share of the MNE's global profits. Depending on how it is designed, unitary corporate taxation could benefit developing countries, developed countries or the multinational corporations. One of the possibilities is to explore its implementation at the regional level, for example through regional organisations. Another proposal is the unilateral adoption of unitary approaches: one suggestion is to leave current OECD rules in place but to adopt a formulary alternative minimum corporate tax (FAMICT), which would draw a line under the degree of profit shifting that could be achieved via transfer pricing manipulation.<sup>72</sup>

## BEPS and taxation of a digitalizing economy

### Base erosion and profit shifting (BEPS) norms

The practice of multinational corporations shifting profits to subsidiaries in low-tax or secrecy jurisdictions, often through manipulating transfer pricing, is a large drain on potential tax revenues. In many cases, those subsidiaries exist on paper only, mostly with one or two employees, while the bulk of the activities of the company occur in another country.

BEPS diverts resources from the country where they are generated, thus inhibiting local private investment, which is an important financing source for development. The cost to developing countries is the more significant because corporate tax represents a more important share of government revenue in developing countries than in OECD countries (see Figure 2). One sixth of governments' tax revenue in developing countries is raised through corporate taxation.<sup>73</sup>

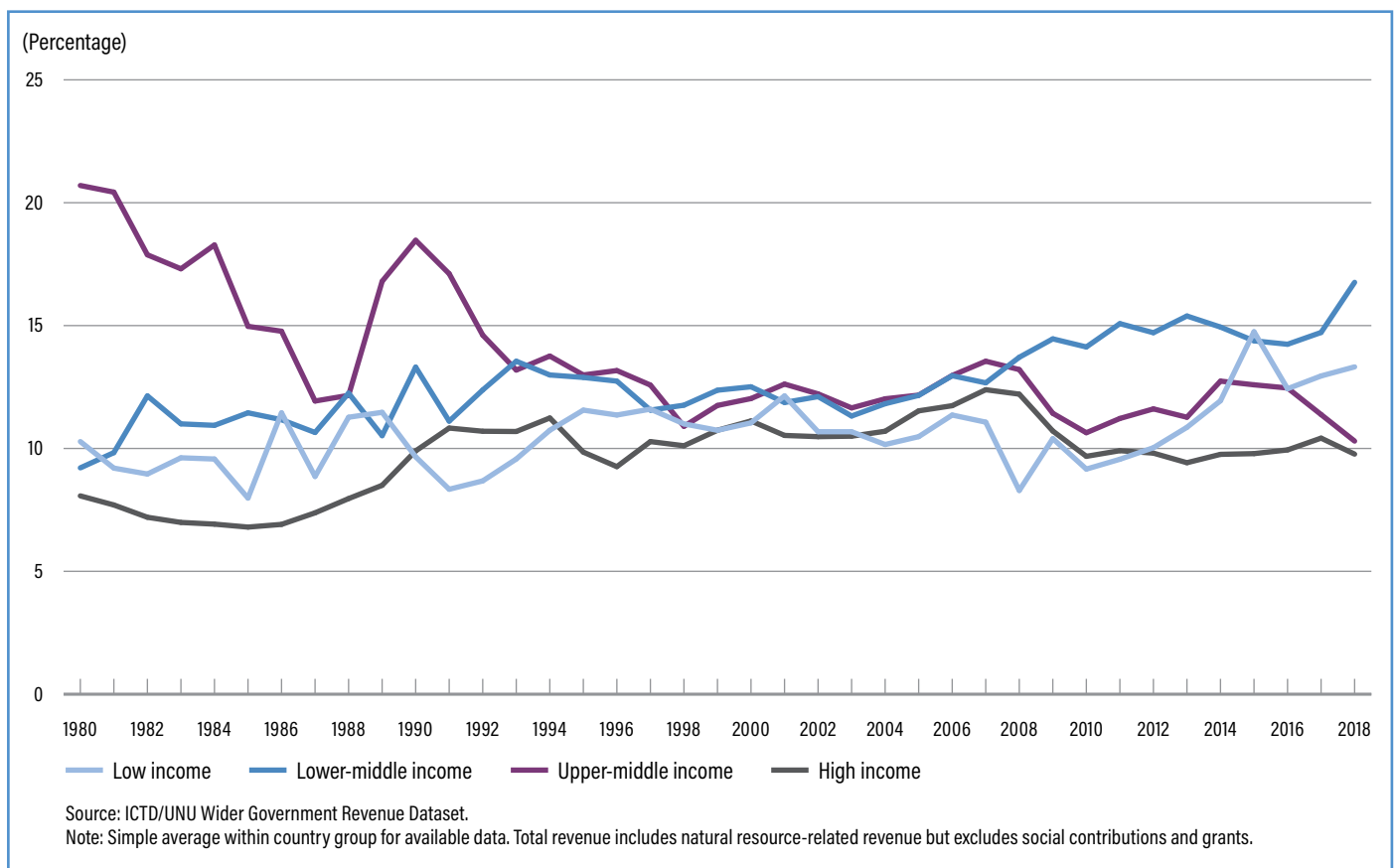
The BEPS Action Plan aims to provide tax authorities with modalities to address tax avoidance. This G20-OECD BEPS project was designed to tackle "tax planning strategies used by multinational enterprises that exploit gaps and mismatches in tax rules to avoid paying tax."<sup>74</sup> The BEPS concerns of developed countries are however not necessarily the same as those of developing countries. After the original BEPS agenda was crafted, developing countries pushed to ensure some BEPS concerns that are pertinent to them are included in the BEPS Action Plan (for example the transfer pricing of commodities). Various commentators have also written on the BEPS challenges of developing countries, the BEPS concerns that are of priority to them and how they could effectively address those concerns in light of their specific circumstances.<sup>75</sup>



The OECD concluded the BEPS Action Plan in 2015 and launched the Inclusive Framework on BEPS in 2016 to promote implementation and follow-up. A new set of rules (referred to here for ease as "BEPS 2") is currently under discussion under the Inclusive Framework. It consists of two pillars, one intended to address the tax challenges of the digitalisation of the economy, and the other to introduce global minimum taxes.

Currently, MNE profits are allocated to different jurisdictions using the arm's length standard, as discussed in the previous section. To allow better enforcement of this standard, the BEPS Action Plan includes a requirement for country-by-country reporting (CBCR) by MNEs. The OECD has developed guidance on CBCR production, filing and sharing among tax authorities. However, as discussed in the next section of this report, the deficiencies of the current design of the international framework for CBCR greatly reduce its potential.

Figure 2: Revenue from corporate income tax in per cent of total revenue



### Norms related to taxation of a digitalizing economy

As highlighted in Part II of this report, the impact of digital technologies is wide-reaching across all the SDGs. However, there is a broad consensus that the current international tax norms produce some perverse effects when applied to digitalized business models, preventing countries from taxing MNEs adequately. According to the UN Transfer Pricing Manual, "In many developing countries, the digital economy currently plays a role as a key growth driver in their economic engine and it is therefore imperative for tax authorities to tackle transfer pricing issues related to it."<sup>76</sup>

Both the UN Tax Committee's subcommittee on tax challenges related to the digitalisation of the economy and the Inclusive Framework have been considering what changes should be made, although it is the latter body that has so far set the agenda. Ahead of the Inclusive Framework's January 2019 meeting G24 members proposed a more radical set of reforms than were eventually taken forward. The work has been divided into two pillars, which will be discussed below.

Although major digital-economy multinationals may be among the most aggressive in exposing the shortcomings of international tax norms, the same patterns of behaviour are seen, to varying degrees, among multinationals from all sectors. The professional enablers, including global law and accounting firms, are a key vector in promoting the spread of these behaviours. For this reason, the OECD's BEPS 2 project—which began purely focused on the digital economy—expanded to cover, in most of the discussions and proposals, a much wider, often universal, set of sectors.

The current negotiations on the two pillars reflect a broader discussion on tax and development such as the challenges facing member States in protecting their policy space, ownership and regulations of data flows. Important broader issues that have been an integral part of the discussions include taxing profits where production and commercial activities take place, thus enhancing the advances made in 2018 BEPS Convention. They also include the concerns over the governance of tax competition and tax exemptions and the need for cost-benefit analysis of their impact on investment. There is a growing literature that questions the impact of tax incentives in low- and middle- income countries based on both investors surveys as well the weak case for their impact on: (i) investments that exploit location-specific rents such as natural resources (exogenous rents) or (ii) investments that exploit agglomeration benefits (endogenous rents).<sup>77</sup>

In the above context, the discussions on Pillar One, for example, focuses on redistributing the tax base of businesses within its scope towards the jurisdiction in which they have sales or users seeking to make it harder for profits to be transferred to low-tax jurisdictions with little real activity. This includes recognition of the need to move beyond arm's length pricing and tax apportion some of the profits of some multinational groups based on a formulaic method. Pillar Two includes efforts that would ensure MNEs pay a minimum level of tax, addressing the transfer of profits to low-tax jurisdictions.<sup>78</sup>

A number of countries, including developing countries, had already acted to tax digital services, e-commerce and technology in general before these consultations began. Countries continue to innovate and emulate each other in this space outside of the global negotiations. These responses, though not always “first best” solutions, are contextual responses based on countries’ administrative and economic realities.

### Gaps and vulnerabilities related to digitalisation

**Insufficient negotiating capacity:** The proposals do fundamentally alter some of the century-old tax architecture, but they also have potentially adverse implications for developing countries. One shortcoming of the proposals is that the agenda and timescale have been dictated by the priorities of developed and large emerging economies: they presume a significant commitment of human and financial resources to negotiation over a short period of time, at a point when developing countries are still considering their policy objectives.

**Not adapted to developing country situations:** There is a variety of concerns about thresholds and definitions that are likely to limit the extent of any redistribution to developing countries.<sup>79</sup> They are also layered on top of existing rules rather than replacing them, tempering the benefits of any simplification.

**Binding arbitration not supported:** The emphasis on mandatory and binding dispute settlement in Pillar One poses the risk that developing countries will be dragged into a system of arbitration that they have so far resisted (see below). Finally, many of the discussions, including for example which rules should take priority under Pillar Two, demonstrate that the goal of global consistency may continue to produce outcomes less likely to be beneficial for developing countries.<sup>80</sup>

## Tax information and sharing standards

### Norms and trends

Sharing tax information is crucial, empowering administrations to collect revenues from cross-border transactions and activities, narrowing the tax gap created by international evasion and avoidance. Losses to corporate profit shifting and hidden offshore wealth disproportionately affect lower income countries, systemically skewing the global distribution of realised tax revenue. The leading estimates for the tax losses to both corporate and individual tax abuse show that these account for a higher share of GDP and therefore a much higher share of current tax revenues in lower-income countries.<sup>81</sup>

The gender equality aspects of taxation highlight the importance of tax information cooperation. The mean unconditional gender wealth gap is large,<sup>82</sup> and is more pronounced in developing countries.<sup>83</sup> One recent study using data from Colombia suggests that evading tax by offshoring wealth is an overwhelmingly male pursuit.<sup>84</sup> Since there is a clear gender

imbalance in the distribution of wealth, effective cooperation and sharing of tax information would contribute to equality, by empowering tax administrators to collect tax revenues from offshore capital income and wealth owners, the great majority of whom are men.

The growth of value-added taxation resulting from fiscal consolidation means that the tax burden falls disproportionately on women.<sup>85</sup> Greater accountability and improved transparency, through financial account information exchange and country-by-country reporting, can increase tax revenue from income and wealth and justify a shift toward progressive taxation regimes considered pro-poor and gender responsive.

Without collective efforts on the part of source and resident countries for disclosure and transparency, the international tax system will remain exposed to tax evasion and avoidance. As the High-Level Panel on Illicit Financial Flows from Africa concluded, it is important for Africa, and for developing countries in general, to be a part of the legal frameworks related to sharing tax information. However, their equal and informed participation in these frameworks could assist these countries in making an effective use of the information shared.

**The role of non-state actors in promoting disclosure and transparency:** in the above context, significant contributions have been made by various civil society groups, research centres and trade unions under their international and regional umbrella bodies to promote international tax cooperation, disclosure and transparency and networking among developing countries through research, advocacy and training to developing and strengthening substantive positions on tax reform, including into UN processes. The role of the media, particularly investigative journalists in highlighting and bringing global attention through exposes such as the Panama and Luxembourg leaks, among others has contributed majorly to increased public understanding and official commitment for change.

### Gaps and vulnerabilities in the implementation of tax information and sharing standards

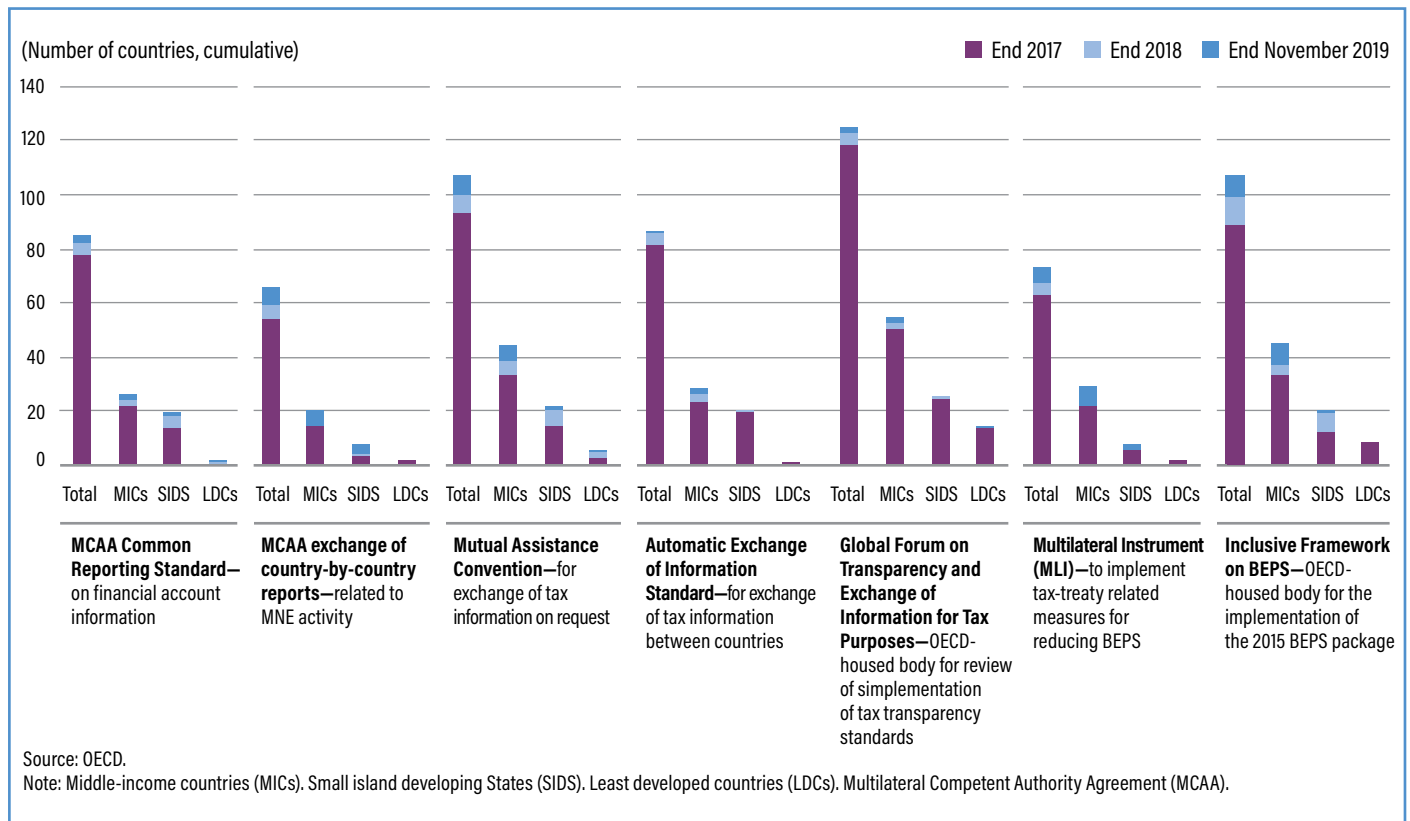
**Gaps in data collection:** To counter tax avoidance and tax evasion it is important to continue to produce and use taxation data. The glaring gaps in global data collection argue for systematic, regular and frequent global data collection and dissemination—yet there is no one source with the responsibility of publishing consistent and reliable data on taxation for the entire world, an important systemic shortcoming.

States commonly use three methods of tax information exchange: exchange of information on request (EOIR), which takes place when a tax authority makes a specific request for information to another tax authority in a foreign country; automatic exchange of information (AEOI), carried out among the tax authorities of two or more countries on an ongoing basis in accordance with predetermined categories; and spontaneous exchange of information that occurs when a tax authority considers tax information in its jurisdiction to be of interest to another tax authority in a foreign country and sends it without prior solicitation.

**Lack of complete coverage:** Addressing these issues is particularly important for low-income countries with average tax revenues below the 15 per cent of GDP threshold required

to ensure the effective functioning of governments.<sup>86</sup> However, as shown in Figure 3, the poorest countries have almost no presence in transnational tax cooperation networks. No least-developed country receives data either via the automatic exchange of financial account information or country by country reporting.<sup>87</sup> In 2019, only four African countries (The Seychelles, South Africa, Mauritius and Ghana) activated AEOI relationships regarding financial accounts.<sup>88</sup> In contrast, all OECD countries participate in information exchange with the sole exception of the USA (which receives information under its own unilateral mechanism, the Foreign Account Tax Compliance Act).

Figure 3: Participation in international tax cooperation instruments, 2017–2019



The information sharing mechanism faces several challenges:

**Insufficient data control:** Countries and authorities may have insufficiently robust data control procedures in place to prevent unauthorized use or disclosure of confidential information, creating obstacles to receiving information.

**Restrictions on data usage:** Authorities have limited ability to act upon information received from other countries. For example, a customs authority receiving information from another country's customs authority may not be able to share it with tax authorities for the purpose of enforcement.

**Lack of compliance by some developed countries:** The Panel heard that although some developing parties are party to some exchange of information mechanisms (e.g article 26 of double tax treaties), often developed countries ignore or outrightly refuse to exchange information with them despite numerous requests. There is no recourse or penalty for those countries that refuse to comply with their international obligations

### Challenges to financial account information transparency

The automatic exchange of information on financial accounts provides for the exchange of non-resident (offshore) account information concerning various categories of income including dividends and interest, and wealth. In 2014, the OECD's Common Reporting Standard (CRS) contributed to the legal framework for automatic exchange of financial account information. While the CRS's multilateral framework promises to be highly beneficial for developing countries, its effectiveness is weakened by a number of deficiencies. These include:

**Restrictions on the use of information:** The Multilateral Convention on Mutual Administrative Assistance in Tax Matters<sup>89</sup> (Exchange of information on request) include provisions limiting the use of the information exchanged, which mean that, in principle, tax authorities are unable to use this information to tackle money-laundering and corruption, which is clearly a major impediment to the effectiveness of the system.

**Lack of complete coverage:** Automatic exchange of information regarding financial accounts can bring real transparency only if all jurisdictions participate in the network. As of December 24, 2019, there were 108 signatories of the Common Reporting System (CRS) Multilateral Competent Authority Agreement (MCAA). Even if this level of coverage appears adequate, there are important developed countries that chose not to participate and many developing countries that are not yet signed up to the standard. Moreover, signatories are not able to exchange information with every other signatory.

For full transparency, the AEOI system requires complete coverage of reporting financial institutions, reportable persons and reportable accounts. The CRS has several loopholes in these respects that may allow tax evaders to continue their non-transparent activities.<sup>90</sup>

### Challenges to CBCR information transparency

The CBCR information provides data on the global allocation of MNE income, taxes and other indicators of the location of economic activity including employees, stated capital, retained earnings and tangible assets.<sup>91</sup> Availability of this data is a powerful transparency tool that can help governments to ensure that MNEs are paying tax where their economic activities occur and value is created, as agreed in international norms. However, the current design of the international framework for CBCR information exchange has several weaknesses that greatly weaken its potential benefit, and do so systematically more in respect of lower-income countries.

**Restrictions on the use of CBC data:** The CBC MCAA limits the use of data for purposes other than risk assessment. That was a missed opportunity, which could for the first time enable tax authorities to assess tax risks based on a fuller picture of MNEs' operations. The imposition of such a constraint on countries limits their potential to contribute to discussions on the application of formulaic methods that can be facilitated by the information in CBCR.<sup>92</sup> This is especially problematic for developing countries that lack the technical capacity to apply a full functional analysis and seek the certainty, simplicity and ease of administration that a formula might ensure.

**Lack of complete coverage:** Currently, there are 137 members of the Inclusive Framework but only 85 signatories of the CBCR MCAA.<sup>93</sup> Countries can access CBCR information through the automatic exchange of information mechanism. If a jurisdiction is unable to activate automatic exchange of information with the jurisdiction in which the MNE's ultimate parent entity resides, it will usually not be able to receive CBCR information from the foreign tax authority. Importantly, under current regulations and like the AEOI on financial accounts, countries are free to cherry-pick among possible partners for CBCR reporting. In addition, data confidentiality standards are preventing some countries from receiving information, despite the corporate data (which is rather limited) being much less sensitive than personal taxpayer data.

**Impediments to local filing of CBCR information.** Local filing of CBCR information is restricted by design. The guidelines on CBCR enable countries to pass legislation to demand local filing, but only in very limited circumstances. Jurisdictions are permitted to trigger the local filing requirement only if the MNE does not have to file a report in its headquarter jurisdiction or if the exchange of information processes are not working.

**High revenue threshold.** Action 13 includes only MNEs with annual consolidated group revenues of at least €750 million, a very high threshold. While this means the reporting obligations for MNE groups cover over 90 per cent of total global corporate revenues, it entails the exclusion of approximately 85 to 90 per cent of MNE groups from the CBCR obligation.

### Challenges to the transparency of information on accounting records

**Unmet transparency prerequisite.** The basic prerequisite of transparency in accounting records is to oblige all companies with limited liability to file their annual accounts with a government authority or administration. Many jurisdictions do not even comply with this prerequisite, by exempting certain types of companies. Similarly, some jurisdictions do not always require accounting data to be available to the public authority. Finally, some jurisdictions simply fail to implement the requirement.

**Keeping accounting records outside the jurisdiction.** A further issue arises when countries permit companies to keep their accounts outside the jurisdiction, thereby making government enforcement of this legal obligation much more difficult or even impossible.<sup>94</sup>

## Cluster 2: Accountability, public reporting and anti-corruption

This section of the report addresses efforts to increase transparency, ensure public accountability, and deter and combat corruption. Some of the topics covered also have impact on tax matters, particularly by increasing transparency. The cluster first covers measures for deterring and combatting corruption, then the fight against money-laundering and its enablers, and finally looks at the transparency of asset ownership and beneficial ownership information.

### Measures for deterring and combatting corruption

Corruption is a complex social, political and economic phenomenon. Entrenched power structures, systems of societal relations and social norms together form a system of incentives that bind a network of actors into a governance arrangement that does not allow for impersonal application of neutral rules. Corruption affects all countries, and all people; it impedes the mobilisation of public resources and the delivery of basic services delivery by governments, while undermining trust in institutions, the social contract, and the enjoyment of human rights.<sup>95</sup>

While criminal enforcement and sanctions can help deter corruption and influence behaviour, underlying institutional incentives are salient. This is well recognized by the United Nations Convention against Corruption (UNCAC), the only legally binding universal anti-corruption instrument, which includes provisions for both the prevention of and the fight against corruption. The UNCAC covers five main areas: preventive measures; criminalization and law enforcement; international cooperation; asset recovery, and technical assistance and information exchange. It covers a wide range of acts of corruption both in the public and in the private sector, and it has national and international dimensions.

The Panel has examined the international aspects of preventing and combatting corruption, both demand and supply. The Panel notes that more attention has been paid to corruption in developing countries—though developing countries have made much progress in implementing UNCAC and trying to curb corruption—and less to the essential role of countries used as havens for corrupt assets, which are most frequently, though not always, developed countries. The Panel has therefore emphasised the importance of looking at the interactions among actors in three types of countries: countries experiencing corruption, countries facilitating the transfer or flow of resources; and countries hosting the illicit wealth.

Each country operates in different contexts and each has its own priorities, including all countries grappling with domestic corruption. As regards international corruption, developed countries are the home jurisdictions of most multinational corporations, and thus bear the greatest responsibility on enforcing anti-corruption measures on the supply



side. International financial centres, which host the most important enablers such as banks and lawyers, are responsible for regulating and overseeing these enablers; they also have responsibility for recovering and returning assets if their oversight has failed to prevent illicit wealth from entering their jurisdiction (see cluster 3 for more on asset recovery). Large emerging market countries may, like developed countries, similarly have both demand side and supply side challenges. Countries with significant natural resource wealth confront issues in the oversight of concessions and contracting as well as collecting resource royalties, as extractive industries have proved to be especially susceptible to corruption. For countries seeking to attract foreign investment in manufacturing, the most urgent problems may relate to granting and managing tax incentives and regulatory exemptions or permits. In each case, the drain of resources from corruption and other criminal activities may undermine the government's ability to finance the public investment and services needed to deliver on the Sustainable Development Goals.

### Norms and trends

There have been massive changes in the policy and legal landscape of anti-corruption measures over the last three decades. The international, universal norms developed first through the United Nations Convention against Transnational Organized Crime (UNTOC) and then through adoption of the UNCAC revolutionised the international framework. The two conventions sit at the apex of a system of regional and other group treaties. However, there are other relevant norms and standards in this context. As noted earlier, the Panel recognises that the lack of financial integrity impinges on States' duty to respect, protect and fulfil human rights. The United Nations Guiding Principles on Business and Human Rights also recognize that private businesses are required to comply with all applicable laws and to respect human rights.

One of the main positive trends is the fact that some UNCAC provisions have been widely implemented within domestic law including such key areas as the spread of national anti-corruption strategies and agencies.<sup>96</sup> There is also a great deal of receptivity to international technical assistance. During the first cycle of the UNCAC implementation reviews, the peer-learning aspect of the mechanism became increasingly important, often resulting in immediate responses to technical assistance needs.<sup>97</sup>

**There is a trend towards greater transparency, with governments publishing documentation such as budgets, tenders and contracts.** Voluntary initiatives to create and strengthen international transparency norms and practices include the Open Government Partnership (which has 78 country members and 20 subnational authorities) and the Open Contracting Partnership (41 jurisdictions are committed to or already implementing the Open Contracting Data Standard). The Extractive Industries Transparency Initiative (54 implementing countries) has also advanced anti-corruption practices in its efforts to improve transparency in the highly corruption-prone resource, mining and hydro-carbon sectors. Freedom of information laws continue to be adopted,

with almost 120 countries now having legal frameworks to enhance citizens' rights to public information.<sup>98</sup> Other special partnerships have also been established, such as the intergovernmental International Anti-Corruption Academy, and the private sector Partnering Against Corruption Initiative.

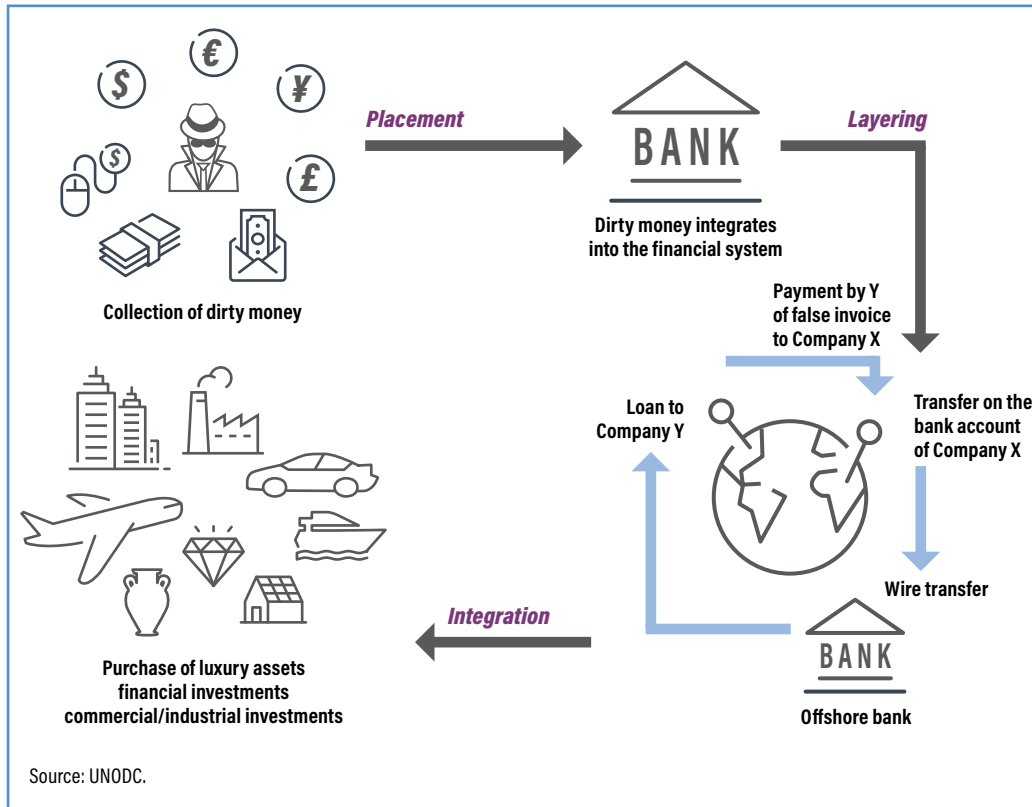
**Another trend is the increasing prevalence of corporate social responsibility initiatives, which some fear may become channels for corruption.** Multinational enterprises' contracts with governments increasingly include provisions under which the contracting firm provides benefits apart from the specific purpose of the contract.<sup>99</sup> These measures, such as training, supply chain development, or contributions to local education or health programmes, can contribute to SDG achievement—but they may also be a way of distributing patronage and disguising payoffs. They may also be unsustainable in the long run while inflating the cost of the contracted operations, further reducing tax revenue. The frequent power imbalance between large multinational enterprises and small or under-resourced public bureaucracies can lead to unfair deals, which also may be more susceptible to corruption.

**Corruption involving vast quantities of assets, also called grand corruption, has been a core concern** of Member States in negotiating the UNCAC.<sup>100</sup> It has remained a major driver of the advocacy of civil society groups on corruption issues, which point to vast sums allegedly stolen by heads of state and their families.<sup>101</sup> In 2017, the Conference of the States Parties to UNCAC further urged Member States to increase their efforts to prevent and counter corruption, giving the necessary focus to acts of corruption involving vast quantities of assets.<sup>102</sup> A subsequent 2018 experts' meeting organised to follow-up on the resolution, stressed the importance "of fighting impunity and ensuring that crime does not pay." A 2019 meeting noted that grand corruption continues to make headlines around the world and recommended exploring "innovative ideas to end impunity".<sup>103</sup>

While corruption techniques have evolved as law enforcement improves, the elements have remained surprisingly constant: corrupt officials use businesses, family members and other associates to take bribes or steal resources and move the money via shell companies and inter-bank transfers to major financial centres with the help of professional intermediaries and enablers (see Figure 4).

**Major instances of corruption and other financial crimes are commonly brought to light by journalists, whistle-blowers and NGOs** rather than regulators and law enforcement agencies, despite the latter's massive information-gathering apparatus. Many exposés have relied on leaked documents, with media working in cross-border partnerships to examine, analyse and publish leaked information.

Figure 4: Schematic diagram of a typical money-laundering scheme

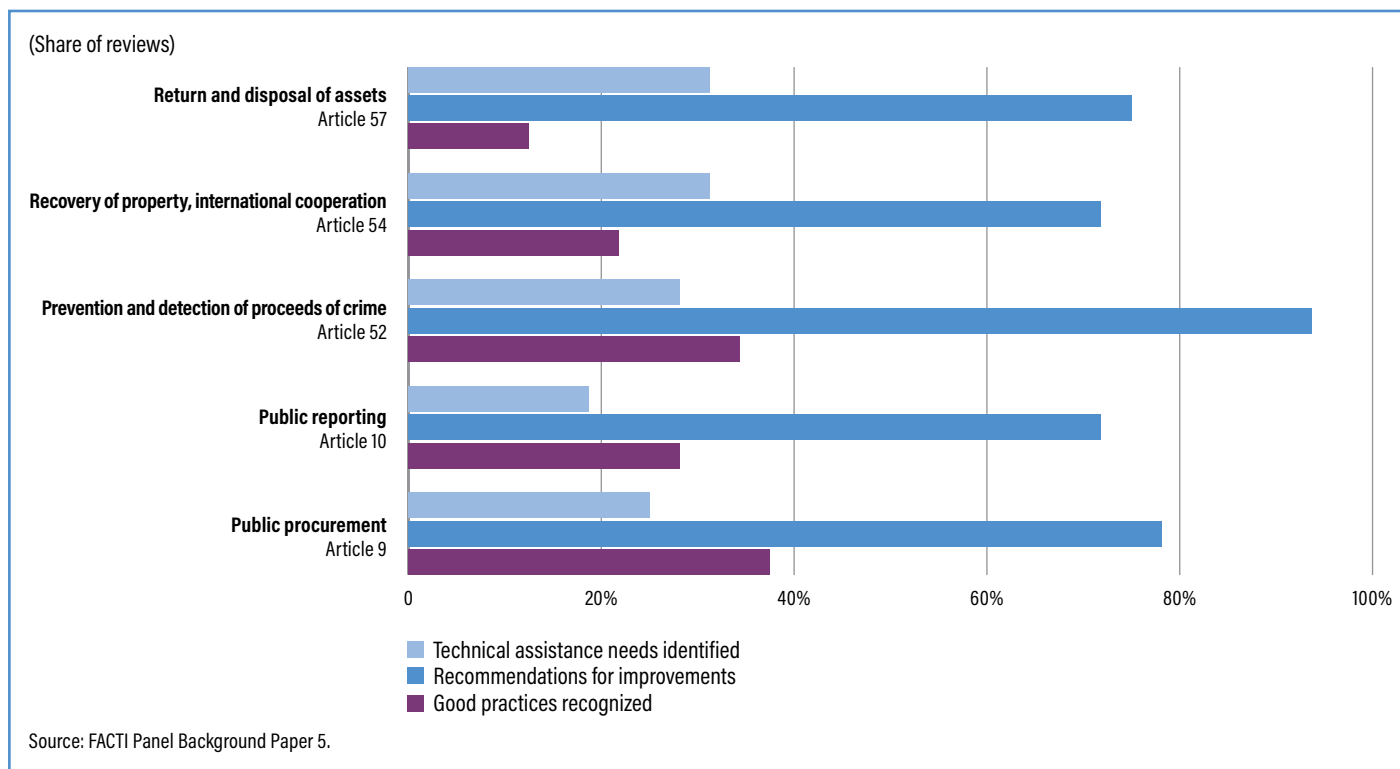


### Gaps and vulnerabilities in anti-corruption measures

Despite very considerable changes in the legal landscape over the last three decades, many analysts have concluded that there has been little effect on the volume of corruption. The UNCAC implementation review mechanism is designed to help identify shortcomings in implementation of the convention in all countries. After the first cycle of reviews, which focused on only two chapters of UNCAC, peer reviews had identified gaps and shortcomings in the domestic frameworks of at least 74 per cent of States.<sup>104</sup> Two major drivers of underperformance are a lack of political will and a lack of capacity. At times, the lack of capacity may be the result of low political priority for the topic, through in many countries there are also real issues of lack of resources for sometimes costly measures to prevent corruption.

**International cooperation impediments:** UNCAC implementation review reports reveal that mutual legal assistance was limited by the absence of extensive corruption laws, a recurring theme in many implementation reviews.<sup>105</sup> The reviews also revealed that very few states had good practices in sharing special anti-corruption investigative techniques (Article 50) or transferring convicted persons (Article 45).<sup>106</sup>

Figure 5: Results of round 2 UNCAC reviews published by mid 2020



Note: covers 32 implementation reviews

**Insufficient progress on prevention:** Figure 5 (from reviews conducted in the second cycle of UNCAC IRM) also shows many countries' shortcomings regarding preventative measures (Articles 9 on public procurement and 10 on public reporting). Fewer than half the countries had recognized good practices, while the vast majority received recommendations for improvement.

**Scant resources for anti-corruption capacity building and education:** While donors do provide resources for capacity building and technical assistance, these are usually voluntary and not a core part of multilateral institutions' budgets. There are always challenges in ensuring that capacity building is demand driven. One area that receives relatively little attention is anti-corruption education programmes, which can complement though not substitute for other anti-corruption measures. In addition to the absence of a culture of integrity in some parts of the public sector, the failure of business ethics is a widespread and major challenge. The Panel's own survey of the private sector provides anecdotal evidence of the widespread willingness of the private sector to break both the letter and the spirit of the law.

### Impediments to accountability and integrity

Simple reforms such as criminalising corrupt activity or establishing an anti-corruption body, even though they are welcome and increasingly common, are not sufficient on their own to end corruption. Effective enforcement of anti-corruption policy is unlikely if corrupt public officials are responsible for implementing it. This problem of guarding the guardians is broad and deep —especially when law enforcement, prosecutors and the judiciary are themselves corrupt.<sup>107</sup> Member States have recognised the problem.<sup>108</sup>

**Impunity:** A corrupt regime can undermine enforcement and weaken national legal frameworks, for example by attacking the independence of the judiciary and independent-minded judges; derailing prosecutions; hamstringing or subverting independent anti-corruption agencies and workers; persecuting whistle-blowers; and closing down independent media. Greater transparency and information exchange are not enough: in many countries the details of serious corruption are public knowledge but knowledge does not translate into accountability. As long as powerful, corrupt people control the government or sabotage investigations, they can enjoy impunity.

Prosecution usually happens after a regime change in the country of origin, providing that the new government is willing to pursue legal proceedings. In practice, this means a delay of years, even decades, and longer still for recovery and return of the stolen assets (see cluster 3 for more on the asset recovery issues). The prevalence of impunity, and the associated scale of resources diverted from investment in sustainable development, not to mention the inevitable violations of fundamental human rights,<sup>109</sup> motivates many advocates to call for innovative ideas to try to end impunity.

**Obstacles to foreign enforcement:** UNCAC encourages other countries to take action against foreign corrupt officials if there are links to their own jurisdiction and they have credible information on which to base a case, for example through enforcement of anti-money-laundering laws. But while such proactive enforcement may raise issues of sovereignty, the immunity of foreign officials is a major obstacle.<sup>110</sup> Other countries may be able to deny safe haven to corrupt assets through non-conviction-based confiscation;<sup>111</sup> in practice however, such proactive enforcement actions are quite exceptional in grand corruption cases, and many former kleptocrats managed to escape justice and to enjoy their illicit wealth with almost total impunity. Sometimes the choice of whether to take proactive action in grand corruption cases is based on geopolitical concerns rather than (lack of) desire for financial integrity. Other countries can also pursue those on the supply side of a bribe (see cluster 3 for more on foreign bribery enforcement).

**Exclusion of non-state actors:** Preventing privilege and impunity from becoming embedded calls for sustained domestic demand for reform.<sup>112</sup> Non-state actors can often most effectively bring corruption to public attention and sensitize the public about its impact. They can also galvanise durable changes to social norms and societal relations. Stable social coalitions to change the embedded power structures that support corruption are specific to each country,

but are likely to include some combination of NGOs, faith-based groups, trade unions, the media, and the private sector as well as parliamentarians and politicians. The Panel finds that excluding non-state actors from the creation and review of anti-corruption policies and strategies reduces the likelihood of broad national coalitions against corruption. This applies both to countries where corruption is found, and to those where the proceeds are hidden.

**Civil society in implementation review:** Specifically, the UNCAC implementation reviews also have no mandated role for civil society, though engagement with stakeholders is “encouraged”. However, the involvement of civil society can increase the impartiality and objectivity of the reviews. Good practice can go even further, for example when Ghana appointed a group of experts working at independent research institutions to draft an objective and impartial national report for the African Peer Review Mechanism.<sup>113</sup>

**Whistle-blower protections:** The Panel notes failure to protect whistle-blowers and constraints on civil society as impediments to reform. UNCAC lists whistle-blower protections as non-mandatory, and at the time of the first round of peer reviews more than two-thirds of States had no comprehensive whistle-blower protections. UNODC has produced a resource guide on good practices,<sup>114</sup> which was welcomed by Member States,<sup>115</sup> but Member States have not committed to such protections.

## Money-laundering and enablers

Money-laundering involves processing of the proceeds of crime to disguise their illegal origin. It cuts across all crimes involving money. It is the method through which criminals profit from their crimes and enjoy the proceeds. Money-laundering frequently involves many transactions layered to create secrecy, as resources are drained from source countries, moved through transit countries, and end up in haven countries (see Figure 4). These transactions are structured and facilitated by a network of enablers – lawyers, accountants, financial institutions, and other professional service providers.<sup>116</sup>

Haven countries are typically those with high levels of stability and wealth, where the corrupt and other criminals can enjoy the proceeds of their crimes. These are most frequently developed countries or other high-income countries, where networks of enablers are also frequently found. Enablers may be a politically powerful vested interest group, benefitting from money-laundering and financial crime in general, and blocking stronger financial integrity rules.

## Norms and trends

The FATF Recommendations set out a comprehensive and consistent framework of measures to combat money-laundering and terrorist financing, as well as the financing of proliferation of weapons of mass destruction. The FATF Recommendations, which were first published in 1990 and subsequently revised, are the preeminent internationally agreed standards. Formally, they are agreed by the FATF's 37 member jurisdictions, which are predominantly developed countries, and two regional organisations. However, more than 200 jurisdictions are committed to implement the standards through FATF-Style Regional Bodies (FSRBs). There are nine FSRBs, which are overwhelmingly made up of developing countries, and their members should implement the standards through measures adapted to their own circumstances. The FATF is the only standard-setting body and the guardian and arbiter of the application of its standard, though FSRB members can participate in FATF meetings and provide input into standard-setting.<sup>117</sup>

**FATF Recommendations require a broad range of preventative measures,** including customer due diligence, record keeping, beneficial ownership, international cooperation, and suspicious transaction reporting. Financial institutions and designated non-financial businesses and professions (DNFBPs) are expected to adhere to standards to counter money-laundering and the financing of terrorism (AML/CFT) set by the FATF. Countries are expected to take a risk-based approach to implementation of the FATF Recommendations, meaning that national rules should evolve to mitigate risks as they develop.

Mutual evaluations assess implementation of the recommendations (see Table 1). In its peer reviews of Member States, FATF has moved beyond technical compliance to assess the use and impact of national laws and regulation. The methodology for such reviews was agreed during its last strategic review in 2013. FATF has commenced a new strategic review round.

As noted in the previous section, private enterprises are bound to comply with all applicable laws and to respect human rights. The UN's Guiding Principles on Business and Human Rights specify that businesses are responsible both for direct impacts of their activities and for potential adverse human rights impacts resulting from their business relationships. This would apply to professional service providers; their facilitation of money-laundering, tax avoidance and tax evasion; and the ultimate impacts of these activities on the ability of the States to raise resources to fulfil human rights obligations.<sup>118</sup>

## Gaps in tackling the crucial role of enablers

### Box 7: Panama Papers and the role of the media

The best-known professional enabler of alleged financial crimes is the now defunct Panamanian law firm Mossack Fonseca. Its activities were exposed when an employee provided internal records to the International Consortium of Investigative Journalists.

Dubbed the Panama Papers, the documents revealed that the firm had created more than 200,000 anonymous corporations and similar entities, 6 per cent of which were owned by persons holding public office, including several current or former heads of state. Over 15,000 of the companies were established at the request of major banks acting on behalf of their clients. The Panama Papers was the first of a number of high-profile international exposés of alleged financial crime and tax abuses based on the disclosure of documents held by enablers.

Investigative journalists and other media also play a role in many less internationally-known cases of corruption and financial crime. The heads of some anti-corruption agencies have come from an investigative journalism background, such as John Githongo of Kenya. Yet investigative journalists take risks when they expose the alleged corruption and other crimes of the politically powerful. Journalists play an important part of the ecosystems of institutions and actors that generate the sustained national political will needed to create accountable and transparent systems to promote financial integrity.

Reference: ICIJ, "The Panama Papers: Exposing the Rogue Offshore Finance Industry", <https://www.icij.org/investigations/panama-papers/>

Enablers are crucial in laundering the proceeds of corruption and of other crimes. States have committed themselves to deny safe haven to the proceeds of crime, but the Panama Papers (see Box 7) and other recent revelations have shown how much remains to be done. Countries hosting proceeds of crimes have little incentive to block the inflow. Enablers include financial institutions, but also lawyers; accountants; trust and company service providers; real estate agents; art dealers, and traders in precious metals and gems—the so-called “designated non-financial businesses and professions” (DNFBPs) mentioned above. They are subject to FATF’s recommendations on preventive measures.<sup>119</sup>

**Gaps in regulating enablers:** Failure to comply with anti-money-laundering requirements should lead to administrative or criminal sanctions, yet there are still many gaps in implementation. For example, real estate agents in some jurisdictions are not subject to anti-money-laundering regulations, while in others there is no regulatory and supervisory regime for DNFBPs. Some entities are not included at all, such as commodity trading firms. Gaps in implementation might result from lack of capacity or resources among regulators or supervisors (see Box 4 on financial regulation in the Caribbean as an example), a lack of political attention to the importance of the issue, or a deliberate strategy on the part of policymakers to turn a blind eye to the activities of the enablers.

**Abuse of legal privilege:** Lawyers and law firms often abuse their legal professional privilege, asserting that routine tasks, such as creating a corporation, that may be performed by non-lawyers are protected from disclosure on grounds of privilege.<sup>120</sup>



**Gaps in enforcement:** Sanctions remain rare and have little effect.<sup>121</sup> Professional money launderers often go unpunished. Key enablers like lawyers and corporate service providers, though usually subject to regulations, frequently face little supervision, enforcement or sanction. Financial institutions may focus on the appearance of compliance rather than actually trying to detect money-laundering (see below).

**Unaligned incentives for banks:** Countries hosting corruption proceeds have little incentive to block the inflow of illicit wealth. Nearly every large global bank has been ensnared in a major scandal related to hosting corruption funds or laundered money, or with participating in sanctions-busting or market-rigging (or, often, some combination of these crimes). When every major bank is tainted and complicit, none is likely to suffer reputational damage relative to the rest of the sector. Compliance departments in major banks may flag transactions or customers as risky before major scandals become public, but these warnings may be misunderstood, deliberately ignored, or overruled by bank management.<sup>122</sup> In addition, when prosecution or asset recovery proceedings are opened, banks continue to earn fees as holders and managers of frozen assets. The lack of a real deterrent capable of altering the balance of risks versus rewards is a major impediment to financial integrity.

### Impediments to accountability and integrity

The problem of impunity described in the previous section may be particularly acute in countries that have experienced regime corruption, but it can also apply to haven countries. Enablers and financial institutions in haven countries benefit from corrupt activity and engage the political process to protect their interests.

**Political capture:** If enablers become politically powerful, they can weaken regulatory and supervisory regimes. They may influence regulatory processes, blocking efforts to create more robust regulation or supervision, or to impose sanctions for breach of the rules.

**Lack of capacity to use information:** Country authorities' failure to deal with all the information they receive may be a failure of political will. The system for reporting suspicious transactions<sup>123</sup> has uncovered very few instances of corruption, money-laundering or other cross-border financial crimes. Even in the European Union, with some of the highest capacity for monitoring and investigation, authorities use, on average just over 10 per cent of reports submitted, a percentage that has not changed since 2006.<sup>124</sup> More specific failures include perverse incentives leading to excessive and defensive filing of low-quality reports; a lack of communication between agencies that receive the reports and investigators who should act on them; the status of reports as intelligence rather than admissible evidence; and uninformative reporting through inadequate customer due diligence.

**Non-state actors:** Finally, the issues with whistle-blower protections and the participation of civil society apply both where corrupt activities take place and where the proceeds are concealed. The manual of procedures for FATF peer reviews indicate that meetings with businesses and other non-governmental organisations are "an important part of the visit" but does not explicitly require them.

### Transparency of asset and beneficial ownership information

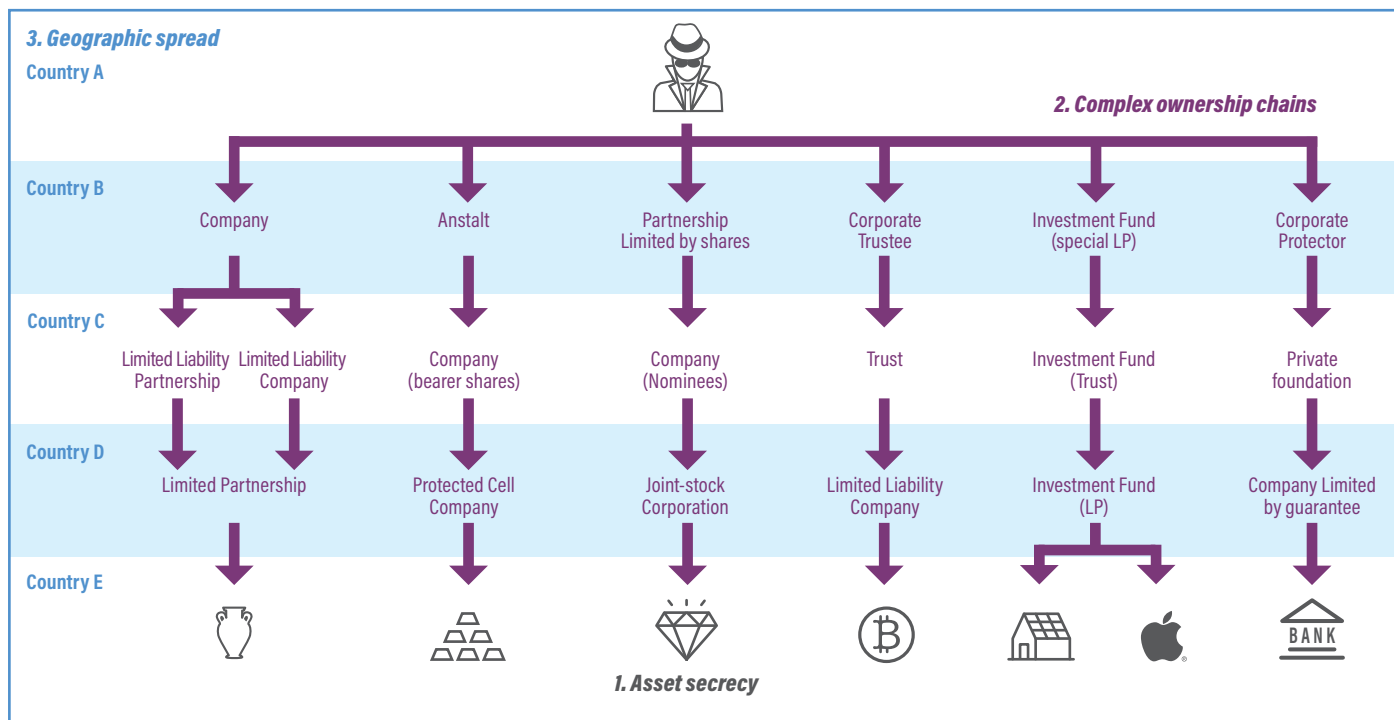
Perpetrators of financial crimes and abuses rely most commonly on secrecy. They may exploit three related secrecy levels (see Figure 6):

- First, owning secretive assets whose ownership is not registered or available (for example cash, gold or art works)
- Second, holding assets not under an individual's name but indirectly in the name of secretive legal vehicles such as companies, trusts or private foundations. These legal vehicles may be combined, creating complex ownership chains
- Third, spreading the ownership structure in as many countries as possible, especially in those that do not collect or exchange information. This reinforces the other two levels of secrecy.

A basic tool for addressing these secrecy risks is to identify the natural persons who ultimately own, control or benefit from legal vehicles, the “beneficial owners”. Transparency regarding beneficial ownership can help prevent abuses.

**Beneficial ownership information is not the same as basic ownership information.** Basic information on companies is provided to and recorded by a company registry and

Figure 6: Schematic diagram of types of secrecy



is generally made available publicly. The beneficial owner might exert control through direct ownership, or through other means such as personal connections to persons in position of influence or power, contractual relationships, or even by participating in the financing of the entity.

The FATF first agreed on a standard on beneficial ownership in 2003. The current recommendation requires that competent authorities have timely access to accurate and updated beneficial ownership information. Assessment of compliance is included in FATF mutual evaluations. The Global Forum on Transparency and Exchange of Information for Tax Purposes has adopted the FATF definition of beneficial ownership; since 2016, all Global Forum members are being assessed to evaluate the implementation of this standard with a focus on exchange of tax information upon request. Global Forum peer reviews of the automatic exchange of information, planned for 2020, are also planning to evaluate whether jurisdictions are ensuring that financial institutions collect and report complete and accurate information on account holders and any “controlling persons”.<sup>125</sup> Many international agencies and other stakeholders have developed toolkits, guidance and other products to assist countries to implement these standards.

### Importance of beneficial ownership information

In many cases, only the “legal owners” of an asset or legal vehicle are known. These may refer to a nominee or to another legal vehicle, meaning accountability cannot be ensured. Beneficial ownership transparency is a way to anchor legal vehicles to a natural person. Identification of the natural persons who ultimately own, control or benefit from legal vehicles is an important tool in investigating and eventually prosecuting financial crimes and other abuses.

#### **Beneficial ownership transparency can reveal that apparently legitimate and unrelated companies and trusts are in fact part of a global financial crime or tax-abuse scheme.**

Figure 7 and Figure 8 show how this can happen using a fictional set of transactions related to a hypothetical public tender for exploitation of natural resources in Country A. The possible crimes and tax abuses are spelled out in the figures. After uncovering and prosecuting the corruption of the hypothetical Mary and Paul, to recover all the assets authorities of Country A would also have to discover all the financial transactions after the bribe was paid. This would probably be impossible without access to beneficial ownership information.

Beneficial ownership information has a number of uses beside detection and prosecution of tax abuse, corruption or money-laundering. Beneficial ownership information can also help find the assets of criminals for purposes of confiscation or disgorgement, and to ensure that no one benefits from the proceeds of crime. Authorities may also use beneficial ownership information for deterrence and prevention. Finally, in the private sector, beneficial ownership information can help companies conduct due diligence and know who owns the entities with which they do business, enhancing trust in business partnerships.<sup>126</sup>

Figure 7: Schematic diagram of global financial crime scheme

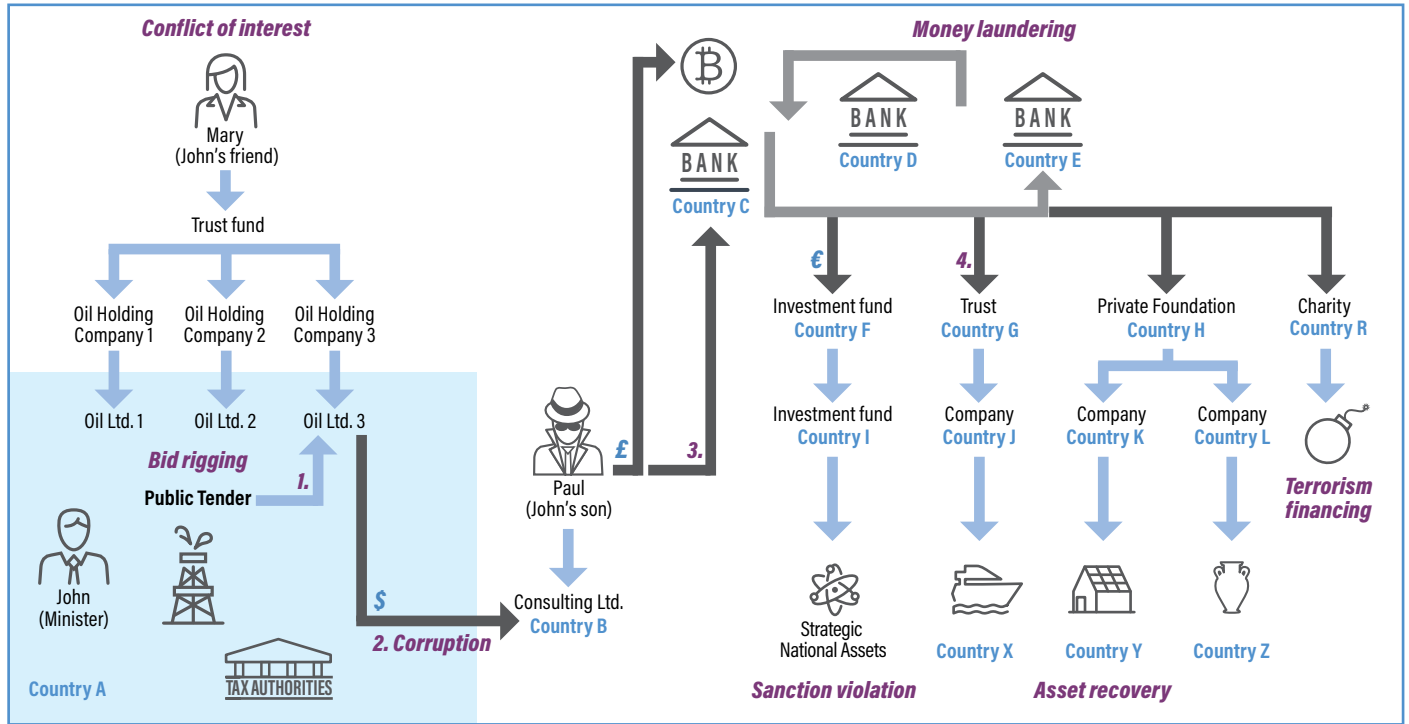
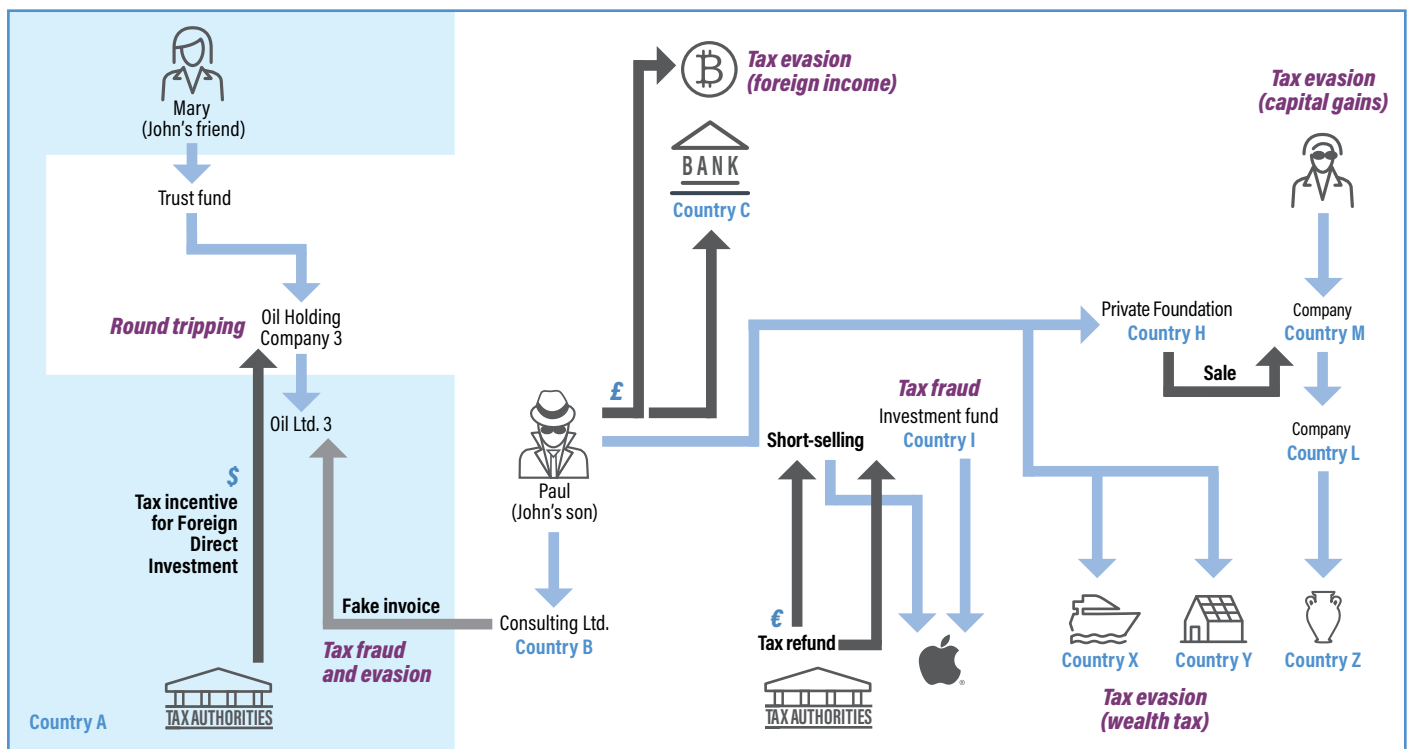


Figure 8: Schematic diagram of global tax abusive scheme



### Trends in beneficial ownership information

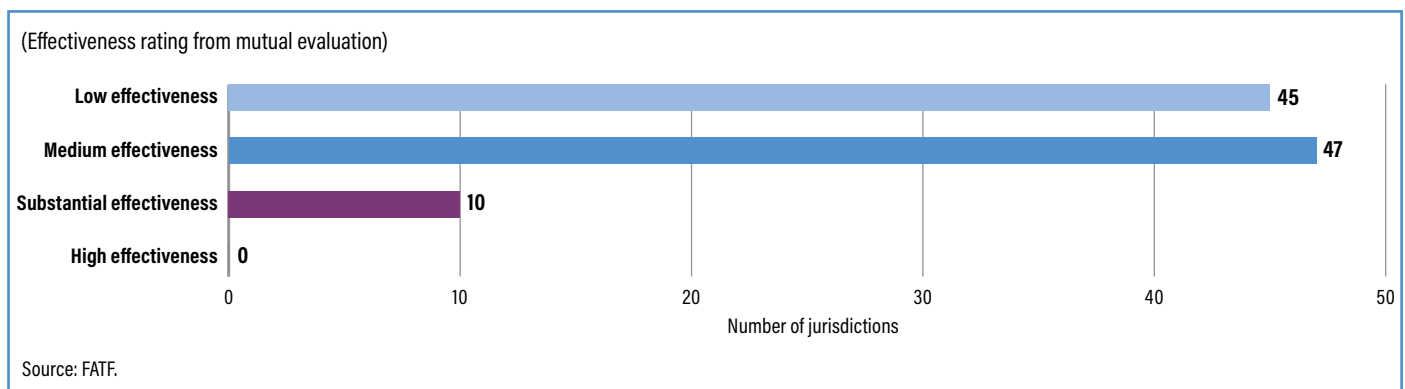
International norms require access to beneficial ownership information for both types of legal vehicles – legal persons (e.g. companies) and legal arrangements (e.g. trusts). FATF and the Global Forum allow three approaches to ensure availability and access to beneficial ownership information: the company approach (the company or other entity collects information on itself and authorities can access it upon request); the registry approach (establishing a beneficial ownership register) or the existing information approach (relying on any information held by financial institutions, corporate service providers or any other authority). Each approach has advantages and disadvantages, and different economic costs. In 2019, the FATF stated that a combination of approaches with multiple sources (the “multi-pronged approach”) would obtain better results.<sup>127</sup>

The existing information approach has been widely used, relying on financial institutions and corporate service providers to collect beneficial ownership information. In recent years more than 80 countries have started approving laws or amending regulations to require beneficial ownership information to be filed with a government authority (the registry approach). A new wave has started to give public access to beneficial ownership information, mainly in the European Union but now extending to countries in Africa, Latin America, Eastern Europe and Asia. However, this new trend is not universal; nor does it ensure availability and access to updated, accurate beneficial ownership information.

### Gaps and vulnerabilities in the implementation of beneficial ownership standards

The international community has made much progress in the relatively short time since the international standard was first introduced. However, even among the jurisdictions that have signed up to global standards for maintenance of beneficial ownership information, there is comparatively low compliance. As of April 2020 no country subject to the fourth round of FATF mutual evaluations obtained a high level of effectiveness on preventing legal persons and arrangements from being misused for money-laundering or terrorist financing, or on availability of information on beneficial ownership to competent authorities without impediments (see Figure 9).<sup>128</sup> The most common gaps and vulnerabilities the Panel has identified are outlined below.

Figure 9: Effectiveness of country beneficial ownership regimes



**Scope:** As noted above, there is currently no requirement for central registration of beneficial owners. It is also possible to exploit exemptions from beneficial ownership registration for a given type of legal vehicle. Some countries with registers exempt specific types of legal vehicles. The exclusion may sometimes be tacit, such as when laws require only legal persons to register their beneficial owners, leaving legal arrangements such as trusts unregulated. Criminals adjust their strategies to the most permissive or unregulated categories.

**Conditions that trigger beneficial ownership registration:** There may be no requirement for registration of beneficial ownership information in the country where the legal vehicle is operating, if it is incorporated elsewhere. Differences across jurisdictions open a gap for abuse when local authorities are unable to get information on foreign legal entities.

**Beneficial ownership definitions:** many beneficial ownership definitions for legal persons adopt the “greater than 25 per cent” threshold for ownership or voting rights, but this condition may be easy to avoid by splitting ownership among associates. For publicly listed companies (which are usually exempted from beneficial ownership registration laws), small ownership shares may still represent vast wealth about which the authorities would want to know, for tax purposes. Some legal frameworks fail to distinguish different ownership definitions based on the legal entity type, creating loopholes.

**Identification and relevant details of the beneficial owner:** Most countries require sufficient identity details (e.g. full name, address, date of birth, country of residence, tax identification number or passport number), but the process can be more difficult with transliteration of foreign names and addresses, lack of official national identification, fake identities, and fraudulent tax residencies. Often laws do not require information on the value of acquired ownership nor the reason why a person became a beneficial owner of a legal vehicle. Family and gender information is rarely collected, despite many cases of the corrupt using their families to hold assets.

**Complementary information:** Most countries do not require the full ownership chain of an asset or entity to be registered. The full ownership chain can be particularly helpful where there are cases of cross-shareholding in a corporate group, or circular ownership. Complementary information can also help identify forms of control beyond ownership, such as power of attorney or financial instruments related to shareholding. Beneficial ownership information is not yet synchronised with other complementary systems for the identification of legal vehicles, such as Legal Entity Identifiers (LEIs).

**Verification:** While accuracy is part of the FATF standard, verification of beneficial ownership information is a consistent vulnerability. Verification should involve authentication (making sure the beneficial owner is who they say they are), authorisation (ensuring that the beneficial owner intends to be involved in the legal vehicle), and validation (to prevent mistakes and deliberate falsehoods). Pattern detection and red-flag systems can help identify fraud or abuse. A handful of countries have developed validation tools and cross-checks with other

databases showing that more can be done. Though countries may start to introduce registers and strengthen beneficial ownership information requirements, lack of registration and verification of existing entities could undermine the new measures.

**Sanctions:** Sanctions may be necessary to incentivise compliance. The most common sanctions involve economic penalties, but these may be too low to change behaviour. Another way to encourage compliance involves losing the rights that the legal vehicle was intended to confer. Some countries, for example, have removed limited liability for unregistered entities, declined to enforce ownership of unregistered assets, or reversed the burden of proof so that the owner must demonstrate registration (see also unexplained wealth orders in Box 8). Few countries have effective sanctions regimes in place.

### Impediments to accountability and integrity

**Information availability:** Some relevant local authorities may not have access to a beneficial ownership register, for example the tax authorities may have access but not the financial intelligence unit, creating gaps of knowledge and enforcement. If the “company” and “existing information” approaches are used, local authorities may have some difficulties accessing information, but it may be impossible for other users, such as businesses conducting due diligence, to access information.

**Cross-border availability:** Cross-border information access is generally difficult and time-consuming. The Egmont Group of Financial Intelligence Units has a framework for exchanges of information related to money-laundering among financial intelligence units, while there are also bilateral, regional and multilateral frameworks to exchange information for tax purposes. However, requests for information demand many resources, both for requesting and responding countries. The requesting country will have to spend substantial resources to substantiate a request, given that fishing expeditions are prohibited. Major financial centres and developed countries, where many legal vehicles are incorporated and where most of the cross-border assets and wealth are held or invested, bear a larger responsibility and burden in this regard.

**Legal structures with secrecy built in:** Even with better implementation of existing FATF standards, certain legal structures still allow secrecy to flourish. For example, if bearer shares are freely circulating, it becomes impossible for authorities to know who the legal and beneficial owners are, unless they know who is holding the instrument at a given moment. While most countries have immobilised bearer shares, not all have done so. Thus, even if a country prohibited them, there may be no impediment for a foreign company that issued bearer shares to be part of the ownership chain of a local company.

## Cluster 3: International cooperation and settling disputes

This section of the report addresses the challenges of international cooperation and settling disputes in international tax matters, foreign bribery, and recovery and return of illicit assets. It further examines gaps and weaknesses in peer review mechanisms that are relevant to financial integrity.

## Tax dispute resolution mechanisms and coercive mechanism in tax matters

### Norms related to tax disputes

A unique feature of bilateral tax treaties is that, in some jurisdictions, they have direct effect under domestic law and, as a result, can be enforced through domestic courts.<sup>129</sup> This has led to a multitude of decisions issued by domestic courts on the interpretation and application of tax treaties, creating uncertainty for revenue authorities, policymakers and taxpayers.<sup>130</sup> In comparison, despite having shared or connected objectives, dispute resolution mechanisms in the trade and investment space differ significantly. The World Trade Organization general agreements and international investment agreements have frameworks for compulsory and binding procedures for dispute settlement. These have only recently entered the tax treaty space.<sup>131</sup>

Alongside access to domestic courts, dispute resolution mechanisms commonly available in bilateral tax treaties include mutual agreement procedures (MAPs) and, less commonly, mandatory binding arbitration. Disputes may arise from a failure to prevent double taxation, or inconsistency in interpretation and application of treaty provisions. Despite being perceived as a means of resolving a dispute, most MAP provisions in bilateral tax treaties do not compel competent authorities to reach an agreement.<sup>132</sup> Developing countries' concerns have long been reflected in calls for stronger regulation of multinationals and more transparency of their finances. **The aim is to assist governments in resolving disputes, securing what they consider more equitable taxation and fairer allocation of taxing rights over profits earned in their jurisdictions, and in this way contribute to domestic resource mobilization.**

The number of MAP cases resolved between countries has continued to increase, but mostly among developed countries and large emerging economies. MAP statistics collected by the OECD revealed that the number of cases received prior to 1 January 2018 that had yet to be closed in 2018 amounted to 3,355, compared to 1,231 that had been closed.<sup>133</sup> Timing is still a challenge and the backlog appears to be increasing. The number of developing country cases, however, remains minimal, confirming that most have no or only limited experience with MAPs.<sup>134</sup> Nevertheless, the UN Tax Committee has taken steps to provide detailed guidance for developing countries, to ensure that they are prepared to engage in MAPs.

The MAP mechanism relies heavily on the goodwill of the competent authorities, and is very much left to the discretion of the tax authorities.<sup>135</sup> However, MAP does not prevent a country from breaching its treaty obligations: it is not binding and therefore not enforceable by domestic courts. Between 1999 and 2015, over 30 cases initiated directly by companies challenging tax measures taken by host countries had been brought before ISDS arbitral tribunals.<sup>136</sup>

The most recent proposals emerging from Inclusive Framework consultations on addressing tax challenges arising from the digitalisation of the economy emphasized the need for dispute mechanisms, which were viewed as critical to a consensus-based solution.<sup>137</sup> In this



regard, the OECD Secretariat's proposal for Pillar One recommends the adoption of a clear, administrable and binding process for early dispute prevention. **The Inclusive Framework is also now considering the applicability of mandatory binding arbitration to resolve the disputes that would arise from the proposals under consideration.** However, these proposals have not reached consensus among members of the Inclusive Framework.

Almost all developing countries and several large economies that have signed the MLI have opted out of the arbitration provision, including Kenya, India, China, Argentina, South Africa, Indonesia and Chile. Concerns relate to sovereignty; potential violation of national constitutions; cost of arbitration and lack of resources; potential for unfair outcomes and biased arbitrators; lack of transparency, and lack of experience with overall international tax dispute settlement.

This position reflects the experience of countries in investor-state dispute settlement, where some of these limitations have given rise to expensive outcomes. Given the experience in investment arbitration, it remains to be seen whether the position among developing countries regarding arbitration is likely to change significantly.

### Alternative approaches to tax disputes

Since an inadequate framework for tax dispute resolution may continue to see corporations taking their disputes into the trade and investment spaces, it is worth considering how developing countries' concerns could be allayed. At the UN Tax Committee, the Subcommittee on Dispute Avoidance and Resolution has developed additional guidance that includes: steps to prevent disputes in the first place; arbitration requested by the tax authority rather than the tax payer; representative panels of arbitrators supported by the UN Tax Committee, and the use of mediation.

Arbitration frameworks may be revised, but it is unlikely that the confidence of developing countries in such processes will change.

### Coercive mechanisms in international tax frameworks

Given that the international tax framework is based on cooperation and the goodwill of countries to comply with the recommendations made by the OECD or the UN Tax Committee, it has been controversial to coerce countries unwilling to participate. Cooperation can be a useful strategy where unilateral efforts, in this case tax competition, result in inadequate outcomes for the majority or for key strategic players. As a result, where "uncooperative strategic interactions harm both global and national welfare, cooperative measures could work to improve both".<sup>138</sup> Every country is entitled to design its own tax and transparency rules independently, which has inevitably led to increased tax competition between states, which bilateral cooperation alone cannot resolve.<sup>139</sup>

**In multilateral cooperation, powerful countries have taken a dominant position that has permitted them to advance their own interests and reap the most benefits.**<sup>140</sup> They

have promoted voluntary cooperation, but also used coercive measures such as blacklists or other tools that threaten sanction for failure to comply with favoured international tax norms. A majority of international tax norms have emerged from practices and interactions among OECD and G20 countries,

The OECD 1998 report on Harmful Tax Practices set out an ambitious agenda to tackle harmful tax practices by large and small states alike. At United States request it was reduced to a focus on exchange of information targeted at small tax havens.<sup>141</sup> The Forum on Harmful Tax Practices (FHTP), also established following the 1998 report, was mandated to assess preferential tax regimes and determine whether they could be harmful to the tax bases of other jurisdictions. Its work was not backed by the same threat of sanctions as for information exchange. It is only in recent years that developing countries have been subject to the same sorts of coercive measures, focused on their implementation of the outcomes of the BEPS project and tax transparency norms.

In 2017, the EU established its own list of non-cooperative jurisdictions, based on a mix of OECD transparency and exchange of information standards, BEPS measures and EU criteria for harmful preferential tax measures.<sup>142</sup> Although membership of the Inclusive Framework is voluntary, these countries were effectively forced by the EU to comply with the BEPS minimum standards. The first list, published in 2017, included countries that had not implemented the BEPS minimum standards or eliminated harmful tax regimes, including for example, Namibia on the blacklist and Botswana, Cape Verde and eSwatini on the grey list. This had notable implications for each of these countries. Although subject to frequent monitoring and review, inclusion in the list gave rise to reputational issues in the eyes of other countries and potential investors. More importantly, EU member states were considering coordinated sanctions.<sup>143</sup>

### Suitability and challenges related to coercive mechanisms

Coercion is particularly undesirable where cooperation results in an expensive process to adopt standards that cannot be fully implemented without the necessary systems and tools within a tax administration and other authorities. Following its inclusion in the grey list, a country such as Botswana or eSwatini would be forced to make expensive amendments to its tax system in order to comply with the minimum standards; yet it poses a far smaller tax avoidance threat than some EU and OECD Member States.

There is no universally agreed standard for assessing international tax cooperation that takes into account the risk to other jurisdictions from the practice of any country. Thus, there is no coercive mechanism that begins from an assessment of the impact of jurisdictions' tax systems on lower-income countries. Power imbalances are also problematic, as predominantly large developed markets which play host to most international financial flows, have sufficient structural power to effectively coerce policy change by threatening sanctions. Smaller, lower-income, and other developing countries, which might be harmed by the tax policies of developed countries or their overseas territories, are unable to engage in effective coercion because of a lack of structural power.

## Resolving foreign bribery cases

Bribery of foreign public officials, also referred to as “bribery in international business transactions” or “foreign bribery”, causes economic and social damage on a scale that the amounts of the bribes themselves—no matter how large—do not capture.<sup>144</sup> Foreign bribery threatens the integrity of markets and undermines fair competition; erodes trust in government and institutions, and diverts scarce and much-needed resources for development. In that regard, an OECD report observes that a \$1 million bribe can quickly amount to a \$100 million loss to a poor country, by way of derailed projects and inappropriate investment decisions.<sup>145</sup>

Moreover, foreign bribery is often associated with money-laundering schemes and transfer of the proceeds across national borders. **Energetic prosecution of the perpetrators—both of those who pay and those who receive bribes<sup>146</sup>—is in the Panel’s view one critical component of the broader efforts needed to combat cross-border corruption and achieve the Sustainable Development Goals.**<sup>147</sup> A global architecture to address the issue exists, but with serious implementation and enforcement gaps.

### Norms and trends

Two main international instruments address cross-border corruption—the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, also known as the OECD Anti-bribery Convention, and the UNCAC. They differ in reach, as the OECD convention only covers 44 states, and scope. Although both conventions require the criminalization of the supply side of the foreign bribery transaction; criminalization of the demand side is only covered by UNCAC.<sup>148</sup> In recent years, there has been a proliferation of new methods for addressing the supply side of foreign bribery, most notably the resort to deferred prosecution agreements and other non-trial resolutions (see further below).

### Implementation and enforcement gaps

**Criminalisation of foreign and domestic bribery:** All 44 States Parties to the OECD Anti-bribery Convention, which are responsible for 81 per cent of foreign direct investment, have criminalized the offence of foreign bribery or have otherwise introduced mechanisms to sanction bribe payers (in countries where criminal liability of legal persons is not allowed).<sup>149</sup> The first cycle of the UNCAC review process has revealed gaps in criminalisation of foreign bribery: few States Parties have criminalised the offence of foreign bribery (the supply side) and the large majority of those that have done so were already bound by the Anti-bribery Convention.<sup>150</sup> With respect to the demand side of bribery transactions, all States Parties have adopted measures to criminalize bribery of domestic public officials but there are still challenges in the implementation of Article 15. These include the limited scope of public officials covered by the bribery offence, and the fact that some legislation only covers the offer or exchange and not the promise to do so.<sup>151</sup>

**Limited enforcement of foreign bribery:** Only 23 out the 44 Parties to the OECD Anti-Bribery Convention have ever concluded a foreign bribery case.<sup>152</sup> It is worth noting though that a recent academic study concluded that the OECD Convention has reduced the propensity

of multinational companies based in signatory states to pay bribes in international transactions.<sup>153</sup> What is worrying however is that this study also suggests that companies in non-signatory states have increased the payments of bribes to foreign officials.<sup>154</sup> In that regard, large exporting nations—including UNCAC States Parties—are not prosecuting corporate bribe payers.<sup>155</sup>

**Prosecution of corrupt officials:** Another major source of concern relates to the demand side of foreign bribery. Failures were exposed in a set of 55 foreign bribery cases involving OECD-based companies concluded between 2008 and 2013: of the 33 cases for which information was provided, 30 were investigated in the demand-side countries; 20 cases were prosecuted and criminal sanctions imposed in only 11 cases.<sup>156</sup>

**Weak international cooperation:** There is a low level of co-operation between demand-side and supply-side enforcement authorities. As reported by the OECD, none of the countries whose public officials were involved in bribery transactions received information, formal or informal, from enforcement authorities where the cases were concluded.<sup>157</sup> Such failures to co-operate and share information with demand-side enforcement authorities may indicate unwillingness to apply UNCAC provisions, particularly Article 56 (see Box 8) but in some cases it might also be explained by lack of trust in supply-side countries (see also further below). This is regrettable considering that joint investigations involving multiple enforcement authorities on the supply side are on the rise, as evidenced by the recent development of joint settlements.<sup>158</sup>

### Box 8: Proactive information sharing

UNCAC Article 56 encourages States Parties to share information on proceeds of corruption with another State Party without prior request whenever they consider that “the disclosure of such information might assist the receiving State Party in initiating or carrying out investigations, prosecutions or judicial proceedings, or might lead to a request by that State Party under this chapter of the Convention.”

As an example, in 2000 Liechtenstein trust companies and banks submitted suspicious activity reports to the Financial Intelligence Unit. On the basis of these reports, the prosecutor launched domestic proceedings, conducted investigations and froze more than DM350 million. Subsequently, Liechtenstein authorities transmitted relevant information to their Nigerian counterparts in an informal meeting. Nigeria subsequently submitted a formal request for mutual legal assistance concerning Sani Abacha and his entourage. Although the accused persons were not convicted in Nigeria, Liechtenstein confiscated the assets through non-conviction based forfeiture and returned them to Nigeria.

In practice, however, the spontaneous transmission of information to affected countries is rare in foreign bribery cases. In a 2017 report, UNODC reports only one example: the Serious Fraud Office Standard Bank case. Information was proactively shared by the United Kingdom with authorities of Tanzania which ultimately led to \$7 million in compensation being paid.

Sources: CAC/COSP/WG.2/2016/2; CAC/COSP/WG.2/2017/2

### Trends in non-trial resolutions

According to the OECD, close to 80 per cent of concluded foreign bribery cases were resolved through non-trial resolutions (NTRs).<sup>159</sup>

NTRs are any agreements between a legal or natural person and an enforcement authority to resolve foreign bribery cases short of full criminal proceedings. Prerequisites

usually involve voluntary self-reporting on the part of the company and its co-operation with enforcement authorities. As such, **domestic enforcement authorities see NTRs as a pragmatic tool to overcome profound power and information asymmetries when they investigate acts of corruption in secret, complex, multi-layered and multi-jurisdictional transactions.** In fact, in recent years, a growing number of jurisdictions—both in common law and continental law countries—have introduced settlement mechanisms into their legislation to address foreign bribery. Thanks to this new tool, some were able to conclude a case for the first time.<sup>160</sup>

However, considering the huge volume of monetary sanctions that are imposed on companies and disbursed to public treasuries in enforcement authorities, some consider that the underlying motivations for resorting to NTRs (as a substitute for traditional criminal prosecution schemes) are based on economic or financial grounds rather than on the genuine desire to ensure integrity in international business transactions.

Likewise, as noted above, while joint investigations involving multiple enforcement authorities on the supply side are increasing, there is little international cooperation with demand-side enforcement countries. The outcome is that supply-side countries accumulate fines and disgorged profits, while affected countries are most often left out of the bargain (see further below on the compensation gap in foreign bribery).<sup>161</sup> The low level of cooperation with demand-side enforcement authorities also hinders the prosecution of bribe payers and some fear that NTRs may become a type of protection for corrupt officials. As noted above, foreign bribery is a two-sided affair, and it is critical not to give the impression that a case is resolved if only the supply-side of the transaction has been addressed.

### Gaps in non-trial resolutions

The whole system remains extremely fragmented, with important gaps in the way some countries make use of NTRs. Given this, a growing number of voices are calling for the development of international guidelines to standardise practices.<sup>162</sup> The OECD's High-Level Advisory Group on Anti-Corruption and Integrity is currently leading work in that regard.

**Safeguards missing:** The Panel finds that the lack of strong safeguards, including the strict delimitation of the circumstances in which NTRs cannot be used (such as recidivism) or the judicial review of settlements to ensure that they are in the best interests of justice, may result in NTRs themselves becoming vehicles of impunity for corporate wrongdoers.

**Insufficient incentives:** The Panel also finds that the system is vulnerable to settlements becoming a part of the business model of multinational companies, thus creating uneven playing fields for smaller businesses. There is also insufficient coordination among enforcement authorities which may lead to parallel enforcements and ultimately to some

sort of “settlement shopping” on the part of the companies which might be more willing to self-report and cooperate with enforcement authorities that are believed to be more lenient in terms of monetary sanctions.<sup>163</sup>

**Lack of transparency:** The Panel is also concerned about the opacity surrounding the way some settlements are concluded. Settlement agreements—including the reasons for agreeing a settlement, rather than proceeding to prosecution, as well as the underlying wrongdoings—should be fully transparent. Transparency is critical to ensuring accountability towards the general public, mitigating the risks of recidivism and of companies using settlements to carry out “business as usual”. Transparency is also important to supporting compensation claims from victim countries.

### Foreign bribery, asset recovery and compensation

Since the adoption of the UNCAC in 2003, there is an international consensus that countries damaged by corruption should be compensated. Pursuant to UNCAC Article 53(b), affected countries should be allowed to appear in foreign bribery proceedings and offenders ordered to pay compensation or damages. This provision, which provides for the direct recovery of property through compensation claims, was established precisely to offer a concrete remedy to affected countries in situations such as foreign bribery where the bribe paid by a company, and the profits made as a result, involve funds of private origin over which they cannot establish prior ownership.<sup>164</sup> UNCAC Article 57.3.(b) also provides for the award of damages as a basis for returning confiscated property. UNCAC Article 56 provides for proactive information sharing to help affected countries to pursue compensation. In fact, UNCAC provisions on asset recovery are meant to apply to any court or out-of-court proceedings involving proceeds of corruption; the latest UNCAC Conference of States Parties resolution on asset recovery adopted in 2019 provides a strong reminder of this.<sup>165</sup> However, these provisions and commitments have yet to be implemented.

**Lack of proactive information sharing prevents compensation claims:** As noted above, Article 56 is poorly implemented (see Box 7); as a result affected countries are usually not aware of legal proceedings in supply-side countries until after they are concluded or settlements reached, and thus are not in a position to make compensation claims.

**Lack of trust depriving the ultimate victims:** Identifying, quantifying and repairing the damage caused by corruption is a complex issue,<sup>166</sup> but this is not the only reason why supply-side enforcement authorities do not as a rule share information with demand-side enforcement authorities and that compensation in foreign bribery cases is rare. The fundamental challenge is a lack of trust; there may even be suspicions that demand-side countries may be co-conspirators rather than victims, a concern that may sometimes be legitimate (see above on impunity and grand corruption). The result, however, is that the damage caused to the citizens who are the ultimate victims of bribery transactions, is not compensated.

## Recovering and returning illicit assets

### The international framework for asset recovery and related trends

UNCAC provides a unique, comprehensive international framework for asset recovery. It includes provisions for the direct recovery of property through civil claims (Article 53)<sup>167</sup> for international cooperation for purposes of confiscation (Articles 54 & 55) and for the ultimate return of confiscated property (Article 57).

The return of assets is singled out as “a fundamental principle” of the Convention.<sup>168</sup>

Despite the entry into force of the UNCAC in 2005 and recent progress in this area, the known volume of asset returns by any means accounts for only a tiny fraction of the proceeds of corruption laundered worldwide. In 2014, StAR and the OECD published the most recent and reliable data about asset recovery, finding that between 2006 and June 2012, around \$2.6 billion of assets were frozen and only around \$423.5 million were returned by OECD countries.<sup>169</sup> While no comparable analysis of international returns of proceeds of corruption is available since 2012, open-source research on asset recovery cases by StAR showed that between 2012 and 2019 \$1.4 billion in proceeds of corruption were repatriated internationally.<sup>170</sup> UNODC and StAR launched a new exercise to collect data from States in 2019.

Recent high-profile instances of grand corruption have contributed to a growing interest in the international battle against cross-border corruption and the recovery of illicit assets. The challenges to recovery efforts by successor governments further prompted the adoption of new laws and strategies to assist asset recovery, especially by states with limited capacity, experiencing conflict or undergoing a transition of power (see Box 9). In a few cases of alleged grand corruption, autonomous enforcement actions have been taken by haven country authorities.<sup>171</sup> Meanwhile capacity building initiatives have increased over time; for example, the African Legal Support Facility is increasingly assisting African countries to recover sovereign assets.

There is also a growing number of international initiatives to deal with asset repatriation and the ultimate disposal of returned property. This includes the Addis Ababa International Expert Meetings on the Return of Stolen Assets, the Global Forum on Asset Recovery and its principles for the Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases,<sup>172</sup> UNCAC COSP Resolution 8/9 on strengthening asset recovery to support the 2030 Agenda for Sustainable Development, and the recent African Union Common African Position on Asset Recovery.<sup>173</sup>

### Box 9: New initiatives on asset recovery in haven countries

Switzerland has developed a specific administrative confiscation procedure to deal with transitions of power: the Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons. The law allows its authorities to initiate proceedings in situations where international cooperation is constrained; it applies where “the government or certain members of the government of the country of origin have lost power, or a change in power appears inexorable”(Section 2, Article 3, 2.a).

In 2017, the United Kingdom introduced unexplained wealth orders, an investigation tool aimed at facilitating law enforcement’s ability to act on assets suspected of being derived from bribery, money-laundering, and other serious crimes.

The US Department of Justice set up the Kleptocracy Asset Recovery Initiative, a dedicated unit of prosecutors to deal with the proceeds of foreign official corruption. From 2011 to 2016, it froze several billion dollars in funds and returned hundreds of millions to affected states. Recent recoveries as part of the investigation into Malaysia’s sovereign wealth fund, 1MDB, have been worth hundreds of millions of dollars.



Another recent trend is the crucial role of non-state actors in asset recovery. Recent cases have showed that civil society organisations, whistle-blowers and investigative journalists are essential in prompting cases, leaking evidence, and raising public awareness.<sup>174</sup>

### Gaps in international co-operation for recovery and return

Recovering and returning assets hidden abroad—often concealed or transferred through layers of anonymous corporations and trusts, in multiple jurisdictions, and possibly commingled with legitimate funds—is a complex, long and costly process calling for a great deal of resources and expertise.<sup>175</sup> It depends on effective cooperation, formal and informal, among the jurisdictions involved and ultimately, on trust between requesting and requested States.<sup>176</sup> While mutual legal assistance (MLA) requests are used throughout the process (see Figure 10), proactive information sharing is also critical to enable action towards the recovery. Together with UNCAC Chapter IV (on International cooperation), Articles 54, 55 and 56 offer unique and comprehensive provisions in that regard. In practice however and despite much worthwhile action aimed at removing legal and technical barriers,<sup>177</sup> international cooperation is far from being effective. In fact, requested states have enormous discretion in whether and when to provide international cooperation and requesting states continue to face burdensome and lengthy MLA procedures.

**Lack of prompt responses to MLA requests:** Given that moving assets to another jurisdiction may be as simple as clicking on a keyboard, time is of the essence in asset recovery. Yet the time to respond to an MLA request ranges from one to six months, and in some cases, over a year.<sup>178</sup> What is even more worrying is that some MLA requests are not answered at all which indicates a blatant disregard for UNCAC provisions

**Lack of adequate resources in requested jurisdictions:** UNODC reports that several central authorities were not provided with adequate resources, financial, technical and human, to follow up on incoming requests in a timely fashion and carry out their responsibilities in accordance with the Convention.

### Difficulties faced by requesting jurisdictions in providing supporting evidence:

With the help of enablers, offenders usually resort to opaque and sophisticated financial schemes in order to disguise the sources of illegal money and obscure connection with criminal activities. It becomes very difficult for requesting jurisdictions to establish the paper trail linking assets hidden abroad to a specific criminal offence committed in their country. Establishing the predicate offence as well as the link to the assets is even harder in

Figure 10: Steps in the asset recovery process





cases involving former corrupt officials who remained in power for decades since, as a result of the passage of time, statutes of limitation reduce the window for prosecution, supporting evidence may have been destroyed, and potential witnesses may no longer be available. To overcome this and ease the prosecution's burden of proof, some jurisdictions have made it a criminal offence for a public official to possess unexplained wealth, so-called "illicit enrichment", the criminalization of which is encouraged under UNCAC Article 20.<sup>179</sup> However, the dual criminality requirement has proven to be a major barrier to MLA in cases involving the offence of illicit enrichment, given that many countries do not have such an offence and interpret the requirement in a restrictive manner.<sup>180</sup> While it is critical to ensure due process throughout the asset recovery process, the Panel considers that it is equally important to recognize that requesting jurisdictions face huge and asymmetrical burden of proof and the critical need to explore new approaches—including the resort to presumptions—to challenge this, facilitate MLA requests and enhance asset recovery.

### Impediments to accountability and integrity

**Limited scope:** While UNCAC Chapter V constitutes a major breakthrough, it covers only the proceeds of corruption. A growing number of voices are calling for an extension of the international framework to cover other types of resources for which there are no effective repatriation mechanisms.<sup>181</sup> For example, proposals have been made on unpaid tax liabilities and recovery of resources paid out under suspect contracts, meaning those implicated in corruption cases.

**Lack of data:** Collecting and disseminating reliable, comprehensive and disaggregated data on the actual volume of assets seized, confiscated and returned is critical for a comprehensive picture of asset recovery efforts and assessing effectiveness in meeting UNCAC's commitments. It is a startling failure that most UNCAC States Parties neither collect nor publish asset recovery data, and what data there is remains scattered, partial and inconsistent. Transparency and accountability can restore trust and bring credibility to the whole process of asset recovery.

**Controversy over return and ultimate disposal of assets:** As noted earlier, there are situations where the country holding confiscated assets lacks trust in the country of origin, particularly when the assets were confiscated without a request from the country of origin.<sup>182</sup> Trust may not be warranted when the assets are linked to people who continue to exert influence on government, but in other cases suspicions may be unfounded. Countries returning assets have sought voluntary agreements on the ultimate disposal of assets, saying they want the resources to reach the people of the nations harmed by corruption. Yet countries of origin invoke sovereignty and rightful ownership of the assets in rejecting oversight of disposal. None of the voluntary guidelines offer permanent solutions for every case, and the gap in trust potentially hinders asset return, penalizing the ultimate victims of corruption. Bearing in mind the sensitive nature of sovereignty questions, it is nevertheless critical to develop innovative, concrete and balanced solutions to ensure effective, accountable and transparent asset return in all cases.

## Peer review mechanisms

### Design characteristics for peer review

As noted in Part II, several peer review mechanisms are relevant to financial integrity issues (see Table 1) and each of them holds considerable potential. Peer review is not the only mechanism for States to be held accountable, but it enjoys wide legitimacy because it is usually viewed as impartial, and still respects the sovereignty of States.

Each of the peer review mechanisms have developed in a path-dependent fashion, based on the historical development of their associated international instruments or standards. For example, peer review through the implementation review mechanism (IRM) of UNCAC was controversial when it was first proposed, as many countries had limited experience with such instruments. Given that it was the first peer review mechanism introduced at the United Nations, the IRM is an important achievement especially considering its wide scope and the intense negotiations necessary to reach global consensus.

The Panel finds five components critical for effective peer review: comprehensiveness, inclusiveness of all stakeholders, impartiality, transparency and monitoring. For comprehensiveness, peer review should assess more than legal compliance, looking at compliance in practice, and the impact of compliance. Including civil society, academics and the private sector in reviews can improve the process and promote compliance. Regular and systematic monitoring is crucial to ensure that recommendations are being addressed.

### Gaps in peer reviews

There are still gaps and weaknesses in the current mechanisms.

**Lack of comprehensiveness:** Comprehensiveness is essential to detect and expose “mock compliance” where states formally adhere to international norms or standards but behave inconsistently. For example, recent research has reported that some low-tax jurisdictions were in “mock compliance” with the Global Forum standards on transparency and exchange of information for tax purposes.<sup>183</sup> The FATF mutual evaluations and the UNCAC implementation review is supposed to include assessment both of implementation of national laws and of their application in practice. For UNCAC, the peer review process would reveal impunity where it exists, yet the Panel finds that this has not yet been realised effectively in the review process.

**Lack of inclusiveness:** The UNCAC reviews have no requirement for involving stakeholders, leaving it to the discretion of the reviewed state. However, the inclusion of civil society and other stakeholders is standard practice for most peer reviews including the FATF, the OECD Working Group on Bribery in International Business and the Follow-up Mechanism for the Implementation of the Inter-American Convention against Corruption.

**Lack of impartiality:** All states under review should be treated equally and reviews should be immune from political bias and power imbalances.<sup>184</sup> Discussion of country reports by the

collective peer review body can help ensure impartiality across reviews by giving countries a chance to object to lenient treatment of another country. While most peer reviews provide for plenary discussions, the UNCAC is a notable exception.

**Lack of transparency:** Most peer review mechanisms publish review reports and aggregate tables of assessment rating and compliance. There are no precise aggregate statistics on UNCAC implementation, in part because the implementation reviews do not always produce binary statements on whether a provision has been implemented or not implemented. The UNODC has compiled a state of implementation report including regional trends,<sup>185</sup> but it does not provide country by country information because not all full country reviews are made public. There is no requirement for countries to publish their full self-assessments or country review reports, though the executive summaries are always published.

**Lack of monitoring:** Regular and systematic follow-up monitoring is crucial to ensure that recommendations are being addressed.<sup>186</sup> The UNCAC review mechanism does not have a formalized system for monitoring,<sup>187</sup> opening the possibility that gaps in implementation will persist.

**Systemic challenges to efficient peer review:** Financial integrity peer review systems also need to overcome lack of adequate funding, slowness of the review process, and the multiplicity of different and distinct peer review mechanisms.

## Notes

- 52** ECA (2018) "Base Erosion and Profit Shifting in Africa: Reforms to Facilitate Improved Taxation of Multinational Enterprises," Addis Ababa.
- 53** AU-ECA (2015) *Report by the High-Level Panel on Illicit Financial Flows from Africa*, Addis Ababa.
- 54** ECA (2019) *Economic Report on Africa 2019*, Addis Ababa; estimates for other regions are available in United Nations (2019) *Financing for Sustainable Development Report 2019*.
- 55** Some UN Tax Committee members already proposed this article, see <https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-08/TAX%20TREATY%20PROVISION%20ON%20PAYMENTS%20FOR%20DIGITAL%20SERVICES.pdf>.
- 56** For historical accounts, see Sunita Jogarajan (2018) *Double Taxation and the League of Nations*, Cambridge: Cambridge University Press; Sol Picciotto (1992) *International Business Taxation: A Study in the Internationalization of Business Regulation*, London: Weidenfeld & Nicolson.
- 57** Cobham, A., Janský, P., & Meinzer, M. (2018) "A half-century of resistance to corporate disclosure," *Transnational Corporations*, 25(3), 1-27.
- 58** Including territories and dependencies that are not sovereign countries.
- 59** For more on the African Legal Support Facility, see <https://www.aflsf.org/>.
- 60** Estimate based on IBFD online database of tax treaties, and IMF Coordinated Direct Investment Survey, see Hearson, M., J. Ndubai, T. Randriamanalina (2020) "Appropriateness of tax norms to developing country contexts," FACTI Background Paper 3, at <http://www.factipanel.org/documents/background-paper-3-appropriateness-of-tax-norms-to-developing-country-contexts>.
- 61** A large proportion of developing countries levy such a tax in their domestic law, and the inclusion of this article in a treaty allows them to retain this taxing right unambiguously. In the presence of a tax treaty that does not have such a clause, it is commonly considered that the income of a foreign contractor who provides services to a client in a country can only be taxed by that country under Article 7, that is, if the contractor meets the permanent establishment threshold.
- 62** French Tax Administration (2017) "Mutual Agreement Procedure," 4 May, <https://www.impots.gouv.fr/portail/international-particulier/mutual-agreement-procedure>.
- 63** Tsilly Dagan (2000) "The Tax Treaties Myth," *New York University Journal of International Law and Politics*, vol. 32, No. 4, p. 939; Victor Thuronyi (2010) "Tax Treaties and Developing Countries," in *Tax Treaties: Building Bridges between Law and Economics*, Michael Lang et al. (eds.), Amsterdam: IBFD, pp. 441-58; Dimitri Paolini et al. (2016) "Tax Treaties with Developing Countries and the Allocation of Taxing Rights," *European Journal of Law and Economics* vol. 42, no. 3, December, pp 383-404; Kim Brooks and Richard Krever (2015) "The Troubling Role of Tax Treaties," in *Tax Design Issues Worldwide*, Geerten M., M. Michielse and Victor Thuronyi (eds.), Kluwer Law International, pp 159-178.
- 64** See for example Davies RB (2004) "Tax treaties and foreign direct investment: potential versus performance," *International Tax & Public Finance*, 11:775-802; Kumas, A., & Millimet, D. L. (2018) "Reassessing the effects of bilateral tax treaties on US FDI activity," *Journal of Economics and Finance*, 42(3), 451-470.
- 65** Picciotto, Sol (2018), "Problems of Transfer Pricing and Possibilities for Simplification," ICTD Working Paper 86, Brighton: International Centre for Tax and Development.
- 66** United Nations (2017) *United Nations Practical Manual on Transfer Pricing for Developing Countries (2017)*, New York.
- 67** Caroline, Silberzstein (2013), « Les différends en matière de prix de transfert et leurs causes », *Rev. Droit fiscal*, No. 3, 60.
- 68** AU-ECA (2015) *Report by the High-Level Panel on Illicit Financial Flows from Africa*, Addis Ababa, p.27.
- 69** Monkam Nara (2015) "Cross Border Taxation in Africa Challenges and ATAF's Response", German Development Institute (DIE), ATAF Members", p.25, [https://www.diegdi.de/uploads/tx\\_veranstaltung/5-Monkam\\_ATAF\\_Challenges\\_in\\_Taxation\\_and\\_ATAF\\_s\\_response.pdf](https://www.diegdi.de/uploads/tx_veranstaltung/5-Monkam_ATAF_Challenges_in_Taxation_and_ATAF_s_response.pdf).

- 70** For further details about these models see Hearson, M., J. Ndubai, T. Randriamanalina (2020) "Appropriateness of International Tax Norms to Developing Country Contexts," FACTI Background Paper 3, <https://www.factipanel.org/documents/background-paper-3-appropriateness-of-tax-norms-to-developing-country-contexts>.
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- 72** ICRICT (2018) *A roadmap to improve rules for taxing multinationals*, Independent Commission for the Reform of International Corporate Taxation, <https://www.icrict.com/icrict-documents-a-fairer-future-for-global-taxation>.
- 73** Calculated using ICTD/UNU-WIDER, 'Government Revenue Dataset'; see Hearson, M., J. Ndubai, T. Randriamanalina (2020) "Appropriateness of International Tax Norms to Developing Country Contexts", FACTI Background Paper 3.
- 74** OECD (n.d.) "What is BEPS?", OECD website, <https://www.oecd.org/tax/beps/about/>.
- 75** Annet W Oguttu (2015) "OECD's Action Plan on Tax Base Erosion and Profit Shifting: Part 1 - What Should Be Africa's Response?" *Bulletin for International Taxation*, Vol 69, No 11; Annet W Oguttu (2016) "BEPS in Africa Part 2: A Critical analysis of some priority OECD BEPS Action points from an African perspective – Addressing Excessive Interest Deductions, Treaty Abuse and Avoidance of Permanent Establishment Status," *Bulletin for International Taxation*, Vol 70, No 6.
- 76** United Nations (2017) *United Nations Practical Manual on Transfer Pricing for Developing Countries (2017)*, New York, <http://www.un.org/esa/ffd/wp-content/uploads/2017/04/Manual-TP-2017.pdf>
- 77** For a more detailed discussion, see Abramovsky, L et al. (2018) *Review of Corporate Tax Incentives for Investment in Low- and Middle-Income Countries*, Institute for Fiscal Studies, March, <https://www.ifs.org.uk/uploads/R142.pdf>.
- 78** For more detailed analysis of the proposals, see United Nations (2020) *Financing for Sustainable Development Report 2020*.
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- 80** United Nations (2020) "Tax consequences of the digitalized economy – issues of relevance for developing countries," E/C.18/2020/CRP.25, June, p.11.
- 81** IMF (2019) "Corporate taxation in the global economy," Policy Paper No. 19/007, International Monetary Fund; Cobham, A. and P. Jansky (2020) *Estimating Illicit Financial Flows: A Critical Guide to the Data, Methodologies, and Findings*, Oxford University Press.
- 82** According to studies based on individual-level wealth data, this is as large as 45 per cent in Germany, 15 per cent in France, 18 per cent in Italy, and 45 per cent in Estonia, Jaanika Meriküll, Merike Kukk and Tairi Rõõm (2020) "What Explains the Gender Gap in Wealth?: Evidence from Administrative Data", NBER Working Paper26920, April, <https://www.nber.org/papers/w26920.pdf>.
- 83** For example, men's mean level of wealth is more than twice that of women in Ghana and four times more in India, Cherly Doss et al. (2011) "The Gender Asset and Wealth Gaps: Evidence from Ecuador, Ghana, and Karnataka, India," *Indian Institute of Management Bangalore 2*, [http://emerge.ucsd.edu/wp-content/uploads/2018/08/dossetal\\_2011.pdf](http://emerge.ucsd.edu/wp-content/uploads/2018/08/dossetal_2011.pdf)
- 84** Juliana Londono-Velez & Javier Avila-Mahecha (2018) "Can Wealth Taxation Work in Developing Countries? Quasi-Experimental Evidence from Colombia," *Annual Congress of the IIPF*, August, <https://eml.berkeley.edu/~saez/course/londono-wealth2018.pdf>.
- 85** Åsa Gunnarsson, Margit Schratzenstaller & Ulrike Spangenberg (2017) "Gender Equality and Taxation in the European Union: Study for the FEMM Committee," Brussels: European Union, pp 43-44.
- 86** This threshold is the total of a minimum tax-to-GDP ratio of 12.88 per cent that is estimated as the adequate amount for spending on development programmes and additional 2 per cent of GDP from the average non-tax state revenues, see IMF (2017), *Sub-Saharan Africa Regional Economic Outlook: Domestic Revenue Mobilisation and Private Investment*, p.32 footnote 4, <https://www.imf.org/en/Publications/REO/SSA/Issues/2018/04/30/sreo0518>.
- 87** United Nations (2020) *Financing for Sustainable Development Report 2020*, p.44.
- 88** OECD (2020) *Tax Transparency in Africa 2020: Africa Initiative Progress Report 2019*, p.39, <https://www.oecd.org/tax/transparency/documents/Tax-Transparency-in-Africa-2020.pdf>.
- 89** The Convention was developed jointly by the OECD and the European Council in 1988 and amended by Protocol in 2010. 137 jurisdictions currently participate in the Convention, including 17 jurisdictions covered by territorial extension.

- 90** For a detailed analysis of the CRS on this point, see Knobel, Andres, and Markus Meinzer (2014) "The End of Bank Secrecy? Bridging the Gap to Effective Automatic Information Exchange", November 24, pp.23-37, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2943979](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2943979).
- 91** Emerging economies requested to add additional transactional data to the CbC report to identify certain BEPS risk, however, this request was rejected in the balance with business requests. The Global Reporting Initiative (GRI) standard includes more relevant information, and stakeholders have called for its adoption at the OECD. A report for the World Economic Forum's International Business Council urges the adoption and integration of the GRI standard into companies' financial reporting, see, World Economic Forum (2020) "Toward Common Metrics and Consistent Reporting of Sustainable Value Creation," 22 Jan, [http://www3.weforum.org/docs/WEF\\_IBC\\_ESG\\_Metrics\\_Discussion\\_Paper.pdf](http://www3.weforum.org/docs/WEF_IBC_ESG_Metrics_Discussion_Paper.pdf).
- 92** BEPS Monitoring Group (2020) "Submission to the Inclusive Framework on BEPS on the Public Consultation Document: Review of Country-by-Country Reporting (BEPS Action 13)," 7 March, p 3, <https://www.bepsmonitoringgroup.org/news/2020/3/7/country-by-country-reporting>.
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- 94** Tax Justice Network (2020), Financial Secrecy Index 2020 Methodology, p 192, <https://fsi.taxjustice.net/PDF/FSI-Methodology.pdf>.
- 95** On the impact on human rights, see Final report of the Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights, A/HRC/28/73.
- 96** UNODC (2017) *State of Implementation of The United Nations Convention Against Corruption: Criminalization, law enforcement and international cooperation*, Second edition.
- 97** UNCAC Implementation Review Group (2020) "Technical assistance in support of the implementation of the United Nations Convention against Corruption, including analysis of technical assistance needs emerging from the country reviews," Conference of the States Parties to the United Nations Convention against Corruption, 27 May, <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/27-29May2019/V1901917e.pdf>.
- 98** United Nations (2019) *World Public Sector Report 2019: Sustainable Development Goal 16: Focus on public institutions*, New York, June.
- 99** Practice differs from sector to sector. In the arms trade, this is frequently called an "offset", while in the extractive industries and other sectors they are usually called "corporate social responsibility" practices. For an overview of literature on social responsibility in business, see Kolk, A. (2016) "The social responsibility of international business: From ethics and the environment to CSR and sustainable development," *Journal of World Business*, 51(1), pp 23-34.
- 100** In the UNCAC Preamble, States Parties expressed concern about "cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States", A/58/422.
- 101** See for example a frequently referenced table of alleged political corruption created by Transparency International and published in their *Global Corruption Report 2004: Political Corruption*, p.13.
- 102** UNCAC COSP Resolution 7/2.
- 103** UNODC (2019) "Lima statement on corruption involving vast quantities of assets," [https://www.unodc.org/documents/corruption/LimaEGM2018/Outcome\\_Statement\\_Lima\\_EGM\\_2018.pdf](https://www.unodc.org/documents/corruption/LimaEGM2018/Outcome_Statement_Lima_EGM_2018.pdf).
- 104** This is the reported percentage of Member States who said that the reviews helped them identify gaps. The actual percentage of states with gaps is likely to be higher; see CAC/COSP/IRG/2018/CRP.13.
- 105** See for example UNCAC IRM Executive Summary, Ghana, CAC/COSP/IRG/1/3/1/Add.18; UNCAC IRM Executive Summary, Trinidad and Tobago, CAC/COSP/IRG/1/3/1/Add.5.
- 106** UNODC (2019) "Celebrating 10 Years of the UNCAC Implementation Review Mechanism"; UNODC (2017) *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Co-operation*, 2nd ed.
- 107** Susan Rose-Ackerman (1999) *Corruption and Government: Causes, Consequences and Reform*, Cambridge: Cambridge University Press, pp. 114-115.

- 108** UNCAC Conference of States Parties Resolutions 4/4 and 5/3
- 109** See in that regard: Peters, Anne (2018) "Corruption as a Violation of International Human Rights," *European Journal of International Law*, Vol. 29, Issue 4, November, pp 1251–1287.
- 110** In practice, considering that grand corruption usually takes place at the top levels of the public sphere, the immunity privilege enjoyed by senior state officials before foreign courts constitutes a major obstacle to foreign enforcement.
- 111** Non-conviction-based confiscation is brought against the property itself (not the person who owns/controls it). This measure - crucial to overcome the difficulty of getting a criminal conviction in asset recovery cases - is recommended by UNCAC Article 54.1.c. It has been used to overcome the immunity privilege enjoyed foreign officials, see: Perdriel-Vaissière, M. (2019) "International Immunities and the Fight against Grand Corruption" in *Legal remedies for grand corruption: the role of civil society*, p.53, <https://www.justiceinitiative.org/uploads/7e52b140-4550-4be4-9d0c-96d0131060d1/publication-legal-remedies-grand-corruption-20190607.pdf>.
- 112** Mungiu-Pippidi, A. (2011) "Contextual Choices in Fighting Corruption: Lessons Learned," Norwegian Agency for Development Cooperation.
- 113** McMahon, E. R., Busia, K., & Ascherio, M. (2013) "Comparing Peer Reviews: The Universal Periodic Review of the UN Human Rights Council and the African Peer Review Mechanism," *African and Asian Studies*, 12, 266-289.
- 114** UNODC (2015) *Resource Guide on Good Practices in the Protection of Reporting Persons*, [https://www.unodc.org/documents/corruption/Publications/2015/15-04741\\_Person\\_Guide\\_eBook.pdf](https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf).
- 115** UNCAC COSP Resolution 6/6.
- 116** Some literature refers to some these actors as "gatekeepers". FATF refers to "professional money launderers", and has a catalogue of their characteristics and methods; see FATF (2018), *Professional Money Laundering*, Paris, France, [www.fatf-gafi.org/publications/methodandtrends/documents/professional-money-laundering.html](http://www.fatf-gafi.org/publications/methodandtrends/documents/professional-money-laundering.html).
- 117** FATF (2012), "High-Level Principles for the relationship between the FATF and the FATF-style regional bodies," updated February 2019, Paris, France, <https://www.fatf-gafi.org/publications/fatfgeneral/documents/high-levelprinciplesfortherelationshipbetweenthefatfandthefatf-styleregionalbodies.html>.
- 118** For a longer discussion of this topic please see International Bar Association (2013) "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," [https://www.ibanet.org/Human\\_Rights\\_Institute/TaskForce\\_IllicitFinancialFlows\\_Poverty\\_HumanRights.aspx](https://www.ibanet.org/Human_Rights_Institute/TaskForce_IllicitFinancialFlows_Poverty_HumanRights.aspx).
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- 120** Lawyers associations in some countries have rejected the imposition of some requirements of money laundering standards, see for example Sahl, J. P. (2014) "Lawyer ethics and the financial action task force: call to action," *New York Law School Law Review*, 59(3), 457-486.
- 121** See FATF mutual evaluations at [https://www.fatf-gafi.org/publications/mutualevaluations/?hf=10&b=0&s=desc\(fatf\\_releasedate\)](https://www.fatf-gafi.org/publications/mutualevaluations/?hf=10&b=0&s=desc(fatf_releasedate)).
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- 140 Ibid, p.168.
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- 145 OECD (2014) *Illicit Financial Flows from Developing Countries: Measuring OECD Responses*, [https://www.oecd.org/corruption/Illicit\\_Financial\\_Flows\\_from\\_Developing\\_Countries.pdf](https://www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf).
- 146 Bribery is a two-sided affair: the bribe-payer is the "supply side" of the bribery transaction; the "demand side" refers to the bribe-taker.
- 147 The Panel recognizes that simply prosecuting those involved in corrupt transactions is not sufficient and that institutional reforms that can change the underlying incentives for making and receiving payoffs are likely needed.
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- 163 Parallel enforcements may also breach the "non bis in idem principle" which precludes multiple punishments for the same criminal offence.
- 164 According to UNDOC, "This innovative provision departs from the notion that proceeds of corruption should be recovered only on confiscation grounds and obligates States Parties to enable their Courts to recognize the right of victim States Parties to seek to recover compensation or damages," see UNODC (2009) *UNCAC Technical Guide*, p. 203.
- 165 See in particular operative clauses 16 and 17 of UNCAC COSP Resolution 8/9 on strengthening asset recovery to support the 2030 Agenda for Sustainable Development: <https://www.unodc.org/unodc/en/corruption/COSP/session8-resolutions.html>.
- 166 "Best practices for the identification and compensation of all different types of victims in accordance with the Convention, and third-party challenges and their impact on asset recovery under chapter V," CAC/COSP/WG.2/2019/5.
- 167 Article 53 does not provide for a right to restitution but for the right to seek recovery of proceeds of corruption through ownership or compensation claims.
- 168 "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.
- 169 Gray, L. et al (2014) *Far and Few: The hard facts on stolen asset recovery*, Washington, DC: World Bank and OECD, p.19.
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- 171 For example, the United States, Switzerland and France all took proactive enforcement actions towards the recovery of assets of Teodorin Nguema Obiang, son of the president of Equatorial Guinea and since 2016, vice-president of the country.
- 172 StAR (2019) "GFAR Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases," <https://star.worldbank.org/sites/star/files/the-gfar-principles.pdf>.
- 173 For more information see: African Union (2020) "African Union Member States adopted unified position on the recovery of illicit assets", 11 February, <http://www.africanunion.org/highlights/view/african-union-member-states-adopted-unified-position-on-the-recovery-of-illicit>.

- 174** Open Society Justice Initiative (2019) *Legal remedies for grand corruption: the role of civil society*, <https://www.justiceinitiative.org/uploads/7e52b140-4550-4be4-9d0c-96d0131060d1/publication-legal-remedies-grand-corruption-20190607.pdf>.
- 175** In some cases, asset recovery efforts fail, but countries have incurred substantial legal costs in seeking the return of the assets, including huge fees paid to private law firms in the haven countries, see Economist (2013) "Recovering Stolen Assets: Making a Hash of Recovering the Cash," 11 May; Mark V. Vlasic and Gregory Cooper (2011) "Beyond the Duvalier Legacy: What New 'Arab Spring' Governments Can Learn from Haiti and the Benefits of Stolen Asset Recovery," *Northwestern Journal of International Human Rights*, Vol.10 (1): 19-26; Saad, A. et al. (2013) "Recovering Stolen Assets: The Egyptian Experience," in *Emerging Trends in Asset Recovery*, Gretta Fenner Zinkernagel, Charles Monteith and Pedro Gomez Pereira (eds), Bern: Peter Lang, pp. 17-26.
- 176** The asset recovery process is made even more difficult when source countries have little capacity, and in some circumstances even little inclination, to provide the detailed admissible evidence necessary to successfully prosecute such cases.
- 177** For an overview of actions taken in recent years, see the latest progress report on the implementation of the mandates of the Working Group on Asset Recovery, CAC/COSP/WG.2/2019/2.
- 178** UNODC (2018) "Practical Trends and Challenges in International Cooperation in Corruption Matters: Observations from the United Nations Convention against Corruption Implementation Review Mechanism," CAC/COSP/IRG/2018/CRP:19.
- 179** Perdriel-Vaissiere, M. (2012) "The accumulation of unexplained wealth by public officials: Making the offence of illicit enrichment enforceable", Chr. Michelsen Institute, U4 Brief 2012:1, <https://www.u4.no/publications/the-accumulation-of-unexplained-wealth-by-public-officials-making-the-offence-of-illicit-enrichment-enforceable/>; Lindy Muzila et al. (2012) *On the Take: Criminalizing Illicit Enrichment to Fight Corruption*, The World Bank.
- 180** For the purpose of establishing dual criminality, some jurisdictions require an exact match between the names and elements of the offence in both jurisdictions, while others apply a conduct-based approach, requiring equivalence between the criminal conducts prohibited by the two offences. The latter approach is recommended by UNCAC.
- 181** See in that regard the Common African Position on Asset Recovery (CAPAR) recently adopted by African Union members which covers all types of illicit financial flows: African Union (2020) "African Union Member States adopted unified position on the recovery of illicit assets", 11 February, <http://www.auanticorruption.org/index.php/highlights/view/african-union-member-states-adopted-unified-position-on-the-recovery-of-ill>; aee. See also Transparency International and UNCAC Coalition (2020) "Coalition' Submission to the UNGASS against Corruption," [https://ungass2021.unodc.org/uploads/ungass2021/documents/session1/contributions/TI\\_UNCAC\\_Coalition\\_Proposal\\_for\\_Asset\\_Recovery\\_Agreement.12.6.2020.pdf](https://ungass2021.unodc.org/uploads/ungass2021/documents/session1/contributions/TI_UNCAC_Coalition_Proposal_for_Asset_Recovery_Agreement.12.6.2020.pdf).
- 182** Under UNCAC, the return of confiscated assets to the country of origin is mandatory only where the assets in question were confiscated pursuant to a mutual legal assistance request from the affected country. In all other cases, there is no legal obligation for the holding country to return the assets to the country of origin.
- 183** Woodward, R. (2016) "A Strange Revolution: Mock Compliance and the Failure of the OECD's International Tax Transparency Regime," in *Global Tax Governance. What is Wrong with It, and How to Fix it*, Dietsch, P. & Rixen, T. (eds), ECPR Press, Chapter V.
- 184** Research indicates that states under review frequently engage in negotiations to change the wording of final reports in order to depict a more positive situation than emerged during the review. See in that regard: Carraro, V. (2017) "The United Nations Treaty Bodies and Universal Periodic Review: Advancing Human Rights by Preventing Politicization?" *Human Rights Quarterly*, 39(4), 943-970.
- 185** UNODC (2017) *State of Implementation of the United Nations Convention Against Corruption: Criminalization, Law Enforcement and International Cooperation*, 2nd Ed.
- 186** Jongen, H. (2018) "The authority of peer reviews among states in the global governance of corruption," *Review of International Political Economy*, 39(4), 1-27.
- 187** States may voluntarily report on the measures they have taken to address the recommendations during Conferences of States Parties and through subsidiary bodies. There are ongoing discussions among Member States on how to follow up on both cycles of peer reviews once they are completed.

## PART IV: CONCLUSIONS AND NEXT STEPS

This report affirms the Sustainable Development Goals as the ultimate destination. Recognising that every destination requires a path, the Panel has explored how improved financial accountability, transparency and integrity could assist Member States to work together towards sustainability, resilience, sustainable development and the protection of human rights, generating resources and preventing them from draining away from the countries and people who need them. The COVID-19 pandemic and its economic aftermath have made these efforts still more urgent, yet even more difficult.

The common aim of creating an ecosystem of financial integrity calls for shared global action by Governments and non-state actors, with accountability within and across national boundaries. This is a systemic problem that requires systemic solutions and better global coordination. Reviewing international systems and institutions, the Panel noted gaps, vulnerabilities, impediments, and systemic shortcomings. The Panel also found that existing frameworks offer jumping-off points for further joint action. Though there has been great progress, more work is needed on the different parts of the architecture, and the way they fit together. The results of the review—too numerous to repeat in detail—will form the basis for the Panel's recommendations.

**The Panel's final report, to be published in February 2021, will advance specific recommendations based on the areas identified below and other issues emerging from its work in the next six months. The Panel will focus on recommendations which are technically feasible, politically viable, and have direct bearing on releasing resources for the Sustainable Development Goals. As a package they will seek to respond to the need for a systemic approach to reform.**

The Panel plans to present its recommendations according to a realistic timeframe for implementation. Proposals where political consensus is already at hand will be recommended for immediate action. Member States will require more time to consider other proposals and formulate a response. Finally, the Panel will present ideas which members think are essential, but which will probably require a longer time to achieve the vision.

### Cross-cutting issues

The Panel recognises the need to find a common purpose and a shared path. Political engagement and political will are needed, both at the national level – for embracing reforms that might be politically difficult – and at the international level, for reaching a shared understanding of the challenges and the best ways to resolve them. The Panel notes that rules and regulations alone will not produce equitable and sustainable development outcomes—there must be willing acceptance of the rules and determination to apply them.

**Governance:** The Panel reflected on different regions' and countries' situations as well as the priorities of different stakeholders, and strived to bring a balanced approach to this interim report, identifying critical cross-cutting issues and challenges. The variety of institutional arrangements presents, at a minimum, challenges of coordination. The plethora

of overlapping governance arrangements and non-universal instruments brings with it some questions about legitimacy. There are also many practical questions about capacity, implementation and enforcement.

**Capacity:** Many of the most severely affected jurisdictions have especially limited capacity for engaging in international cooperation, as well as for implementation and enforcement. These jurisdictions frequently also have the least structural power, which affects not only their ability to shape the process of setting norms, but their ability to deter and prosecute crimes or combat abusive practices. The limitations faced by countries, particularly developing countries, are interrelated.

**Systemic thinking:** Addressing the limitations requires a basic understanding among all stakeholders that there are no silver bullets or single measures to resolve the issue. This leads directly to the Panel's conclusions about the nature of solutions and the importance of broad and systemic thinking about the road ahead.

**Role of non-state actors:** Arriving at financial accountability, transparency and equity will be difficult without the effective participation of non-state actors. The Panel will therefore seek examples of effective ethics and compliance programmes in the private sector that go beyond mere compliance to foster a culture of integrity. While being mindful of different national contexts, the Panel will examine ideas for incorporating civil society, including the media, in the fight against tax abuse, money-laundering and corruption. The Panel will also examine the possibility of strengthening the UNCAC provision on whistle-blower protections.

The Panel has also identified the specific areas below as worthy of additional work and discussions, which could lead to recommendations in the Panel's final report.

## Cooperation in tax matters

International tax norms, dominated by the OECD, are currently under negotiation. The world is therefore at a critical juncture for ensuring that norms meet the needs of developing countries and adequately promote financial accountability and integrity. The Panel will explore how to develop a more coherent, nuanced and equitable approach to international tax cooperation to tackle tax avoidance and evasion. In the next stages of its work the Panel will consider the following areas:

**Architecture for cooperation:** The Panel identified elements of institutional deficits and is considering proposals for structural changes. These include regional cooperation structures, as well as global ones, considering the lack of a universal global institution or legal instrument in the tax sphere. Consideration is needed as to how the many existing and new measures and instruments are joined up and coherent.

**Taxation of the digital economy:** In response to the challenges of digitalisation, a number of emerging options were presented to the Panel, as well as many possible venues and

configurations for discussions. The Panel will pay special attention to what countries are, or could be, doing individually and through regional mechanisms of cooperation.

**Financial reporting and information exchange:** The Panel will examine potential improvements to existing frameworks for reporting information related to financial integrity concerns, including exchange of financial account information and country-by-country reporting by multinational companies. The aim is to reduce tax avoidance and evasion; ensure accountability to the public; and benefit those countries currently unable to access or use this information effectively.

**Data production and publication:** The Panel thinks filling the gaps in global data is important to enable progress on all other points and will look at the possibility of a neutral and authoritative body with responsibility for collating and analysing tax-related data (including gender-disaggregated data).

## Accountability, public reporting and anti-corruption

The Panel has examined both demand and supply sides of cross-border corruption and money-laundering. The Panel plans in its recommendations to examine shortcomings in all countries, focussing both on countries experiencing integrity challenges and countries used as havens for assets.

**Addressing impunity:** In many countries the details of serious corruption are public knowledge, but knowledge does not translate into accountability. The Panel heard very ambitious institutional reform proposals to address grand corruption, as well as some ideas about the practice of international cooperation to address impunity. The Panel will look carefully at which ideas meet the criteria of technical feasibility and political viability.

**Enablers:** The Panel will examine measures needed in the countries used as havens, or where enablers of corruption and tax abuse work, building ideas in advance of the forthcoming FATF strategic review. Coherence with the tax transparency norms will be important, as well as better regulation and supervision.

**Beneficial ownership:** Certain legal structures still allow secrecy to flourish with cross-cutting implications for tax enforcement, anti-corruption, money-laundering and countering organised crime. The Panel will consider proposing solutions related to technical barriers facing better accessibility of beneficial ownership information, as well as the institutional and governance factors that should be addressed with sufficient international political commitment. The value of universal central registers will be of special concern.

**Capacity building:** Developing countries, especially the smaller and least developed, have less institutional capacity, a gap which must be addressed. Calls for stronger enforcement and internal agency cooperation according to international standards can be difficult to implement when other priorities demand attention. The Panel will examine ideas for international cooperation on capacity building to fight tax avoidance and evasion, money-laundering and corruption.

## International cooperation and settling disputes

Many gaps and shortcomings in this cluster are related to a lack of trust that creates obstacles to information sharing and cooperation. The need is for developed and developing countries to communicate clearly and consider each other's expectations, to reduce the risks of mutual disappointment, and ensure the best outcomes. Failure of states to cooperate means people are the ultimate losers. Among our priorities are the following issues:

**International tax dispute settlement:** There are tensions between sovereignty and taxpayers' desire for certainty, with implications for the amount of revenue raised. The Panel will examine proposals for creating instruments or institutions for more quickly resolving tax disputes, considering lessons learned from past experience with international arbitration, and fundamental values such as representation, neutrality, fairness and certainty.

**Non-trial resolutions:** The Panel welcomes greater enforcement against bribery, but also notes that the development of non-trial resolutions poses important challenges. The Panel will examine whether an international framework in this regard would add value and consider possible design options and principles with a view to ensuring that these enforcement tools serve both the interests of justice and the global fight against bribery.

**Foreign bribery and compensation:** Even though UNCAC explicitly recognizes that countries damaged by corruption should be compensated, compensation is quite exceptional in foreign bribery. The Panel will consider how best to address this gap, including in situations where there is a lack of trust in the country of origin, with a view to ensuring that the damage caused to the citizens, who are the ultimate victims, due to bribery schemes is properly compensated.

**Confiscation of assets:** Although UNCAC Chapter V constitutes a major breakthrough, international cooperation is far from being effective and the whole MLA process remains extremely burdensome and lengthy for requesting countries—especially those that are seeking to recover assets stolen by former long-lasting kleptocratic rulers. The Panel will explore innovative approaches to ease and accelerate the whole asset recovery process and ultimately enhance the volume of asset recoveries.

**Return and disposal of assets:** Despite the recent development of principles in this area, there are still many challenges when it comes to repatriating assets to the country of origin especially in situations where there is no trust between jurisdictions involved. The Panel will explore innovative, concrete and balanced solutions to ensure effective, accountable and transparent asset return in all cases.

**Implementation and peer review:** While recognizing that the IRM of the UNCAC remains an important achievement, the mechanism is not yet robust enough to ensure comprehensive and effective implementation of UNCAC provisions by States Parties. Furthermore, it departs significantly from practices among other peer review mechanisms. The Panel will explore ways to strengthen it with a view to making it more comprehensive, fair, inclusive, and transparent and to ensuring an adequate follow-up monitoring mechanism.

# GLOSSARY

<b>Arm's-length principle</b>	The international standard that compares the transfer prices charged between related entities with the price in similar transactions carried out between independent entities at arm's length.
<b>Base erosion and profit shifting (BEPS)</b>	Tax planning strategies that exploit gaps and mismatches in tax rules to make profits disappear for tax purposes or to shift profits to locations where there is little or no real activity but the taxes are low, resulting in little or no overall corporate tax being paid.
<b>Beneficial owner</b>	The natural person or group of people who control(s) and benefit(s) from a corporation, trust, or account.
<b>Country-by-country reporting</b>	Report by multinational enterprises with aggregate data on the global allocation of income, profit, taxes paid and economic activity among tax jurisdictions in which it operates.
<b>Crypto-asset</b>	private assets that depend primarily on cryptography and distributed ledger or similar technology; examples include bitcoin, litecoin and ethereum.
<b>Designated non-financial businesses and professions (DNFBPs)</b>	Enablers of illicit wealth, including professions such as lawyers, accountants, trust and company service providers.
<b>Double taxation</b>	Overlapping claims on the taxing rights of countries on same declared income of a company or individual that incurs a tax liability in more than one country.
<b>Dual criminality</b>	The requirement that applies in Mutual Legal Assistance processes according to which the requesting jurisdiction must demonstrate that the offence underlying the request for assistance is criminalized in both the requested and requesting jurisdictions.
<b>Haven country</b>	Any country where assets can be safely held while minimizing legal, regulatory and tax scrutiny.
<b>Illicit enrichment</b>	A significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.



<b>Illicit financial flows (IFFs)</b>	There is no universally agreed intergovernmental definition on this term, though it is often used in United Nations documents. In 2017, the United Nations Inter-Agency Task Force on Financing for Development defined three components of IFFs: tax-related IFFs, IFFs originated from transnational criminal activities, and corruption-related IFFs.
<b>Mutual legal assistance</b>	A formal channel for international cooperation by which States seek for and provide assistance to other States.
<b>Non-conviction-based confiscation</b>	A legal procedure that allows the confiscation of illegal property without requiring prior criminal conviction of the offender, also known as civil forfeiture or <i>in rem</i> proceedings.
<b>Non-trial resolutions</b>	The term refers to any agreements between a legal or natural person and an enforcement authority to resolve foreign bribery cases short of full criminal proceedings.
<b>Peer review</b>	The systematic examination and assessment of the performance of a state by other states, with the ultimate goal of helping the reviewed state improve its policy making, adopt best practices and comply with established standards and principles.
<b>Proceeds of corruption</b>	Any property (assets of every kind, movable or immovable, tangible or intangible) obtained through or derived from the commission of a corruption offence.
<b>Shell bank</b>	A bank without a physical presence or employees in the jurisdiction in which it is incorporated.
<b>Suspicious transaction report</b>	A report filed by a financial institution, or other entity, to their local anti-money-laundering authorities if they have reasonable grounds to suspect that a transaction is related to criminal activity or it is of an unusual nature or circumstance.
<b>Tax avoidance</b>	The legal practice of seeking to minimize a tax bill by taking advantage of a loophole or exception to tax regulations or adopting an unintended interpretation of the tax code.
<b>Tax evasion</b>	Actions by a taxpayer to escape a tax liability by concealing from the revenue authority the income on which the tax liability has arisen.



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<b>Tax treaty shopping</b>	The attempt by a person to indirectly access the benefits of a tax agreement between two jurisdictions without being a resident of one of those jurisdictions.
<b>Trade mis-invoicing</b>	The act of misrepresenting the price or quantity of imports or exports in order to hide or accumulate money in other jurisdictions.
<b>Trade-based money-laundering</b>	A technique where trade mispricing is used to hide, or disguise income generated from illegal activity.
<b>Transfer pricing</b>	The price of transactions occurring between related companies, in particular companies within the same multinational group.
<b>Virtual asset service providers</b>	Any entity that conducts any of the following activities: exchanges among virtual assets and fiat currencies; transfer, safekeeping or administration of virtual assets; or provision of financial services related to a virtual asset.
<b>Whistle-blower</b>	A person who informs on a person or organisation engaged in an illicit activity; in the UNCAC this is called a reporting person.

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# ANNEX: BACKGROUND INFORMATION

## a. Objectives and scope of work

The objective of the FACTI Panel is to contribute to the overall efforts undertaken by Member States to implement the ambitious and transformational vision of the 2030 Agenda, particularly as set out in SDG 16, to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.

The Panel's work has been dedicated to achieving these goals. The Terms of Reference of the Panel called for it to:

- Review current challenges and trends related to financial accountability, transparency and integrity;
- Review existing international institutional and legal frameworks related to financial accountability, transparency and integrity, with a view to identify any gaps, impediments and vulnerabilities in their design and/or implementation, including with regard to their comprehensiveness, effectiveness and universality;
- Make evidence-based recommendations, building on the successes and ongoing work of existing mechanisms, on:
  - How to make the systems for financial accountability, transparency and integrity more comprehensive, robust, effective, and universal in approach;
  - Ways to address identified gaps, impediments and vulnerabilities, including by: (i) strengthening the implementation of existing mechanisms, standards and commitments; (ii) improving existing international frameworks related to financial accountability, transparency and integrity, where possible; (iii) exploring the need for, and feasibility of, establishing additional international instruments or frameworks, where warranted; and (iv) governance arrangements to match the challenges; and
  - Ways to strengthen international cooperation, including through existing bodies, that will enhance capacity to implement the recommendations.

In the Panel's first video conference held on 31 March 2020, Panel Members agreed to split up further work into three clusters: improving cooperation in tax matters; accountability, public reporting and anti-corruption measures; and cooperation and settling disputes.

**Improve cooperation in tax matters:** fostering universal participation in international legal instruments on tax matters; further work on tax avoidance and evasion; preparing consistent and reliable global data on taxation.

**Accountability, public reporting and anticorruption measures:** promoting accountability in contexts where it is currently lacking such as beneficial ownership; anticorruption measures; improving tracking of asset ownership and use of this information including through the establishment of a global asset registry.

International cooperation and settling disputes: improving cooperation and standardization on bribery investigation and prosecution; examining options to strengthen peer review processes; exploring options to improve capacity; improving international cooperation on asset recovery and return.

## b. Panel's approach to its mandate

As a starting point and to gain a full understanding of the current trends and challenges related to financial accountability, transparency and integrity, the Panel reviewed existing literature, commissioned research papers and undertook wide-ranging consultations.

### Inclusive consultations

From the outset, the Panel was committed to carry out the work with ultimate transparency and inclusiveness despite constraint caused by the COVID-19 pandemic. Since late April, the Panel has conducted various consultations with members states, regional group, civil society organisations, private sector representatives and academics with interest in the subject.

The Panel also engaged directly with the various international institutions that play a role in financial integrity matters. This has included extremely useful discussions with the standard setting bodies like the OECD and FATF, as well as with UN agencies, including UN Office on Drugs and Crime and UN Committee of Experts on International Cooperation in Tax Matters.

On 10 July 2020, The President of the United Nations Economic and Social Council and the President of the United Nations General Assembly co-convened a meeting to update the international community on the progress the FACTI Panel has made since its establishment. The FACTI Panel Co-chairs briefed participants from member states, civil society and private sector about the overall approach and initial ideas of the Panel.

Date	Meeting
2 Mar 2020	Public Launch of the Panel
31 Mar 2020	1st Video Meeting of the FACTI Panel
24 Apr 2020	First Discussion with Member States
28 Apr 2020	Global Townhall with Civil Society Organisations
30 Apr 2020	Expert Discussion: Accountability, public reporting and anti-corruption measures
5 May 2020	Expert Discussion: Improving cooperation in tax matters
8 May 2020	Expert Discussion: Cooperation and settling disputes
14 May 2020	Meeting with UN Committee of Experts on International Cooperation in Tax Matters

22 May 2020	Meeting with International Trade Union Confederation, Public Services International, and UNI Global Union
29 May 2020	Meeting with Organisation for Economic Cooperation and Development (OECD)
29 May 2020	Briefing by United Nations Office on Drugs and Crime (UNODC)
16 Jun 2020	Meeting with Financial Action Task Force (FATF)
25 – 26 Jun, 29 Jun – 1 Jul 2020	2nd Video Meeting of the FACTI Panel
10 Jul 2020	UN HLPF High-level Side Event on International Financial Integrity
14 Jul 2020	Meeting with High-level Panel on IFFs from Africa
21 Jul 2020	Second Discussion with Member States
23 Jul 2020	Meeting with Caribbean Private Sector Representatives
30 Jul 2020	Meeting with United Nations African Group
9 & 11 Sep 2020	3rd Video Meeting of the FACTI Panel

Recognizing that it is not possible for all interested stakeholders to participate in the consultation meetings, the Panel issued a call for written inputs in late April and received over 30 written inputs from around the world.

The Panel also launched an online survey for private sector globally in August, to solicit ideas on gaps in existing international financing mechanisms and solutions for promoting financial accountability, transparency and integrity for achieving the 2030 Agenda.

## Research

The Panel secretariat developed the first background paper to reviews existing international institutional and legal frameworks, as per the Panel's terms of reference. The paper builds on inputs from the UN System agencies, material already provided by UN and non-UN bodies to the Inter-agency Task Force on Financing for Development. It provides an issue-based overview based on the six areas suggested by the President of the General Assembly and the President of ECOSOC in the terms of reference of the Panel: financial and beneficial ownership transparency, tax matters, bribery and corruption, money-laundering, confiscation and disposal of the proceeds of crime and the recovery and return of stolen assets. The paper also introduces cross-cutting analysis with respect to common themes across 11 different issues and proposes areas for further investigation by the Panel.

To support the FACTI Panel to deepen its analytical work, the Panel Secretariat also commissioned expert consultants in the fields of financial accountability, transparency and integrity to develop seven background papers on specific topics of interest to the Panel. All

the papers are available online at <https://www.factipanel.org/documents>.

- BP1 - Overview of existing international institutional and legal frameworks related to financial accountability, transparency and integrity
- BP2 - Tax information production, sharing, use and publication
- BP3 - The appropriateness of international tax norms to developing country contexts
- BP4 - Transparency of asset and beneficial ownership information
- BP5 - Anti-corruption measures
- BP6 - Current trends in foreign bribery investigation and prosecution
- BP7 - Recommendations for accelerating and streamlining the return of assets stolen by corrupt public officials
- BP8 - Peer review in financial integrity matters

## Outreach and Communication

From its inception, the Panel saw outreach and communication as an essential part of its work. In keeping with the commitment to full transparency, the Panel Secretariat kept publishing meeting summaries and videos, related papers and sharing updated information through FACTI Panel's website, monthly newsletter, twitter account and YouTube channel.

The FACTI Panel Co-chairs have also published op-eds in both French and English news outlets about their views on the how to promote financial integrity in post-COVID-19 world.

## Interim and final report

The Panel's work is ultimately focused on exploring what further action is needed by governments and financial institutions to strengthen financial accountability, transparency and integrity of the global financial system. The interim report accordingly focuses on the analysis of the gaps, vulnerabilities and impediments present in the current systems related to a broad set of financial accountability, transparency and integrity issues.

The final report, which is expected to be published in February 2021, will provide recommendations which are both technically feasible and politically viable. The recommendations will be broken down into those that can be carried out in the short-term, those that can be done in the medium-term and those, which though essential, may take a longer time to achieve.

