Curbing Illicit Financial Flows from Resource-rich Developing Countries: Improving Natural Resource Governance to Finance the SDGs

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Illicit Financial Flows: Concepts and Definition

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1 INTRODUCTION

Countries have committed to "significantly" reducing "illicit financial flows" (IFFs) by 2030 in accordance with Sustainable Development Goal (SDG) target 16.4. Yet there is still no consensus regarding the concept and definition of IFFs. The contours of the definition remain fuzzy, and its inherent coherence is debated. The term IFFs commonly refers to cross-border movement of money and assets associated with illegal activity (World Bank 2016, at 2). There is an ongoing debate regarding what commercial activities fall under this definition of IFFs, especially in relation to tax evasion and avoidance (for a review of the debate, see Forstater 2018a). In a "narrow" sense, IFFs refer to cross-border financial transfers "that have a clear connection with illegality" (World Bank 2016, 1).[1] The "broad" definition of IFFs stretches the concept further by including transactions that are deemed unethical, even if not technically illegal in the assessed jurisdiction (High Level Panel on Illicit Financial Flows from Africa 2015, Independent Expert on the effects of debt 2016, UNCTAD 2014).[2] Beyond the narrow/broad definitional debate, several questions remain with respect to the following (Erikkson 2017): (1) the type of cross-border transfers that qualify as IFFs – whether money flows or anything with monetary value, from loans embedded in private contracts to smuggled physical goods; (2) the type and degree of illegality involved; (3) and whether the source, the use, or the transfer mechanism of a cross-border transfer should be assessed as illegal. The debates point to major divergences and disagreement on all these points. In the end, the definition of IFFs remains clouded in "open questions, uncertainties, and inconsistencies" (Erikkson 2017). On the one hand, this definitional uncertainty has served, and still serves, the "IFF agenda". Looking back, it has been instrumental in building political momentum around the IFF issue. Building that momentum required emphasis on aggregates, and postponement of technical disagreements about the specifics of the issue at stake. Looking forward, this definitional "openness" ensures some built-in flexibility in the IFF debate, which is adaptable to the fast pace of legal reform, and to changes in underlying policy perceptions. On the other hand, lack of clarity and agreement about what constitutes IFFs can give rise to misunderstandings and policy disagreement. It is a stumbling block to any effort to rigorously gauge the magnitude of IFFs. Further, it hinders the design of effective policy responses to curb IFFs, since regulatory responses require clarity as regards targeted actors, techniques, and motives of IFFs.

Against this background, this article reviews and challenges some key tenets of the IFF debate, and articulates some lines of legal reasoning that can help to define the boundaries of what constitutes illicit flows (or not). The analysis attempts to steer a middle course between conflicting views in the context of a highly polarized debate. It does so with reference to three hotly contested areas in the debate: the *distinction between "illegal" (in breach of the law) and "illicit" (unethical, even if not technically illegal)* in relation to tax-motivated IFFs; the *tension between "development" and legal approaches to IFFs*; and *how to reconcile aggregate and disaggregate approaches* under the IFF agenda. In each of these areas, the analysis briefly rehearses the state of the debate, challenges some entrenched assumptions, and presents ideas that help to reconcile conflicting views. It concludes with some summary observations.

[1] The narrow definition essentially covers transfers associated with "corruption, illegal natural resource exploitation, smuggling and trafficking, money laundering, tax evasion and fraud in international trade" (World Bank 2016, at 2).

[2] For example, several countries do not have well developed transfer-pricing laws, which results in abusive transfer pricing not being technically unlawful under their domestic legal framework (Chowla and Falcao 2016). Likewise, certain tax optimization schemes that make use of offshore structures to get around an inconvenient law may still be technically legal, depending on the reach of domestic anti-abuse rules. The law may not be violated, but the transaction is normatively unacceptable, hence "illicit", under a normative definition of IFFs (UNCTAD 2014, 172-73; Independent Expert on the Effects of Foreign Debt 2016, 4).

2 TAX-MOTIVATED IFFS: MOVING BEYOND A POLARIZED DEBATE

It is customary in the literature and in policy debates to distinguish between a "narrow" and a "broad" definition of IFFs (for a review, see Forstater 2018a, 4–7). The former requires a breach of the law ("illegal" activities). The latter encompasses unethical acts that may still be technically lawful, if unregulated ("illicit" activities). This distinction has gained wide acceptance in the debate on tax-motivated IFFs. In this context, it is widely held that transfers associated with tax *evasion* (illegal) qualify as IFFs, while tax *avoidance* schemes (formally compliant with "the letter of law") do not, even if unethical (World Bank 2016, at 2; Forstater, 2018a and 2018b). By contrast, tax avoidance practices may still fall under a "broad" definition of IFFs, if perceived as unethical (High Level Panel on Illicit Financial Flows from Africa 2015, Independent Expert on the effects of debt 2016, UNCTAD 2014).

While this distinction is conceptually appealing,[3] it calls for a critical appraisal. In real life, it is hard to draw a line between "illegal" and "illicit" activities: as discussed below, so-called illicit activities often involve illegal elements. This is particularly so in the area of tax avoidance: the legal assessment of tax avoidance practices is a circumstantial process of interpretation and constant adjustment, in a dynamic and adaptive regulatory environment. More nuanced discussion of "legal" vs. "illicit" distinctions in the IFF debate appears necessary in order to chart a middle path between "narrow" and "broad" definitions of IFFs. This line of reasoning is detailed below. The proceeding analysis first clarifies the use of key terms – tax evasion, avoidance, and planning. It then critically reappraises the analytical distinction between "illegal" and "illicit" with regard to tax evasion and avoidance practices. Finally, it seeks to advance beyond that distinction by endorsing a definition of tax-motivated IFFs that, while anchored in law, is dynamic and adaptive to policy changes, and levels the playing field between countries with different lawmaking and law-enforcement capacities.

2.1 TAX EVASION, TAX AVOIDANCE, AND TAX PLANNING

For the purpose of this paper,[4] the terms "tax evasion", "tax avoidance", and "tax planning" are used to denote different tax behaviours. UK Treasury Minister David Gauke drew the following distinction during a parliamentary debate in 2010 – a distinction upheld in the UK 2015 government paper on tax avoidance (HM Treasury 2015):

Tax evasion occurs when people or businesses deliberately do not pay the taxes that they legally owe. They can do so by underreporting income, over-reporting expenses, or simply not paying taxes owed. Tax evasion encompasses the "hidden economy" in which "people conceal their presence or taxable sources of income" (HM Treasury 2015, at 5).

Tax avoidance involves "bending the rules of the tax system to gain a tax advantage that Parliament never intended" (HM Treasury 2015, at 5). It typically entails "taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability" (European Commission 2012). This type of avoidance typically involves highly artificial and contrived

[3] It echoes long-standing distinctions in legal theory between positivist and natural law approaches, and between *lex lata* and *de lege ferenda* perspectives. In legal practice, it hints at some rift between law and justice.

[4] As reviewed by Oats and Tuck (2019, at 567–571), the meaning of "tax avoidance" depends on the context in which it is used. In its widest sense, it covers all arrangements aimed at reducing, eliminating, or deferring taxes. In a narrow sense, as used in this paper, it only encompasses "aggressive" tax avoidance practices that artificially circumvent the law for the purpose of reducing tax liability.

arrangements whose sole or main purpose is to reduce or eliminate tax liability.[5] The practice is sometimes referred to as "aggressive tax planning" (European Commission 2012, 2015 and 2017) or "abusive"/"aggressive tax avoidance" in order to distinguish it from so-called legitimate tax planning. At the global level, it substantially overlaps with "base erosion and profit shifting" (BEPS) under the G20/OECD BEPS programme.

Tax planning involves "using tax reliefs for the purpose for which they were intended" (HM Treasury 2015, at 5), for example, taking legitimate tax deductions included in the tax code to lower the tax bill, as intended by the law. It is sometimes referred to as "lawful tax avoidance" or "legitimate tax planning".

As stated by Treasury Minister David Gauke, tax evasion is always illegal; tax avoidance "involves compliance with the letter but not the spirit of the law"; and tax planning "is a case of acting in both the spirit and the letter of the law" (HC Deb 12 July 2010 c706, reported in Seely 2018).

While this taxonomy brings some theoretical clarity to the debate, the boundaries between tax planning and tax avoidance, and between tax avoidance and tax evasion remain blurred in day-to-day reality. In practice, there is a "continuum of tax aggressiveness" from legal tax planning to outright tax evasion (European Commission 2017, at 23), and much depends on the circumstances of the case. Legal assessment of avoidance practices is seldom simple or obvious, as discussed below.

2.2 TAX AVOIDANCE: ILLEGAL OR ILLICIT?

As defined above, tax evasion directly breaches the law. Tax avoidance exploits tax loopholes and mismatches to circumvent a tax law without directly violating the law. Building on this definition, some argue that tax evasion is illegal, whereas tax avoidance is legal or constitutes a "grey area" in practice, as it exploits regulatory loopholes and mismatches rather than directly breaking the rules. Lacking a clear connection with illegality, avoidance practices are often considered outside the scope of IFFs when narrowly framed. By contrast, avoidance practices fall within a broad definition of IFFs, encompassing commercial practices perceived as unethical, even if legal – and in this way "illicit". This view resonates with basic notions of law *versus* justice, and is widely upheld by economists and commentators (for a review, Mehrotra 2018).

This tax evasion/avoidance or illegal/illicit distinction is intuitively appealing. Yet it is less straightforward than it may appear, for several reasons.

First, as extensively elaborated by Picciotto (2018 and 2018b), legal assessment of tax avoidance practices is a matter of interpretation. Note in this respect that tax rules often embed commercial concepts that require fact-intensive assessment of underlying business structures. Determining whether a corporate tax position is correct is generally a complex, context-specific endeavour, requiring a number of judgment calls by the taxpayer, the tax administration, and eventually the court if the matter is litigated. In some respects, it is only the legal challenge that determines if the tax filing position is correct (Quentin 2017, Devereux, Freedman and Vella 2012). Note also that several tax provisions are in the form of circumstantial, open-ended standards that call for balancing of multiple factors to determine whether a position is illegal, requiring principled decisions and purposive interpretation. Ultimately, it is incumbent on the revenue

[5] This can occur through different channels and techniques, including income shifting through interest payment (offshore loan structures, hybrid loan/entity structures, interest-free loans, etc.), royalty payments (IP and cost-contribution agreements, two-tiered IP structures, patent box structures), strategic transfer pricing and treaty shopping (European Commission 2015 and 2017). These schemes may have a legitimate commercial purpose (legitimate tax planning) or can be implemented primarily to deliver a tax advantage (aggressive tax planning), depending on the circumstances of the case.

authority or the court to authoritatively categorize the facts to place them under a particular legal classification.

It is important to note that this interpretative process is not value-free: when interpreting a specific law provision, judges typically seek to determine the "intention" of legislation, viewing legal terms in light of the objectives and rationale of the law. By interpreting the law purposively, a court may strike down an arrangement that follows the letter of the law, but violates its intention. Judges use different approaches and techniques to do so. Depending on the legal system in place in a given country, these techniques include statutory interpretation and construction, judicial anti-abuse doctrines, and anti-abuse theories of law.[6] This process of legal interpretation *per se* problematizes distinctions between the "letter" and "spirit" of the law, on which the illegal/illicit distinction largely rests.

Second, in tax matters, the reach of the law has markedly extended into tax avoidance areas. As a consequence, the distinction between tax evasion (illegal) and tax avoidance (formerly perceived as legal) is blurring somewhat. This reflects the increased pace and breadth of regulatory reform in tax law over the past years – including under the BEPS agenda, in particular. Two major developments are worth noting in this respect: the enactment of specifically targeted anti-avoidance legislation, and the introduction of *general anti-abuse rules* (GAAR). Many jurisdictions have introduced specifically targeted laws to close regulatory loopholes and redress mismatches that provided opportunities for regulatory arbitrage and abuse; these include transfer-pricing rules, interest deductibility rules, thin capitalization rules, controlled foreign company rules, anti-hybrid rules, as well as "switch-over" rules designed to prevent "double non-taxation" of certain dividends, capital gains, and profits.[7] These rules defeat the most common methods used by companies to aggressively avoid taxes, including through artificial schemes that shift income offshore through interest payments, royalty payments, and strategic transfer pricing. Going a step further, many countries have enacted so-called "catch all" rules, typically in the form of GAARs that rule out transactions designed to avoid tax.[8] A GAAR is a "provision of last resort" that can be invoked by a tax authority "to strike down unacceptable tax avoidance practices that would otherwise comply with the terms and statutory interpretation of the ordinary tax law" (Waerzeggers and Hillier 2016, at 1). GAARs are meant to "strike down those otherwise lawful practices that are found to be carried out in a manner which undermines the intention of the tax law" (ibid.). All tax arrangements that satisfy the relevant provisions of a given tax code

[6] As regards *statutory construction and purposive interpretation*, courts generally interpret law provisions purposively. They do not apply a strict letter of the law approach, but instead read provisions in terms of the purpose of the law as a whole. By interpreting legislation purposively, the courts can disallow transactions that merely follow the letter of the law but not its intention. However, there are limits to this process. Typically, rules of legal interpretation oblige courts to stick to the wording of the legislation when assessing the objectives of the legislature. Further, the interpretation of tax statutes is not straightforward, and it may be difficult to discern a reasonably clear purpose. Beyond statutory constructs, common law jurisdictions have developed *judicial doctrines to counter tax avoidance* (judicial anti-abuse doctrines). This goes beyond the purposive interpretation of statutes. It entails judge-made rules and guiding principles that emerge from the case law. In the United States, for example, courts (and the revenue authority) turn to several doctrines to deal with tax avoidance schemes – for example, "substance over form", "sham transactions", "business purpose", "economic substance", and "step transaction" doctrines. Even where a taxpayer carefully engineers its scheme to comply with all technicalities of a particular tax statute, courts could resort to these doctrines to recharacterize the scheme or deny tax benefits. The underlying principle is that technical compliance with the law is not enough, if against the spirit of the law. Similar techniques are used in other jurisdictions to void transactions, recategorize transactions, or collapse a series of connected transactions into a single one. Finally, some civil law systems have *general theories of abuse of law* that prevent abuse. For example, Swiss law entails general "anti-avoidance rules" (Article 2 (2) *Code civil suisse*, RO 24 245) that also apply to tax law. In particular, under deeply rooted abuse of law principles, the law cannot be used for purposes contrary to that for which it was provided – i.e. no law can provide for its circumvention.

[7] Withholding taxes and exit taxes, though not technically anti-avoidance rules, also play a key role as an anti-abuse device.

[8] There are many variants in the language of GAARs. Some generally target arrangements tht have the sole or main purpose of achieving a tax advantage (for example, the GAAR enshrined in the EU amended anti-tax avoidance directive). Others more narrowly target artificial and contrived avoidance schemes that cannot be regarded as a reasonable course of action in business (for example, under the UK GAAR). An equivalent tax treaty approach is the "principal purpose test" (PPT).

yet simultaneously undermine its intention are potential targets for GAARS – thus, possibly making them unlawful. This *per se* problematizes the statement that tax avoidance is legal. Certainly, businesses will adjust and find new, more subtle forms of elusion. Targeted anti-avoidance legislation can actually create avoidance opportunities through new loopholes and mismatches, absent a general anti-abuse rule. Absent "catch all" GAAR-type rules, the regulation of tax avoidance typically engenders a "balloon effect": regulators squeeze the balloon in one place only to see it inflate elsewhere. But the law will seek to adapt, resembling a cat-and-mouse game of constant pursuit, near captures, and repeated escapes.

Third, it is important to stress that "illegality" is a complex concept that must be assessed in the context of complex, multi-layered legal settings. Public discourses tend to conflate illegality and criminality. According to this logic tax avoidance is legal, since normally it is not a crime, and thus should not invite legal sanctions. This line of reasoning is problematic, however. The notion of "illegality" not only embraces actions contravening criminal law, but also violations of civil or administrative law. To put it clearly, some actions may be unlawful even if they are not criminal. Take the example of aggressive tax optimization schemes: in the mainstream public discourse, these practices are deemed technically lawful. Yet, as discussed above, under some circumstances the tax authority has the right to challenge the tax arrangement and deny the tax advantage that the "abusive" scheme would otherwise enable. In this case, tax avoidance does not amount to a criminal tax offense. At worst, it may expose the party in question to civil penalties. Yet the counteracted scheme can be said to be technically unlawful in administrative terms, to the extent that the tax authority has the regulatory power to strike it down. It is also important to stress that "criminal" is, per se, a multi-layered and nuanced concept: most jurisdictions provide for different classifications of criminal offense – for example, crime, *délit*, and contravention in civil law countries,[9] or felony and misdemeanour in Anglo-American law. To sum up, what is commonly presented as legal or "quasi-legal" is often technically unlawful, even if the conduct only amounts to an infraction not liable to a prison sentence.

Finally, the mainstream public discourse tends to mix up two questions that should be kept conceptually distinct: the question of legality in theory, and that of whether the existing law is being *properly applied and enforced*. As discussed, in many cases, tax avoidance may be unlawful in contexts where tax law has attained a certain level of sophistication. Nevertheless, many cases go undetected and are never brought before a court. Further, when a case is litigated, there may be a degree of judgment involved in assessing what activities are "abusive" or not, raising uncertainty about the outcome of litigation. Note also that there can be many delays before a case is finally litigated, and decisions are often weakly enforced. In these circumstances, many avoidance schemes succeed "by default" in the sense that they are simply not litigated or are drawn out indefinitely (Quentin 2017). For this reason, businesses may deliberately choose risky tax positions if they have a perceived likelihood for success. This explains the mass-marketing in the UK of avoidance schemes with as little as a 50% chance of success if challenged in court (House of Commons Committee of Public Accounts 2013).[10] This risk appetite helps to explain the persistent "tax gap" between

[9] In the field of direct taxation, Switzerland's criminal tax law makes a distinction between breaches of procedural obligations (violations des obligations de procedure, LIFD Art. 181), tax evasion (*soustraction d'impôts*, LIFD Art. 175), and tax fraud (usage de faux, LIFD Art. 186). Tax fraud is a qualified form of tax evasion, which implies the use of forged or falsified documents or other deliberate acts to cheat the tax administration. It is a criminal offense punishable by a term of imprisonment up to three years or a monetary penalty. Tax evasion is a minor offense (a contravention) punishable by a fine, which can reach as much as three times the evaded tax. See *Loi federal sur l'impôt federal direc*t (LIFD) (RO 1991 1184) and Xavier Oberson 2008 and 2016.

[10] In the United Kingdom, the Committee of Public Accounts (House of Commons) held hearings in 2012 to investigate "why some multinational companies pay little corporation tax despite doing a large amount of business in the UK, and why some individuals can get away with using contrived schemes to avoid tax" (House of Commons Committee of Public Accounts 2013, at 3). The assessment found that there was no clarity over where firms drew the line between legitimate tax planning and aggressive tax avoidance, selling schemes that the firms considered would only have a 50 percent chance of being upheld in court, if challenged (House of Commons Committee of Public Accounts 2013, at pp. 5 and 7).

tax collected and due (Seely 2018),[11] not only in countries with weak governance systems, but also in countries with well-developed legal systems.

These examples highlight the need to reconsider simplified "illegal" versus "illicit" distinctions (and tax "evasion" versus tax "avoidance" distinctions) in the IFF debate. The question of what is legal, and what is not, "is a set of grey areas with many nuances and disagreements" (Shaxson 2019). In the end, it is hard to draw a line *ex ante*[12] between tax evasion and tax avoidance, or between avoidance activities that are unlawful or technically legal: the legal assessment of tax avoidance practices is a circumstantial process of interpretation and constant adjustment, in a dynamic and adaptive regulatory environment.

Two observations follow from the above.

First, what is genuinely at stake, today, is not the illegal versus illicit dilemma, but uncertainty over the *ex ante* legal characterization of tax arrangements: in a fast-moving regulatory environment, what was lawful yesterday may be unlawful today and legality is, increasingly, a matter of judicial and administrative interpretation. The shift in tax law from detailed legal drafting towards broad purposive directives such as GAARs rules may possibly exacerbate this feature of the legal system. GAARs are inherently vague and purposive, afford decision-makers more discretion than detailed rules, and may generate some uncertainty about the tax treatment of business transactions.[13]

Second, the focus on the illegal versus illicit distinction may conceal something else of critical import: capacity gaps regarding tax administration and prosecution, particularly in resource-strained jurisdictions. These gaps may lead to lack of regulation or weak legal enforcement. A narrow definition of tax-motivated IFFs that only considers the positive law applied in the assessed jurisdiction fails to consider the variability of administrative and enforcement capacity across countries. As a result, it neglects IFFs in countries with lower tax administration capacity, lower prosecution capacity, and less sophisticated legal systems (Chowla and Falcao 2016)

2.3 MOVING BEYOND "ILLEGAL" VERSUS "ILLICIT": EVOLVING LEGAL NORMS AND PRINCIPLES

These considerations show the need to move beyond simplified distinctions (illegal versus illicit) that fail to bring clarity to the debate. How, then, to move forward? A pragmatic way out is to steer a middle course between narrow and broad definitions of IFFs, as described in the following.

On the one hand, the definition of IFFs should be anchored in legal concepts, rather than ethics, in order to avoid unproductive subjective arguments over moral values. It is thus important to define the boundaries of what constitutes illicit flows according to concrete legal understandings, making reference to legal rules and legal constructs.

[11] The "tax gap" is defined as "the difference between tax that is collected and that which is 'theoretically due'" – an estimated £33 billion for 2016/17 in the UK, or 5.7% of total tax liabilities (Seely 2018, at 9).

[12] Before the tax arrangement is tested in court.

[13] A good deal of uncertainty and administrative discretion can attach to the question of whether a particular tax arrangement falls within the intended scope of GAAR. UK GAAR strike down tax arrangements that "cannot reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions" (Finance Act 2013, c. 29, Part 5, Art. 207 (2)); EU GAAR counter schemes "put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances" (Article 6, Council Directive (EU) 2016/1164 of 12 July 2016, OJ L 193, 19.7.2016, p. 1). In order to mitigate uncertainty of legal outcome, general anti-abuse rules are often associated with "pre-clearance mechanisms", whereby the taxpayer can approach the tax authority in advance and obtain a ruling as to whether particular arrangements fall under the GAAR. Case law and reliance on advisory panels to delineate abusive arrangements also reduces uncertainty.

On the other hand, the corresponding legal assessment of IFFs should be broad. First, it should move beyond "bright line" rules and also encompass legal standards and doctrines that set the terms for the legal assessment. This means emphasizing commonly shared anti-abuse principles that can be found across domestic legal systems. They can be considered *the* legal standard against which to define the contours of what constitutes IFFs for reasons of policy analysis, even in those countries where avoidance arrangements are not regulated.[14] Note that while (bright line) rules are "precise and ex ante in nature" (Casey 2017, at 1407), standards are "circumstantial and open-ended", requiring determination of the law's content only *ex post*, once the judge has made a fact-specific determination (Parisi 2004, at 510).[15] It is important to stress that both "bright line rule" and "open-ended standards" are legally binding and form part of the positive law of the state. Second, the assessed practices need not be considered illegal in all cases. There might be (rare) cases where the legal system in question is so rudimentary that it does not integrate any anti-abuse rule or principle at all, leaving avoidance practices unregulated. Yet aggressive avoidance practices still go against rules and standards established across most jurisdictions. For policy purposes, the legal definition of IFFs should refer to these widely recognized rules and norms. In other words, the legal assessment should not be confined to the positive law in force in the assessed jurisdiction: it should comparatively refer to major legal developments in other jurisdictions, and encompass international law, including human rights law.

Along these lines, for definitional purposes, "illegality" should be flexibly interpreted with reference to national or international law *and evolving anti-abuse standards*, with a view to reflecting the dynamic, evolving nature of legal processes. In tax matters, this implies considering the wealth of legal principles and statutory enactments that collectively challenge the widely held assumption that tax "avoidance" is legal while tax "evasion" is not. The previous analysis has drawn attention to lines of judicial reasoning, judicial doctrines, and statutory enactments aimed at countering abuse of law and tax avoidance. Based on this wealth of legal material, it is possible to identify general principles that are crucial to assessment of tax-motivated IFFs. In particular, GAAR provisions reject the idea that taxpayers are free to use their ingenuity to reduce their tax bills by any lawful means. Instead, they stipulate that abuse or misuse of tax laws is not a lawful course of action. Some GAARs also seek to establish the "substance over form" doctrine in tax law. A key reference norm is that of realigning taxation with economic substance and value creation. That is also the stated aim of the BEPS programme. Interestingly, this overriding BEPS principle echoes the legal doctrines of "economic substance" and "substance over form" that have long been a part of the tax law of many countries.[16] In some respects, soft law legal instruments are integrating long-standing anti-abuse principles into the "mainstream" policy discourse. In turn, these principles set norms that inform lawmaking. Such construction of "illegality" (and IFFs) tends to blur the distinction between soft and hard law. Most importantly, by referring to international standards and principles of law, it levels the playing field between countries with different regulatory and law enforcement capacity to seize and sanction tax avoidance.

[14] It remains open to question whether these anti-abuse principles, recognized in a wide range of national legal systems, amount to "general principles of law recognized by civilised nations" under Article 38 of the Statute of the International Court of Justice.

[15] Rules "bind a decision-maker to respond in a determinate way to the presence of determined triggering facts" while standards "collapse decision-making" into principled decisions that apply a law's purposes or principles to a fact situation (Sullivan 1992, at 58). In practice, there is a "continuum" between rules and standards, as rules may to varying extent integrate standard-like language (Sullivan 1992, at 61).

[16] Refer to footnote 6 above. To put it clearly, the "substance over form" doctrine makes the incident of taxation dependent on the economic "substance" rather than the legal form of a transaction. A typical example involves the debt vs. equity distinction: if an investor mischaracterizes an equity contribution (non tax-deductible) as debt (in which case the corporation may deduce interests payable on the debt), the court may recharacterize the debt as equity for tax purposes, disallowing the interest deduction.

Questions remain as to whether and how such definition of IFFs, anchored in legal concepts, can be reconciled with a "development" perspective on IFFs, which goes beyond the legal characterization of activities. This matter is discussed below.

3 DEVELOPMENT AND LEGAL PERSPECTIVES ON IFFS: BRIDGING THE GAP

A further perspective is relevant to efforts to determine what constitutes IFFs. In order to resolve the narrow/broad controversy, some observers argue for adopting a functional, purposive interpretation of IFFs. They move beyond the question "What are we measuring?", and instead emphasize the question "*Why* are we measuring?", so as to redirect attention to revenue (or, broadly, development) impacts of relevant income/wealth transfers, and away from narrow discussion of the strict illegality (or not) of such transfers. The following analysis briefly sketches the main tenets of this "development approach" to IFFs. It then seeks to "translate" some key insights from that approach into legal terms.

3.1 A "DEVELOPMENT APPROACH" TO IFFS

Under a "development approach" to IFFs, the key issue in defining IFFs is the revenue impact of the flows. More broadly, the key underlying concern is that of "the impact of illicit financial flows […] on the economic, social and political stability and development of societies" (A/RES/71/213, December 2016). Pursuant to this approach, IFFs are defined as international financial flows that have a negative net impact on sustainable development, when all their direct and indirect effects are taken into account (Blankenburg and Khan 2012, Miyandazi and Ronceray 2018). This definitional approach focuses on the revenue (or, broadly, the development) impact of transfers, rather than merely on the illegality of transfers. Its central question is that of whether or to what extent financial flows damage the development of poorer countries, irrespective of whether the flows are technically legal, illegal, or fall in a grey area.

The "development impact" approach bears two key corollaries.

On the one hand, a development-focused definition of IFFs encompasses transactions that, although technically lawful (until proven unlawful), have adverse revenue impacts on developing countries. This also covers "legitimate" tax planning schemes by multinational enterprises that shift profits out of developing countries. It has been estimated, in this respect, that profit shifting – whether technically unlawful or lawful – leads to annual revenue losses of USD 100–600 billion (refer to the literature review by Cobham and Janský 2017 and 2018). From a development perspective, all profit-shifting activities erode the tax base of developing countries and should accordingly constitute IFFs, irrespective of whether they amount to aggressive tax avoidance or legitimate tax planning.

On the other hand, the development definition of IFFs excludes flows that, although technically unlawful, have no negative net impacts on sustainable development (Miyandazi and Ronceray 2018). It has been observed, in this respect, that rule-violating transactions are not all equally harmful (Blankenburg and Khan 2012, OECD 2018). For example, informal value transfers are especially important in countries where the formal banking system is too expensive for the poor. Transactions conducted through these informal systems of money transfer do not fit under a development definition of IFF, even if illegal under domestic law (Erikkson 2017). Similarly, unreported artisanal mining may feature a high degree of subsistence-level criminal activity: it provides income for ordinary people lacking credible alternative livelihoods, and the profits may be reinvested in the local economy (OECD 2018). One step further, some authors argue that

corruption-related IFFs also require nuanced distinctions. They observe that, for example, bribes meant to bypass unproductive red tape may enable economic activities, even if they undermine the rule of law (Miyandazi and Ronceray 2018; see also Khan and Andreoni 2018). In specific cases, some scholars acknowledge, it is also possible to identify exceptions to the general harmful nature of tax abuses: for example, profit shifting to avoid illegitimate expropriation by a predatory regime in a fragile state may undermine the tax base, but also make investment viable (Blankenburg and Khan 2012, Khan and Andreoni 2018, Miyandazi and Ronceray 2018). Overall, the point is made that IFFs may be driven by "inappropriate or contradictory formal rules, or low capabilities of firms in developing countries" (Khan and Andreoni 2018). IFFs thus reflect structural drivers that cannot be changed in the short-to-medium term without hurting the local economy or social set up. Tackling or diminishing these flows could provide difficult and the development impact may be negative in the short to mid-term.

The "development approach" contributes a useful policy orientation to the debate by drawing a distinguishing line between harmful and non-harmful patterns of conduct under the IFF agenda. Yet it also introduces a new layer of complexity that risks making the assessment of IFFs blurred and indistinct. In particular, a purposive definition of IFF based on the revenue impact of the flows would extend the concept of IFFs to all practices that may erode developing countries' tax base or otherwise result in a loss of income. The reach of the IFF agenda would expand to include such issues as business tax incentives, contract and price unfairness, and the allocation of taxing rights under double-tax agreements.[17] Eventually, a development definition of IFFs has merits as it adds policy relevance to the debate. Yet it further blurs the connection with illegality, raising the question of how to reconcile "development" and "legal" perspectives on IFFs.

3.2 LEGAL "TRANSLATIONS"

In order to reconcile development and legal views of IFFs, it is useful to explore how to translate some of the insights from the "development approach" into legal terms. The objective is to enrich the legal debate on IFFs, while keeping the definition of IFFs firmly anchored to legal concepts.

Overall, the development approach encourages moving beyond formalistic, static conceptions of IFFs and towards more purposive interpretations, linking IFFs to efforts to mobilize domestic resources for development. More precisely, it firmly embeds the IFF agenda in the "sustainable development" agenda, in particular to the 2030 Agenda for Sustainable Development and the SDGs[18] as well as the Addis Ababa Action Agenda (AAAA).[19] These agendas explicitly anchor IFFs in domestic resource-mobilization efforts. The political commitments enshrined in the 2030 Agenda and the AAAA are legally significant as "soft law". They assist in interpreting existing rules and contribute to the gradual formation of new rules through the political lawmaking process.

Such embedding of the IFF debate in the sustainable development framework has concrete legal implications, in at least two respects. First, it implies some *shift from clearly defined ("bright line") rules to standards, and from categorization to complex balancing tests* (section 3.2.1). Second, it leads to a focus

[17] Note that the revenue impact of these practices is not straightforward. For example, tax incentives may erode a country's tax base, but also attract additional investment: the net revenue impacts should be assessed on a case-by-case basis (Matteotti 2018).
[18] United Nations Sustainable Development Summit, New York, 25–27 September 2015, *Transforming Our World: The 2030 Agenda for Sustainable Development*, UN GA Res. 70/1 (*adopted* on 25 September 2015), downloadable at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1.
[19] Third International Conference on Financing for Development, Monterrey, N.L., Mexico, 8-22 March 2002, *Addis Ababa Action Agenda*, UN GA Res. 69/313 (*adopted* on 27 July 2015), downloadable at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/69/313&Lang=E
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on *outcome and impact assessments* that go beyond legal formalisms (section 3.2.2). These developments and their concrete implications are discussed below with specific reference to IFFs.

3.2.1 From "Bright Line" Rules to Complex Balancing Tests

What does a shift from bright-line rules (categorization) to standards (balancing tests) mean, and how does it apply to the legal assessment of what counts as IFFs?

As mentioned, bright-line rules are clearly defined rules about what is permissible or not, leaving little room for varying interpretation. Standards are imprecise and circumstantial and require determination of the legal outcome based on principled decisions. The rules/standards distinction echoes the distinction between legal "categorization" and "balancing": categorization is rule-like, while balancing corresponds to standards (Sullivan 1992, at 59). More precisely, categorization is "taxonomic": it sets bright-line boundaries and classifies facts as falling on one side or the other (Sullivan 1992, at 59). Balancing tests, by contrast, require weighing and balancing multiple factors in a legal case, and the legal outcome depends on how the judge balances competing normative interests. Open-textured standards and balancing invite "particularization" in the application of the law, allowing exceptions to be made when individual circumstances appear to call for them.[20] Further, they call for "systemic law interpretation and systemic lawmaking" (Bürgi Bonanomi 2015b, at 29, Bürgi Bonanomi 2015a). "Systemic law interpretation" implies open-textured rules interpreted systematically by reference to other legal regimes relevant in the context (ibid.). Systemic lawmaking requires "lawmaking procedures that are shaped by the 'duty to include', the 'duty to structure and weigh', and the 'duty to develop optimal options'" (Bürgi Bonanomi 2015b, at 29).[21] The quest is for regulatory coherence and convergence, beyond legal fragmentation (Bürgi Bonanomi 2015b, at 29–30).

With specific reference to IFFs, the balancing of competing rights or interests may lead to authorizing otherwise unlawful conduct. It leads to qualifying and/or narrowing the scope of IFFs, with an eye to the underlying factual circumstances or competing policies at stake. Complex balancing tests have already begun informing legal assessments of what counts as "illegal". This may be seen regarding rule-violating activities that provide income for poor people that lack credible alternative livelihoods – for example, illegal harvesting, unrecorded artisanal mining, informal cross-border trade, and informal value transfers. In the judicial assessment of these practices, the need to satisfy basic needs may be considered an attenuating circumstance that lessens the severity of a crime and results in reduced charges. Assessment may entail "criminal law defences of necessity or duress", whereby external constraints that compel a defendant to transgress the law "lessen or extinguish culpability" (Gilman 2013, at 498, The Law Reform Commission 2006). Going further, the "right to life" may be asserted, for example, to justify poaching or illegal resource extraction (and associated trade) by impoverished peasants in contexts of extreme duress. Indeed, from a human rights perspective, access to the basic conditions necessary to sustain life is a human right.[22] It translates into the "right to life", inextricably linked to the right to food, as protected by international and regional treaties, customary international law, and domestic legal systems (A/72/335, para. 14). Balancing

[20] Such "particularization" of the law is rooted in equitable constructs. On the role of equity "as a basis for 'individualised' justice tempering the rigours of strict law", Schachter 1982, at 74. See also Schwarzenberger 1966, Cottier 2015 and, for an application to international trade law, Musselli 2016.

[21] This results from the fact that "sustainable development policies are generally located 'somewhere in between'", and prompt questions as to the substantive coherence of legal regimes (Bürgi Bonanomi 2015b, at 30).

[22] Article 6(1) of the International Covenant on Civil and Political Rights states that "[e]very human being has the inherent right to life". The right to life is inextricably linked to the rights guaranteed by the International Covenant on Economic, Social and Cultural Rights, such as the right to the right to food, the right to shelter, or the right to water

is here a matter of enforcing domestic laws in ways that do not compromise the human rights obligations of states.[23]

The balancing of competing rights and interests may also serve to expand the legal scope of IFFs beyond its current reach. As regards tax-motivated IFFs, sustainability concerns encourage examination of adverse "spillover effects" of a country's tax regime on other countries. Spillovers refer to "the impact that one jurisdiction's tax rules or practices has on others" (IMF 2014, at 12). Concerns arise, in particular, when jurisdictions with attractive tax regimes divert taxable income from other countries, affecting the ability of tax administrations in more fragile states to raise revenue needed for sustainable development. Translated into legal terms, the tax spillover debate requires the weighing of competing rights and obligations under international law. On the one hand, under deeply entrenched fiscal sovereignty principles, states are free to tax corporations as they wish – this is a matter of domestic concern. On the other, states have extraterritorial obligations in the area of economic, social, and cultural rights (ETO Consortium 2013). In particular, countries whose internal tax policies have adverse livelihood impacts on other countries may stand in breach of their duty of international cooperation and assistance (for a review, see Lusiani and Cosgrove 2017).[24] Under human rights law, unaddressed tax spillovers may breach governments' obligations to refrain from conduct that impairs the enjoyment of human rights abroad (International Bar Association 2013, Lusiani and Cosgrove 2017). As of today, the balance has been struck in favour of the tax sovereignty of the enacting state: in the dominant policy discourse, financial flows driven by tax competition and legitimate tax-planning schemes do not count as illicit, whatever their development impacts, since tax rates and incentives are largely perceived as a matter of fiscal sovereignty. It remains possible that the balance may tilt towards an equitability focus, driven by sustainability concerns, in the future.[25] Much depends on the legal weight that decision-makers and judges give to international human rights obligations, particularly with respect to economic, social, and cultural rights.

To sum up, embedding the IFF debate in the sustainable development framework increases the need to weigh and balance multiple factors when assessing what counts as illicit flows. The integration of sustainability concerns in the legal definition of IFFs encourages evaluation of socio-economic circumstances that may excuse otherwise wrongful conduct – 'particularization' in the application of the law. Further, it calls for "systemic" interpretation and "systemic" lawmaking, making reference to other relevant legal regimes, for example by importing human rights claims into tax law.

3.2.2 From Form to Substance

Going further, integration of sustainability concerns into the law – and the related shift from rules to standards, and from categorization to balancing – has ramifications for the type of legal reasoning involved. It calls for a less formalist, technically-oriented conception of the law, an instead favours more "substantive" legal reasoning. "Formal law" insulates the law from other social fields; it structures the law according to

[23] When a state has ratified the relevant human rights instruments, its Courts may upheld human rights as excuses for otherwise wrongful acts, to the extent that judges are required to enforce domestic laws in ways that do not encroach on a state's obligation to respect human rights.

[24] In particular, countries whose tax policies have adverse livelihood impacts on other countries may stand in breach of their duty of international cooperation and assistance, as enshrined in the UN Charter (Articles 55 and 56), the Universal Declaration of Human Rights (Article 28), the Convention on the Rights of Persons with Disabilities (Article 3), the Convention on the Rights of the Child (and Articles 4, 24(4) and 28(3)), and the International Covenant on Economic, Social and Cultural Rights (Articles 2(1) and 11(1)) (Luisiani and Cosgrove, 2019).

[25] Some developments move in this direction. Interestingly, the 2015 AAAA includes a commitment by member states "to assess the impact of their policies on sustainable development" and Article 208(1) of the Lisbon Treaty obliges EU Members to take development objectives into account in the implementation of sectoral policies. A growing number of experts argue that countries have a duty under international law to assess and redress the potential extraterritorial impacts of their laws, policies, and practices (ETO Consortium 2013, at 7 (Principle 14)).

standards of "analytical conceptuality, deductive stringency, and rule-oriented reasoning."[26] A more substantive style of legal reasoning places more emphasis on the ends pursued by lawmakers and on "the substantive justice of the outcome" (Craig 1997, at 6).

This change is more profound than it may first appear. It leads to assessing the legality of a course of action in light of the fairness of its outcomes. It requires "policy instruments for integrative lawmaking, such as "sustainability impact assessments" (Bürgi Bonanomi 2015b, at 30). It also "modulates" regulatory responses on the basis of varying socio-economic conditions, for example, by specifying impact thresholds that trigger a state's responsibility (Musselli 2016). Under this approach, the law will increasingly take into account distributive dynamics and outcomes in determining what constitutes illicit flows, to some extent collapsing legal assessments into social and economic impact assessments. To some extent, such an approach bridges legal and economic understandings of IFFs, favouring a broad and pragmatic treatment of IFF problematics, as discussed below.

4 UNPACKING THE IFF AGENDA? A PRAGMATIC APPROACH

Maintaining a broad definition of IFFs anchored in law ultimately requires taking a pragmatic approach when it comes to corresponding measurement of IFFs, research, and policymaking. The key question, addressed below, is how to "unpack" the resulting IFF work programme, without unravelling the whole IFF agenda.

4.1 UNPACKING VERSUS BROAD DEFINITION

Some observers question the policy relevance of an all-inclusive IFF agenda. They recommend breaking down IFFs into discrete categories and treating them separately, rather than developing an agenda that treats them as a single phenomenon. For advocacy purposes, it has arguably been useful to aggregate bribery, tax evasion, corporate profit-shifting, currency regulation evasion, criminal enterprises and earnings, etc. under a single umbrella. However, for policy and research purposes, it is likely better to disaggregate (Reuter 2017).

Indeed, there is a need to add "granularity" to the analysis of IFFs, since emphasis on aggregates tends to conceal key differences in terms of underlying economic and legal dimensions. It is important to disentangle the various dimensions of the phenomenon and isolate key variables, including: (1) the *sources of the proceeds* – whether bribes, tax evasion or avoidance, corruption, currency regulation evasion, sanctions busting, earnings from criminal enterprises; (2) the *various actors involved* – corporate groups or physical persons, public officials or private persons; the (3) different *push and pull drivers* that motivate IFFs, including tax differentials, currency controls, or secrecy provisions; (4) the *geography of IFFs*, from source to recipient countries through transit countries; (5) the *channels* though which illicit funds flow, ranging from simple smuggling to elaborate trade-based money laundering techniques. A circumstantial assessment of these facts is needed to appreciate the governance challenges involved in trying to curb IFFs.

At the same time, the broader notion of IFFs remains useful for policy and research purposes, leaving aside advocacy aims. There are at least three sets of arguments that can be made for a broad IFF agenda. First, a single IFF agenda helps to improve regulatory coordination, between and within countries, across a spectrum of interventions. An agenda that treats IFFs as a single phenomenon encourages moving forward in a synchronized manner on multiple fronts. It counters the tendency, inherent in legal specialism, towards

[26] Teubner 1983, at 256.

fragmentation and duplication. Government actions to tackle the components of IFFs require coordinated responses across different administrations, including revenue authorities, banking supervisors, financial intelligence units, customs agencies, and law-enforcement agencies. An integrated agenda highlights the operational interconnectedness of different specialist areas of law that tend to operate in silos: money laundering and banking prudential requirements, anti-bribery laws, customs law and enforcement, reporting and due diligence requirements, including professional standards for corporate service providers, and multiple exchange of information and transparency requirements.[27] This holistic approach is necessary to properly address avoidance practices by businesses: specifically targeted interventions will just spur new schemes to circumvent them (the "balloon effect"); an integrated package of coordinated policy interventions could eventually burst the balloon.

Second, IFFs differ, but they tend to use similar techniques and facilities: abusive offshore structures and devices, secrecy systems, and a host of facilitators, including the legal profession (Cobham and Janský 2017, Picciotto 2018a and 2018b). A single IFF agenda can converge and heighten regulatory attention on these "nerve centres" of the IFF architecture. Regulatory efforts directed at these hotspots would likely have multiplier effects across the whole spectrum of IFFs, since offshore structures, secrecy jurisdictions, and facilitators cater to different IFFs simultaneously: they are used to conceal or launder the proceeds of corruption or earnings from criminal enterprises, and they facilitate tax-avoidance schemes (Picciotto 2018a and 2018b).

Third, the IFF agenda informs other discourses, leading to cross-fertilization and mutual reinforcement of public narratives and work programmes. For example, there are "distinct areas of direct overlap" between the Domestic Resource Mobilization (DRM) agenda and the IFF agenda (World Bank 2017). Further, the IFF agenda serves to inform and deepen the emerging debate on Sustainable Finance (SSF). Overall, DRM and IFFs, as well as SSF and IFFs, are interlinked at critical junctures in current development discourses. These different strands of work can work together to support comprehensive reform strategies. Cutting off one part of the discourse would weaken the whole fabric.

These considerations encourage use of a broad, but pragmatic agenda, as outlined below.

4.2 A BROAD, BUT PRAGMATIC AGENDA

The arguments outlined above highlight the usefulness of maintaining a broad, flexible definition of IFFs, within a unified agenda. This brings us back to the initial question: how can we add "granularity" and operational significance to the IFF work programme, without unravelling the whole IFF agenda? The recommended strategy is that of keeping a broad, flexible definition of IFFs, and customizing it as needed for specific analytical or policy purposes (section 4.2.1). At the same time, the need for a pragmatic approach necessitates breaking down the IFF agenda into workable modules and corresponding indicators (section 4.2.2).

4.2.1 A Broad Definition of IFFs, but Anchored in Law

As discussed earlier, the definition of IFFs must be anchored in law, rather than (solely) ethics, in order to establish more precise, objective contours regarding what counts as "illicit flows". Accordingly, IFFs should explicitly refer to cross-border transfers of money or assets *connected with some illegal activity*. Yet, as discussed, illegality should be broadly interpreted. First, legal assessment should extend to legal standards and doctrines, going beyond bright-line rules. Further, it should not be confined to the positive

[27] These latter include, for example, exchange of information between tax authorities, whether automatic or on request; disclosure of tax avoidance schemes and exchange of advance tax rulings; country-by-country reporting; and the development of beneficial ownership registries.

law in force in the assessed jurisdiction; it should also refer to rules and legal principles that have attracted wide international recognition. Note also that legal assessments will increasingly integrate sustainability concerns in the definition of what counts as "illicit" when embedding the IFF agenda in the sustainable development framework. Altogether, these qualifications invite a shift in emphasis from legal categorization to complex balancing tests; and from legal formality to anti-formalist, substantive legal approaches.

Qualified in this way, the definition of IFFs can accommodate different and competing definitional approaches and work streams in the IFF arena. Definitional details should not attract too much attention when discussing a broad IFF policy agenda. Note that other major reform packages, such as the BEPS programme, lack clear definition of relevant concepts. Countries did not need to agree on the definition of "value creation" to endorse the BEPS standards. The definitional uncertainty surrounding the term did not prevent the adoption of specific practical actions. The same type of "constructive ambiguity" should play a role in the IFF definitional debate. Nevertheless, the meaning of the definition can still be specified and eventually narrowed for specific policy or analytical purposes, as discussed below.

4.2.2 Adding Granularity to the Definition for Measurement, Research, and Policymaking Purposes

For specific policy and research purposes, it is necessary to add granularity to the definition, spelling out what is or is not within scope in terms of actors, transfer mechanisms, or origin. This "scoping" process is largely discretionary: drawing a line between what is in scope and what is out of scope is necessarily a subjective exercise, framed by considerations of methodological convenience and political sensitivity. Eventually, different stakeholders may use different working definitions of IFFs, tailored to specific analytical or policy purposes, yet remaining under a shared umbrella definition. Working definitions are customized; they come with a policy agenda attached to them (Miyandazi and Ronceray 2018). But that is hardly contentious, as long as stakeholders are conscious of, and explicit about the methodological choices and policy objectives that frame the scoping of their definition.

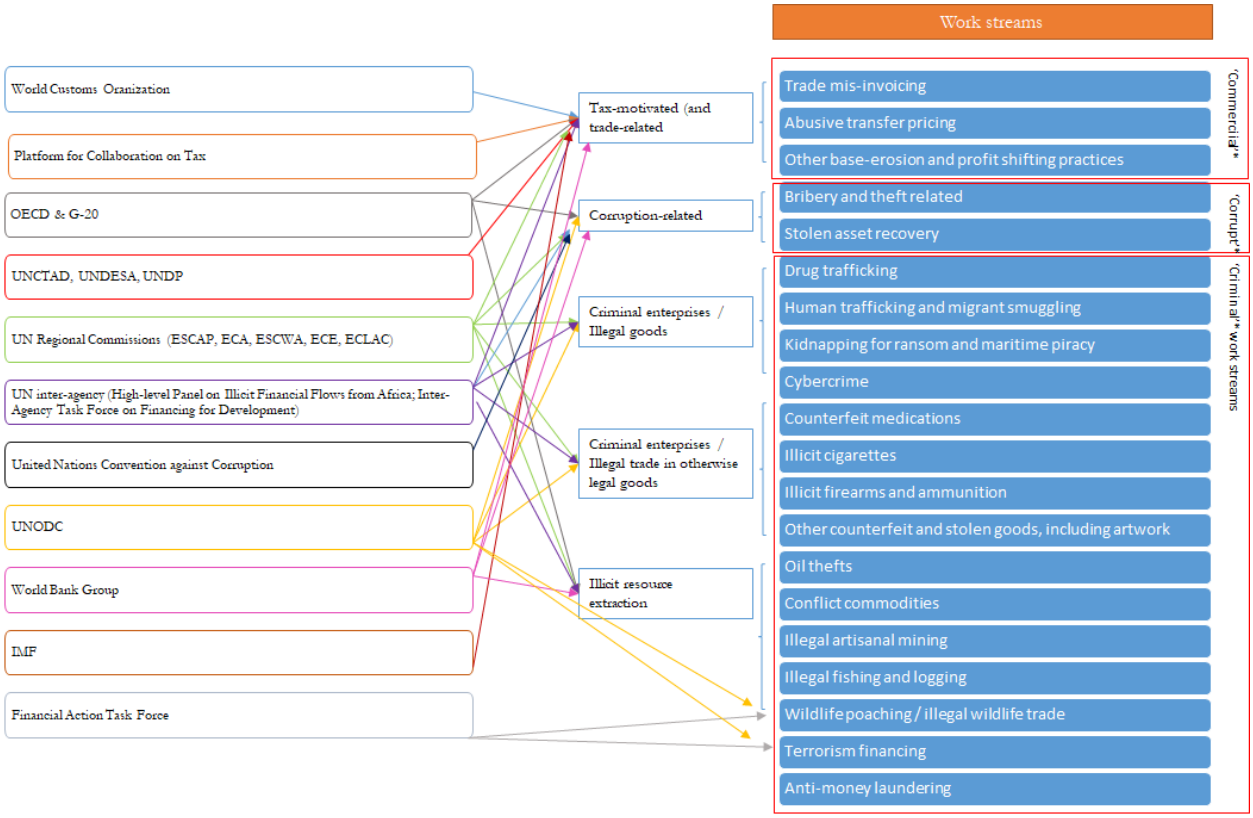
Some degree of pragmatism must also play a role when breaking down IFFs into workable "thematic" modules, or into a taxonomy suitable and distinctive enough for measurement, particularly with reference to SDG indicators. This involves subdividing the existing indicator for IFFs described the SDGs (Indicator 16.4.1 "Total value of inward and outward illicit financial flows, in current United States dollars"), which aggregates all IFF into different sub-indicators.[28] As acknowledged by the UN constituency, "separate analysis of channels or components is more beneficial in designing policy responses to prevent illicit flows" (A/RES/72/207).

Here, it is important not to start from scratch, but rather to build on existing operational work streams. In other words, the taxonomy/categorization exercise should move backward from what exists, in terms of work streams and institutional frameworks in the UN system and in related fora (Figure 1). These work streams include, among others, the Stolen Asset Recovery Initiative, the Conference of the States Parties to the United Nations Convention against Corruption, UNODC-related thematic areas, operational frameworks on countering money-laundering and the financing of terrorism. The starting point should be a stocktaking of existing IFF-related work streams which enjoy a high degree of legitimacy, conducive to an

[28] Splitting the SDG indicator into different sub-indicators may amount to a refinement or a revision, depending on whether small or substantive changes are involved. While refinements of SDG indicators do not require formal adoption by the United Nations Statistical Commission (UNSC), revisions will be considered twice, in March 2020 and in March 2025, for formal adoption by the UNSC after global consultation. Different indicators should capture different types of IFFs, by component and channel. Some even argue for "modularity" of IFF indicators, so as to factor in the context-specific revenue and development impacts of IFFs, and for "politically actionable indicators", allowing for targeted anti-IFFs strategies in specific local contexts (Khan and Andreoni 2018).

exhaustive inventory of IFF-related thematic areas, with a mapping of the responsible agencies (see Miyandazi and Ronceray 2018). The IFF agenda may then build on these thematic areas, spurring strategic alignment and close collaboration between task teams across agencies with distinct client engagement (IMF, World Bank, OECD, and several UN and UN-affiliated agencies).

Figure 1: IFFs – Main action areas



Source: Authors' elaboration. For an in-depth review of initiatives targeting IFFs at the African and EU level, refer to Miyandazi and Ronceray (2018). Note*: The mainstream public discourse identifies three broad types of IFFs: commercial, criminal, and corrupt. In practice, the three categories overlap and intertwine.

Likewise, when establishing or fine-tuning IFF indicators, it is important to consider existing data sources, and structure indicators in a way that informs and guides policy reform. Specifically, the analysis should consider regulatory developments in the area of tax transparency, and the establishment of multiple transparency and exchange-of-information frameworks for tax purposes. These disclosure frameworks generate newly available data and enable more precise measurement of particular aspects of illicit flows. For example, automatic exchange procedures in tax matters[29] generate data on offshore tax evasion. As discussed by Cobham and Janský, this data can be used to create a specific "undeclared offshore assets indicator".[30] Furthermore, disclosure laws on payments to governments, disclosure of tax avoidance schemes and exchange of advance tax rulings, country-by-country reporting, and the development of beneficial ownership registries shed light on relatively opaque practices. The OECD country-by-country

[29] This refers to the Standard for Automatic Exchange of Financial Account Information, developed by the OECD with G20 countries.

[30] Defined as "the excess of the value of citizens' assets declared by participating jurisdictions under the OECD Common Reporting Standard (CRS), over the value declared by citizens themselves for tax purposes to their tax authorities" (Cobham and Janský 2018)

reporting data, in particular, may be used to construct an indicator of misaligned profits.[31] It is worth considering to what extent national authorities may build on these transparency frameworks and procedures to feed such indicators (Musselli and Bürgi Bonanomi 2019). The analysis will need to consider built-in limits to this use: stringent standards on confidentiality, data safeguards, and proper use of the information that strike a suitable normative balance between transparency concerns and taxpayers' rights.

5 CONCLUSIONS

A broad IFF agenda is a powerful engine for systemic change. It counters the tendency, inherent in legal specialism, towards fragmentation and duplication; fosters regulatory coordination across a range of interventions; and promotes policy interventions that have multiplier effects across the whole spectrum of IFFs.

The "umbrella" definition of IFFs should be anchored in law, rather than ethics, so as to give precise and objective contours to what constitutes "illicit flows". The definition of IFFs as *cross-border transfers of money or assets connected with some illegal activity* can be retained as the "common denominator definition". It provides an umbrella definition for separate work streams corresponding to individual IFF sub-components.

Under the "umbrella" definition, "illegality" should be flexibly interpreted with reference to national or international law, including human rights law. It should expand to encompass legal standards that go beyond bright-line rules, allowing scope for principled decisions, balancing tests, and circumstantial assessment. Further, the legal assessment should not be confined to the positive law in force in the assessed jurisdiction: it should comparatively refer to legal developments in other jurisdictions and under international law. By benchmarking illegality against legal standards that have attracted wide international acceptance, the IFF debate would remain anchored in law. At the same time, it would integrate evolving elements and level the playing field across countries with different lawmaking and law-enforcement capacity. If "illegality" is constructed in this way, flows associated with aggressive tax avoidance may be deemed illegal and fall within the scope of the IFF agenda.

A development or revenue-impact approach offers a useful policy orientation to the IFF debate. Embedded in the sustainable development agenda, it assists in drawing a line between licit and illicit financial flows while incorporating an "impact perspective". It is compatible and can be reconciled with a legal definition of IFFs that fully acknowledges the role of standards and balancing in lawmaking and law implementation. The integration of sustainability concerns calls for a shift from taxonomic rules to circumstantial legal standards, from categorization to balancing, and from formalism to non-formalist legal approaches.

For specific policy and research purposes, it is still necessary to add granularity to the legal definition of IFFs, by spelling out what is or is not within scope in terms of actors, transfer mechanisms, or origin. The process is necessarily discretionary, in particular for reasons of methodological convenience and political sensitivity. It is imperative to spell out methodological constraints that dictate definitional choices, alongside the policy implications that each working definition carries.

A pragmatic approach should inform the disaggregation of IFFs agenda into workable modules and corresponding indicators. The starting point should be a stocktaking of existing IFF-related international initiatives (and/or initiatives with a high degree of legitimacy) conducive to an exhaustive inventory of IFF-related thematic areas, with a mapping of the responsible agencies. The IFF agenda may build on these

[31] Calculated as "the total excess profits declared in jurisdictions with a greater share of profits than would be aligned with their share of economic activity" (Cobham and Janský 2018)

thematic areas, spurring strategic alignment and close collaboration between task teams across agencies with distinct client engagement. The SDG indicator on IFFs should be divided into sub-indicators. To the extent possible, this should be understood as an effort to refine the indicator, rather than revise it, in order to avoid time-consuming consensus-building procedures. When refining IFF indicators, it is important to conform to established concepts and standards from economics and accounting. It is also important to consider the potential of new disclosure frameworks (AEOI, CbCR, etc.). These frameworks generate new data that may enable precise measurement of particular aspects of illicit flows. However, there are built-in limits to use of such data, including stringent standards on confidentiality, data safeguarding, and proper use of information.

6 REFERENCES

Blankenburg, Stephanie, and Mushtaq Khan. 2012. "Governance and Illicit Flows." In *Draining Development? Controlling Flows of Illicit Funds from Developing Countries*, edited by Peter Reuter, 21–68. Washington, DC: The World Bank.

Bürgi Bonanomi, Elisabeth. 2015a. *Sustainable Development in International Law Making and Trade: International Food Governance and Trade in Agriculture*. Cheltenham, UK; Northampton MA, USA: Edward Elgar Publishing.

———. 2015b. "Sustainable Investment in Land in the Global South: What Would It Require from a Coherence Perspective? The Case of Sierra Leone." *QIL-Questions of International Law* 21: 17–37.

Casey, Anthony Joseph, and Anthony Niblett. 2017. "The Death of Rules and Standards." *Indiana Law Journal* 92 (4): 1401–47.

Chowla, Peter, and Tatiana Falcao. 2016. "Illicit Financial Flows: Concepts and Scope." Working Paper Series. Inter-Agency Task Force on Financing for Development.

Cobham, Alex, and Petr Janský. 2017. "Illicit Financial Flows: An Overview." Background paper for the International Group of Experts on Financing for Development. http://unctad.org/meetings/en/SessionalDocuments/tdb_efd1_bp_CJ_en.pdf.

———. 2018. "Approach to Studying and Measuring Tax-Related IFFs." presented at the UNCTAD, UNECA, UNODC - Expert Meeting on Statistical Methodologies for Measuring Illicit Financial Flows, Geneva, June 20.

Cottier, Thomas. 2015. *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law*. Camrbidge: Cambridge University Press.

Craig, Paul. 1997. "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework." *Public Law* 3: 467–87.

Devereux, Michael P., Judith Freedman, and John Vella. 2012. "Tax Avoidance." Oxford: Oxford University Centre for Business Taxation.

Erikkson, Frederik. 2017. "Illicit Financial Flows Definitions: Crucial Questions." U4 Anti-Corruption Research Centre. October 5, 2017. https://medium.com/u4-anti-corruption-resource-centre/iff-definitions-3f3d0ba106c3.

ETO Consortium. 2013. "Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights." Heidelberg, Germany. https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23.

European Commission. 2012. "Commission Recommendation of 6 December 2012 on Aggressive Tax Planning." 2012/772/EU.

———. 2015. "Study on Aggressive Tax Planning and Indicators." Working Paper 61. Taxation Papers.

———. 2017. "Aggressive Tax Planning Indicators: Final Report." Working Paper 71. Taxation Papers. European Commission.

Forstater, Maya. 2016. "Illicit Flows and Trade Misinvoicing: Are We Looking under the Wrong Lamppost?" 5. CMI Insight. Chr. Michelsen Institute. https://www.cmi.no/publications/5979-illicit-flows-and-trade-misinvoicing.

———. 2018a. "Illicit Financial Flows, Trade Misinvoicing, and Multinational Tax Avoidance: The Same or Different?" CGD Policy Paper 123. Center for Global Development. https://www.cgdev.org/publication/illicit-financial-flows-trade-misinvoicing-and-multinational-tax-avoidance.

———. 2018b. "Why Illicit Financial Flows and Multinational Tax Avoidance Are Not the Same Thing." ICTD, Institue for Development Studies. May 10, 2018. http://www.ictd.ac/blog/why-illicit-financial-flows-and-multinational-tax-avoidance-are-not-the-same-thing/.

Freedman, Judith. 2004. "Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle." *British Tax Review* 4: 332–357.

Gilman, Michele E. 2013. “The Poverty Defense.” *University of Richmond Law Review* 47: 495–553.
Global Financial Integrity. 2017. “Illicit Financial Flows to and from Developing Countries: 2005-2014.” Global Financial Integrity. http://www.gfintegrity.org/report/illicit-financial-flows-to-and-from-developing-countries-2005-2014/.
High Level Panel on Illicit Financial Flows from Africa. 2015. “Track It! Stop It! Get It! Report of the High Level Panel on Illicit Financial Flows from Africa.” AUC/ECA.
HM Treasury. 2015. “Tackling Tax Evasion and Avoidance.” Cm 9047. London, UK.
House of Commons Committee of Public Accounts. 2013. “Tax Avoidance: The Role of Large Accountancy Firms.” Forty-fourth Report of Session 2012–13. London, UK: UK Parliament House of Commons.
IMF. 2014. “Spillovers in International Corporate Taxation.” IMF Policy Paper. Washington, D.C.: IMF. https://www.imf.org/external/np/pp/eng/2014/050914.pdf.
Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights. 2016. “Final Study on Illicit Financial Flows, Human Rights and the 2030 Agenda for Sustainable Development.” A/HRC/31/61.
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.” London: International Bar Association.
Khan, Mushtaq, and Antonio Andreoni. 2018. “Corruption and Illicit Financial Flows.” presented at the UNCTAD, UNECA, UNODC - Expert Meeting on Statistical Methodologies for Measuring Illicit Financial Flows, Geneva, June 20.
Lusiani, Nicholas, and Mary Cosgrove. 2019. “A Strange Alchemy: Embedding Human Rights in Tax Policy Spillover Assessments.” In *Tax, Inequality, and Human Rights*, edited by Philip G Alston and Nikki R Reisch.
Matteotti, René. 2018. “Integration of Developing Countries into Swiss Policy for Implementing the AEI and the BEPS Measures: Challenges and Fields of Action.” Zurich.
Mehrotra, Rahul. 2018. “Trade-Related Illicit Financial Flows: Conceptual Framework and Empirical Methods.” R4D-IFF-WP01-2018. R4D-IFF Working Paper Series.
Miyandazi, Luckystar, and Martin Ronceray. 2018. “Understanding Illicit Financial Flows and Efforts to Combat Them in Europe and Africa.” Discussion paper 227. ECDPM. http://ecdpm.org/publications/illicit-financial-flows-europe-africa/.
Musselli, Irene. 2017. *Agriculture, Price Stabilisation and Trade Rules: A Principled Approach*. Brill Nijhoff. https://brill.com/view/title/35167.
Musselli, Irene, and Elisabeth Bürgi Bonanomi. 2019. “Curbing Illicit Financial Flows in Commodity Trading: Tax Transparency.” R4D-IFF Working Paper Series, R4D-IFF-WP07-2019.
Oats, Lynne, and Penelope Tuck. 2019. “Corporate Tax Avoidance: Is Tax Transparency the Solution?” *Accounting and Business Research* 49 (5): 565–83.
Oberson, Xavier. 2008. “Revising the Tax Laws: Pandora’s Box.” *La Lettre*, no. 34: 1–8.
———. 2016. “La Fraude, Un Univers plus Dangereux.” *Bilan (Online)*. http://www.bilan.ch/xavier-oberson/fraude-un-univers-plus-dangereux.
OECD. 2014. *Illicit Financial Flows from Developing Countries: Measuring OECD Responses*. Paris: OECD Publishing. http://dx.doi.org/10.1787/9789264203501-en.
———. 2018. *Illicit Financial Flows: The Economy of Illicit Trade in West Africa*. Paris: OECD Publishing. https://doi.org/10.1787/9789264268418-en.
Parisi, Francesco. 2004. “Rules Versus Standards.” In *The Encyclopedia of Public Choice*, edited by Charles Rowley and Friedrich Schneider. Boston, MA: Springer.
Picciotto, Sol. 2018a. “Illicit Financial Flows and the Tax Haven and Offshore Secrecy System.” Tax Justice Network. February 8, 2018. https://www.taxjustice.net/2018/02/08/illicit-financial-flows-tax-haven-offshore-secrecy-system/.
———. 2018b. “Why Tax Avoidance Is Illicit.” ICTD, Institute for Development Studies. May 10, 2018. http://www.ictd.ac/blog/why-tax-avoidance-is-illicit/.

Quentin, David. 2017. “Risk-Mining the Public Exchequer.” *Journal of Tax Administration* 3 (2): 22–35.
Reuter, Peter. 2017. “Illicit Financial Flows and Governance: The Importance of Disaggregation.” Background paper prepared for the World Development Report 2017. The World Bank. http://pubdocs.worldbank.org/en/677011485539750208/WDR17-BP-Illicit-Financial-Flows.pdf.
Shaxson, Nicholas. 2019. “No, Corporate Tax Avoidance Is Not Legal.” FT Alphaville - Guest Post 16 May 2019.
Schwarzenberger, George. 1966. “The Principles and Standards of International Economic Law.” *Collected Courses of the Hague Academy of International Law* 117.
Seely, Antony. 2018. “Tax Avoidance: Recent Developments.” Commons Library Briefing 7948. London, UK: UK Parliament House of Commons.
Sullivan, Kathleen M. 1991. “The Supreme Court, 1991 Term -- Foreword: The Justices of Rules and Standards.” *Harvard Law Review* 106: 22–123.
Teubner, Gunther. 1983. “Substantive and Reflexive Elements in Modern Law.” *Law & Society Review* 17 (2): 239–85.
The Law Reform Commission. 2006. “Consultation Paper. Duress and Necessity.” LRCCP 39-2006. Dublin, Ireland.
UNCTAD. 2014. *Trade and Development Report 2014: Global Governance and Policy Space for Development*. New York and Geneva: United Nations.
UNODC, and OECD. 2016. “Coherent Policies for Combatting Illicit Financial Flows.” Issue Brief. Inter-Agency Task Force on Financing for Developement. UNODC and OECD. http://www.un.org/esa/ffd/wp-content/uploads/2016/01/Coherent-policies-for-combatting-Illicit-Financial-Flows_UNODC-OECD_IATF-Issue-Brief.pdf.
Waerzeggers, Christophe, and Cory Hillier. 2016. “Introducing a General Anti-Avoidance Rule (GAAR): Ensuring That a GAAR Achieves Its Purpose.” Tax Law IMF Technical Note 2016/1. IMF Legal Department.
World Bank. 2016. “The World Bank Group’s Response to Illicit Financial Flows: A Stocktaking.” Board Report 104568. Washington DC: The World Bank. http://documents.worldbank.org/curated/en/502341468179035132/pdf/104568-BR-SecM2016-0112-IDASecM2016-0071-IFC-SecM2016-00423-MIGA-SecM2016-0044-Box394878B-PUBLIC-disclosed-4-5-16.pdf.
———. 2017. “Board Update: Domestic Resource Mobilization (DRM) and Illicit Financial Flows (IFFs).”