Submission to the Department of Finance Tax Treaty Policy Consultation, May 2021

Christian Aid Ireland

Christian Aid Ireland is an international development organisation. We work globally for structural change that eradicates the causes of poverty, striving to achieve equality and dignity for all, regardless of faith or nationality. We are part of a wider movement for social justice. We provide urgent, practical and effective assistance where need is greatest, tackling the effects of poverty, as well as its root causes.

Introduction: tax policy as human rights policy

> *"Tax policy is where the action really is… it reflects better than all of the ministerial statements and white papers the real priorities of a government."* – Philip Alston, UN Special Rapporteur on extreme poverty and human rights, keynote address at Christian Aid Ireland conference, February 2015

Tax policy is critical for the realisation of human rights. It shapes states' capacity to raise revenue, fund essential public services, and consequently to fulfil their human rights obligations. Academics, UN experts and civil society organisations have increasingly emphasised this link – without fair taxation systems, both domestically and internationally, efforts to tackle poverty and inequality are badly undermined.

The disjointed, imbalanced international taxation system makes this difficult. In a globalised economy, multinational corporations exploit divergent tax laws to shift profits across borders into low- or no-tax jurisdictions, dramatically reducing their tax bills. Revenue is siphoned away from countries who badly need it, eroding tax bases and public budgets. This is particularly harmful for developing countries, which are more dependent on corporate income tax than higher income countries.[1]

This tax injustice is one of the fundamental obstacles to developing countries moving beyond a reliance on aid. Since 2007, Christian Aid has worked to challenge and change the international rules that sustain it, and thus we strongly welcome the Government's decision to review Ireland's tax treaty policy – in particular the recognition that tax treaties between wealthier states and poorer developing countries entail particular challenges and require specific attention. It is essential that all tax policy, including bilateral tax treaties, is assessed from a human rights perspective.

This submission draws upon previous Christian Aid Ireland research into the impact of Ireland's tax regime on developing countries' tax bases;[2] our research and discussions

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[1] Corporate income tax (CIT) constitutes an average of 15.3% of all tax revenues in Africa, and 15.4% in Latin America and the Caribbean, while OECD states generate around 9% of their tax revenues from CIT. See OECD Corporate Tax Statistics database: https://www.oecd.org/tax/beps/corporate-tax-statistics-database.htm. Figures are for 2000-2018: see also International Monetary Fund, 'IMF Policy Paper: Spillovers in International Corporate Taxation' (9 May 2014) pp. 7: https://www.imf.org/external/np/pp/eng/2014/050914.pdf

[2] Christian Aid Ireland, *Global Linkages: Re-examining The Empirical Basis of the 2015 Tax Spillover Analysis* (2017), https://www.christianaid.ie/resources/campaigns/2017-christian-aid-ireland-tax-report-global-linkages; Christian Aid Ireland, *'Impossible' Structures: Tax Outcomes Overlooked By The 2015 Tax Spillover Analysis* (2017), https://www.christianaid.ie/resources/campaigns/impossible-structures-2017-tax-report

with revenue authorities and tax experts in a range of countries where Christian Aid and its partners work, including Nepal, Ghana, Zambia and Brazil;[3] and our research and knowledge of Irish tax treaty negotiation practices, particularly during its most recent negotiation of a tax treaty with a developing country – Ghana – from 2014 to 2018.[4]

We make 6 key recommendations for a tax treaty policy more consistent with Ireland's international human rights obligations and development commitments. First and foremost, in line with the spirit of the Ireland-supported *Addis Tax Initiative*, this requires a shift away from seeing tax treaty negotiations between Ireland and small developing economies as a zero-sum, competitive process. They should be reconceptualised as a joint exercise to coordinate the tax treatment of Irish and Irish-mediated investment in the developing economy, and to strengthen protections against revenue loss from sales, intellectual property income and capital gains routed through Ireland. Crucially, they must be conducted in a manner that is consistent with wider development policy.

Summary of recommendations

(1) Do not actively target developing countries for new tax treaties, given the asymmetric nature of such negotiations and risks involved.

(2) If requested by a developing country, any negotiation should begin with a detailed, quantitative assessment of the likely revenue impact – both for Ireland and the treaty partner – along a range of possible outcomes. This assessment should be shared with the prospective developing country treaty partner.

(3) Include default measures to ensure a fairer source-residence balance, beyond the OECD and UN model treaty texts.

(4) Propose OECD BEPS 'minimum standard' anti-abuse clauses in all existing or future tax treaties. Be willing to accept alternative anti-abuse provisions, beyond BEPS Action 6, if proposed by developing country treaty partners.

(5) Negotiate in partnership, with a greater focus on development policy coherence. Source taxation protections should not be dependent on quid pro quos.

(6) Negotiate transparently, enabling detailed input and scrutiny from parliamentarians, business and civil society.

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[3] Christian Aid, Centre for Budget Governance Accountability (India), Fundacion Ses (Argentina), *Trapped in Illicit Finance: how abusive tax and trade practices harm human rights* (September 2019), https://www.christianaid.ie/sites/default/files/2019-09/trapped-in-illicit-finance-report-sep2019.pdf

[4] Dominic Coyle, 'Irish officials disregarded Dept of Foreign Affairs concerns over Ghana trade deal', *Irish Times,* 27 September 2019, https://www.irishtimes.com/business/economy/irish-officials-disregarded-dept-of-foreign-affairs-concerns-over-ghana-trade-deal-1.4031852

Recognising risk: asymmetries & treaty shopping

Bilateral tax treaties seek to promote investment and resolve tax dilemmas for companies and individuals operating between two countries, primarily by carving up taxing rights between income 'source' (e.g. a developing country where an investment takes place) and 'residence' (e.g. Ireland). However, they also deprive developing countries of tax revenue and can create new opportunities for profit-shifting and other forms of cross-border tax avoidance.

The Africa Section of Ireland's Department of Foreign Affairs has previously warned that '*the effect of many double taxation agreements is that capital flows from developing to developed nations*.'[5] A 2018 study by World Bank and IMF economists, modelling the impacts of tax treaties signed by 41 African countries, has suggested that such countries may forego from 15 to 25 percent of their entire corporate income tax revenues due to treaty shopping when they sign tax treaties with investment hubs like Mauritius, Switzerland or Ireland.[6]

As recognised by the UN Tax Committee and the IMF's Fiscal Affairs Division, among others, tax treaties between (usually wealthier) capital-exporting countries and (usually poorer) capital-importing countries by their very nature place greater effective constraints on the taxing rights of the poorer developing country.[7] While bilateral tax treaties may be symmetrical in law, they will be highly asymmetrical in practice if financial flows between the two parties move primarily in one direction.

On this basis, greater revenue risks for poorer capital-importing countries are *inherent* in the nature of bilateral tax treaties, *irrespective* of whether those treaties are also ultimately exploited to engineer double non-taxation or other forms of tax avoidance, and irrespective of whether they contain protections against such abuse. Greater information exchange, capacity-building and anti-abuse clauses can mitigate developing countries' revenue risks, but do not address this fundamental source-residence imbalance.

Moreover, while the direction of investment can be asymmetric, so too can its relative importance to each prospective treaty partner. Tax treaty negotiations with small, developing economies almost never hold particularly high stakes for Ireland, but are often extremely high-stakes for the treaty partner. Available data (see Annex) shows that – with the exception of major emerging economies like India and China – economic linkages between Ireland and developing economies are likely to be (i) very small in

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[5] Briefing note prepared Nov 2012 for the implementation committee of Ireland's *Africa Strategy*, released under FOI in 2018

[6] S. Beer and J. Loeprick, *The Costs and Benefits of Tax Treaties with Investment Hubs: Findings from Sub-Saharan Africa*, IMF Working Paper WP/18/227 (September 2018), https://www.imf.org/en/Publications/WP/Issues/2018/10/24/TheCost-and-Benefits-of-Tax-Treaties-with-Investment-Hubs-Findings-from-Sub-Saharan-Africa-46264. The paper classifies investment hubs as those economies where the sum of FDI in-stocks and out-stocks is more than double its GDP.

[7] For example: United Nations*, UN Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries 2019* (New York: 2019), paras. 55-60, 72, https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-03/manual-bilateral-tax-treaties-update-2019_0.pdf; IMF (n 1), paras. 34-40

comparison to Irish GDP or FDI stocks, or as a proportion of Irish businesses' overall international presence; but (ii) often significant in relation to developing countries' GDP or FDI stocks, or as a proportion of their domestic markets. This imbalance sets an extremely important context to any negotiation.

For example, in the years when Ireland was negotiating a new tax treaty with Ghana (2014-2018), Ghana-reported FDI from Ireland was at most 0.5% of overall outbound Irish FDI. However, it constituted 45% of all inbound Ghanaian-reported FDI in 2015, and over a third in 2016.[8]

Similar imbalances of scale are true of sales income from developing-country customers of multinational companies that book their EMEA (and sometimes APAC) sales in Ireland.[9] Quantification is difficult because such sales do not show up in aggregate trade data or in returns to FDI, nor are they disaggregated in company accounts. Nonetheless digital sales of goods and services in small developing countries will inevitably be a small fraction of major multinationals' overall EMEA/APAC sales, particularly compared to sales in wealthy European countries. They may however be a major component of consumer spending in those developing countries.

Of course, governments have the sovereign right to manage their own tax treaty policy and network, and to seek foreign direct investment where and how they see fit. Nonetheless, wealthy countries like Ireland must recognise that such decisions are not made on a level playing field. Developing countries are often under intense political, corporate and diplomatic pressure to seek FDI from major capital exporters despite the associated revenue risks.[10]

This pressure is heightened when a wealthy country which is already a significant source of FDI proposes a tax treaty – the brute *realpolitik* of '10% of something is better than 100% of nothing' is inevitable. Whether a poorer country benefits from signing a tax treaty ultimately depends on whether it gains enough from increased (or simply maintained) FDI to offset any revenue loss. However, as noted by the IMF among others, the evidence that tax treaties actually promote new inward FDI into developing countries is highly ambiguous.[11]

[8] FDI statistics reported via IMF CDIS database: https://data.imf.org/?sk=40313609-F037-48C1-84B1-E1F1CE54D6D5&sId=1482331048410

[9] Whose taxation may be affected by permanent establishment definitions, treaty measures against commissionaire agreements, or measures such as the new proposed UN Tax Treaty language on Income from Automated Digital Services.

[10] M. Hearson, Bargaining Away the Tax Base: the North-South politics of tax treaty diffusion (PhD Thesis: London School of Economics, 2016), http://etheses.lse.ac.uk/3529/1/Hearson_Bargaining_away_the_tax_base.pdf

[11] See IMF, 2014 (n 1), para. 37, footnote 1. Most research on the effects of tax treaties on cross-border investment has concentrated on developed countries' treaties, for which more data is available. Studies encompassing developing countries have found variously that tax treaties have positive, neutral and negative effects on investment flows. Econometric research on this topic published by the IMF, focusing on sub-Saharan African countries' treaties, finds no statistically significant boost to inward investment from signing tax treaties, but significant revenue costs. See Beer and Loeprick (n 7). Where studies *have* found increased investment from treaties' lowering of withholding taxes on cross-border investment income, they have generally been unable to distinguish between genuinely new investments incentivised by the treaty, and 'treaty shopping' which simply re-routes investments through treaty partners. See A. Lejour, *The Foreign Investment Effects of Tax Treaties*, Oxford Centre for Business Taxation Working Paper 14/03 (February 2014), https://www.eesc.europa.eu/resources/docs/2014-the-foreign-investment-effects-of-taxtreaties_oxford-univ-centre-for-business-taxation.pdf . For a summary of the literature, see M. Hearson, *Measuring*

Finally, tax treaties pose greater risks for developing countries if the wealthier, capital-exporting partner is a major international hub or conduit for international financial flows, as Ireland is for foreign direct investment,[12] sales income,[13] and intra-group flows of royalties and service fees.[14] In such cases, if the treaty does not contain adequate protections against 'treaty shopping', it can be exploited for double non-taxation by investors in countries other than Ireland. The IMF describes this as a process of "constructing advantageous routing by linking bilateral tax treaties, typically through low tax conduit countries. In effect, a treaty with one country can become a treaty with the rest of the world."[15]

From one perspective, then, tax treaties may reduce tax burdens on Irish outward investment and make Ireland a more attractive location for multinationals. However, Ireland is a particularly risky tax treaty partner for developing countries, given its large network of seventy-three in-force treaties and generous tax regime. This combination of factors underpins Ireland's FDI offering, but means that tax treaties with Ireland can act as a global 'leaky bathtub', allowing taxpayers both in Ireland and in many other jurisdictions to shift income and gains through Ireland and on to other low- or no-tax jurisdictions.[16]

Approaching with caution: targeting & evidence

For the reasons set out above – the asymmetric financial flows and treaty shopping risks – the IMF's Fiscal Affairs Division and the UN Tax Committee have suggested that "*many developing countries… would be well-advised to sign [tax] treaties only with considerable caution*".[17] Given the risks and costs involved, the uneven playing field and associated pressure, Christian Aid believes that the Irish government should not actively target low- or lower-middle-income countries for new tax treaties, and should instead only respond to requests from such countries.

For example, in the past the Department of Foreign Affairs, in conjunction with Enterprise Ireland and the Revenue Commissioners, have targeted specific African countries for new tax treaties, as part of efforts to reduce costs for Irish businesses in Africa.[18] Ireland also continues to expand its treaty network with developing countries: of the seven treaties

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Tax Treaty Negotiation Outcomes: the ActionAid tax treaties dataset (International Centre for Tax and Development, Working Paper No. 47), February 2016, pp.12-13, http://eprints.lse.ac.uk/67869/1/Hearson_measuring_tax_treaty_negotiation.pdf.

[12] Javier Garcia-Bernardo, Jan Fichtner, Frank W. Takes & Eelke M. Heemskerk, 'Uncovering Offshore Financial Centers: Conduits and Sinks in the Global Corporate Ownership Network', *Nature: Scientific Reports 7*, Article 6246 (2017), https://www.nature.com/articles/s41598-017-06322-9

[13] Many large multinational companies book EMEA sales in Irish-resident subsidiaries, as evidenced by the annual lists of the largest Irish companies by revenue booked in Ireland. See e.g. http://www.top1000.ie/companies

[14] Christian Aid Ireland, *'Impossible Structures'* (n 2)

[15] IMF (n 1)

[16] The analogy is from Michael Keen of the IMF's Fiscal Affairs Division: "Tax treaties are like a bathtub; a single leaky one is a drain on a country's revenues." Jim Brumby and Michael Keen, 'Tax Treaties: Boost or Bane for Development?', IMF Blog, 16 November 2016: https://blogs.imf.org/2016/11/16/tax-treaties-boost-or-bane-for-development/

[17] IMF (n 1), p.24; for a similar expression of caution, see United Nations (n 7), para. 58-59.

[18] 'Report on Africa Strategy Trade Consultations 21-23 March 2012', 5 April 2012, DFAT document dated 5 April 2012, released under FOI in 2018; 'Note on meeting with Revenue, Africa section, Development Cooperation Division', DFAT document dated 4 May 2012, released under FOI in 2018.

currently awaiting final signature and/or ratification, three are with middle-income economies.[19] Christian Aid does not believe that such targeting is appropriate or consistent with longstanding policies on international development.

In 2012, Ireland approached Ghana with a view to negotiating a tax treaty. A Government Minister told Dáil Éireann that Ghana had approached Ireland, but later corrected the parliamentary record based on documents released to Christian Aid under a freedom of information request showing that the opposite was true. The Government nonetheless argued that "*the Ghanaian negotiating team was led by a member of the UN Committee of Experts on International Co-operation in Tax Matters… and was well placed to determine what was or was not in their interests*".[20]

However, similar FOI documents also showed that agreement on the treaty was actually only reached after the Irish ambassador to Ghana went over the heads of the Ghanaian Revenue Authority and Finance Ministry experts negotiating the treaty – who had opposed significant reductions in withholding taxes sought by Ireland – to lobby the Ghanaian Deputy Minister of Finance directly.[21] Such requests cannot be divorced from the wider context in which they are made, and the relative importance of Irish FDI to the Ghanaian economy at the time of the treaty negotiations.

Recommendation 1: Do not actively target developing countries for new tax treaties, given the asymmetric nature of such negotiations and risks involved.

If developing countries approach Ireland for new or revised tax treaties, Ireland can take a number of steps to reduce associated risks and revenue costs. To begin with, any tax treaty negotiation – whether with a developing or a developed country – should take place on the basis of evidence. Ministerial statements regarding the Ghana tax treaty negotiations indicate that the Irish government undertook no specific analysis of the treaty's likely revenue or wider economic effects, either on Ireland or on Ghana. In other words, a significant piece of Irish tax law was developed and passed without any quantitative assessment of its likely revenue impact, something which would never be countenanced for purely domestic tax measures.[22]

[19] The Ghana treaty has been signed but is awaiting Ghanaian ratification. The Revenue Commissioners also list four treaties (with Kenya, Kosovo, Oman and Uruguay) for which it states that negotiations have concluded: See https://www.revenue.ie/en/tax-professionals/tax-agreements/double-taxation-treaties/index.aspx
In addition, in 2017 the government stated that negotiations had concluded for new treaties with Azerbaijan and Turkmenistan, but these no longer appear in the Revenue's online list. See statement of the Minister of State at the Department of Finance to the Oireachtas Committee on Finance, public expenditure and reform, and Taoiseach, 3 October 2017:https://www.oireachtas.ie/en/debates/debate/select_committee_on_finance_public_expenditure_and_reform_and_taoiseach/2017-10-03/2/

[20] Michael D'Arcy, Minister of State, Department of Finance, comments in Dáil Éireann, 3 October 2018, https://www.oireachtas.ie/en/debates/debate/dail/2018-10-03/41/.

[21] Email correspondence, Irish Ambassador to Nigeria & Ghana, 7 Oct 2015, released under FOI during 2018

[22] Dáil Éireann debate Vol. 972 No. 8 (n 21) For comparison with domestic tax measures, see annual revenue costings for Budget tax legislation changes (https://assets.gov.ie/90869/973e8f47-c7bb-463e-a5b7-eef661daac30.pdf)

Christian Aid therefore believes that any tax treaty negotiation or renegotiation should start with a detailed, quantitative assessment by the Department of Finance of the likely revenue impact of possible treaty outcomes on both Irish tax revenues and the revenues of the treaty partner, as compared to the absence of the treaty. This assessment should include a range of possible withholding tax levels; different permanent establishment options; tax sparing clauses; and articles governing capital gains, particularly from indirect transfers of assets. In the case of negotiations with developing countries, this assessment should be shared with the prospective treaty partner.

The Irish government has previously suggested that for developing country revenue impacts it can rely on the 2015 *Spillover Analysis* commissioned from the International Bureau of Fiscal Documentation.[23] In the case of the Ireland-Ghana treaty, it told the Oireachtas that although it had conducted no specific impact assessment, "*the results of the broad spillover exercise carried out in 2015 did not find evidence of negative effects from Ireland's modern tax treaties. We would expect that the same result would apply to the treaty with Ghana*."[24]

The decision to commission this spillover analysis was a very positive step, strongly welcomed by Christian Aid Ireland and other tax justice campaigners. However, the analysis conducted was limited in crucial respects. Christian Aid published two detailed assessments of the spillover analysis in 2017, outlining problems with its empirical basis, as well as trade links and avoidance structures it overlooked.[25] Ireland's corporate tax regime has, moreover, undergone major changes since 2015. Insofar as this spillover analysis is going to inform future Irish tax policy, it is essential that further analysis is commissioned that takes account of these gaps and changes. It would offer an important restatement of Ireland's commitment to evidence-based policy making and global development.

More importantly, however, the 2015 spillover analysis was an assessment of current tax treaties, which examined economic and fiscal linkages with only a small selection of 13 low and middle-income countries. It is therefore unlikely to be useful in new treaty negotiations, since the new prospective treaty partner will probably not have been included in the 2015 analysis (as Ghana was not). Moreover, FDI stocks and international financial flows between Ireland and prospective treaty partners may have changed significantly since 2015, and may also change as a result of the treaty itself.

In addition, the 2015 analysis is unsuitable as an impact assessment of prospective treaties because it did not attempt to quantify the actual revenue effects of Ireland's tax treaties, current or future. Such assessments certainly face methodological and data challenges. Nonetheless there are existing methods to assess revenue effects of current treaties used in both previously mentioned Christian Aid reports, as well as research

[23] Department of Finance, IBFD Spillover Analysis: Possible Effects of the Irish Tax System on Developing Economies (July 2015), http://www.budget.gov.ie/Budgets/2016/Documents/IBFD_Irish_Spillover_Analysis_Report_pub.pdf
[24] Dáil Éireann debate Vol. 972 No. 8 (n 21)
[25] See the Christian Aid Ireland *Global Linkages* and *Impossible Structures* reports (2017) (n 2)

commissioned by the Government of the Netherlands on treaty effects via dividend and interest withholding taxes.[26]

These methodologies might be modified for use with forecasts of future financial flows resulting from a prospective treaty. More accurate quantitative assessments should also be possible using data which the Central Statistics Office and the Revenue Commissioners already gather. For example:

- CSO data on cross-border royalties and service fees (often redacted publicly when it relates to developing economies involving a small number of Irish taxpayers, but available to government nonetheless), which could allow forecasts of the revenue effects of different royalty and service fees articles;
- Revenue Commissioners' data from tax returns on the size and geographical split of revenue and profits of Irish companies supplying goods and services to other countries, or with branches in other countries, which could allow forecasts of revenue effects from different permanent establishment definitions.

Sharing this analysis with the treaty partner is consistent with Ireland's commitments as a development partner in the Addis Tax Initiative, whose Declaration states: "W*e all have a role to play. While partner countries need to improve their tax systems, development partners will undertake, where feasible, the analyses of spillover effects and policy coherence*."[27] It can also be important given potential imbalances in technical capacity and resources during tax treaty negotiations.

Recommendation 2: If requested by a developing country, any negotiation should begin with a detailed, quantitative assessment of the likely revenue impact – both for Ireland and the treaty partner – along a range of possible outcomes. This should be shared with the prospective developing country treaty partner.

[26] *ibid* pp. 10-16; Government of the Netherlands, *Government's response to the report from SEO Economics Amsterdam on Other Financial Institutions and the IBFD report on developing countries* (9 September 2013), https://www.government.nl/documents/parliamentary-documents/2013/09/09/government-s-response-to-the-report-from-seo-economics-amsterdam-on-other-financial-institutions-and-the-ibfd-report-on-develop

[27] The Addis Tax Initiative, *ATI: Declaration 2025*, https://www.addistaxinitiative.net/sites/default/files/resources/ATI%20Declaration%202025%20%20%28EN%29.pdf

Policy coherence & default protections

Ireland has taken steps in recent years towards better support for developing countries in tax matters. In February 2017 Ireland joined the previously mentioned *Addis Tax Initiative,* which aims to strengthen international cooperation and capacity on taxation and development. In 2019, Ireland launched a *Domestic Resource Mobilisation (DRM)* initiative to coordinate the Departments of Finance, Foreign Affairs and the Revenue Commissioners in strengthening developing countries' tax governance and administrative capacity.

These capacity-building efforts are very welcome. However, boosting the administrative capacity of revenue authorities will have comparatively little impact if those authorities are significantly constrained in their right to tax multinational taxpayers, or if they are faced with increased levels of avoidance as a result of tax treaties. If Ireland is serious about coherence between wider tax and development policy, its tax treaties must include basic measures from the outset to (a) protect source taxation and (b) prevent tax abuse and avoidance.

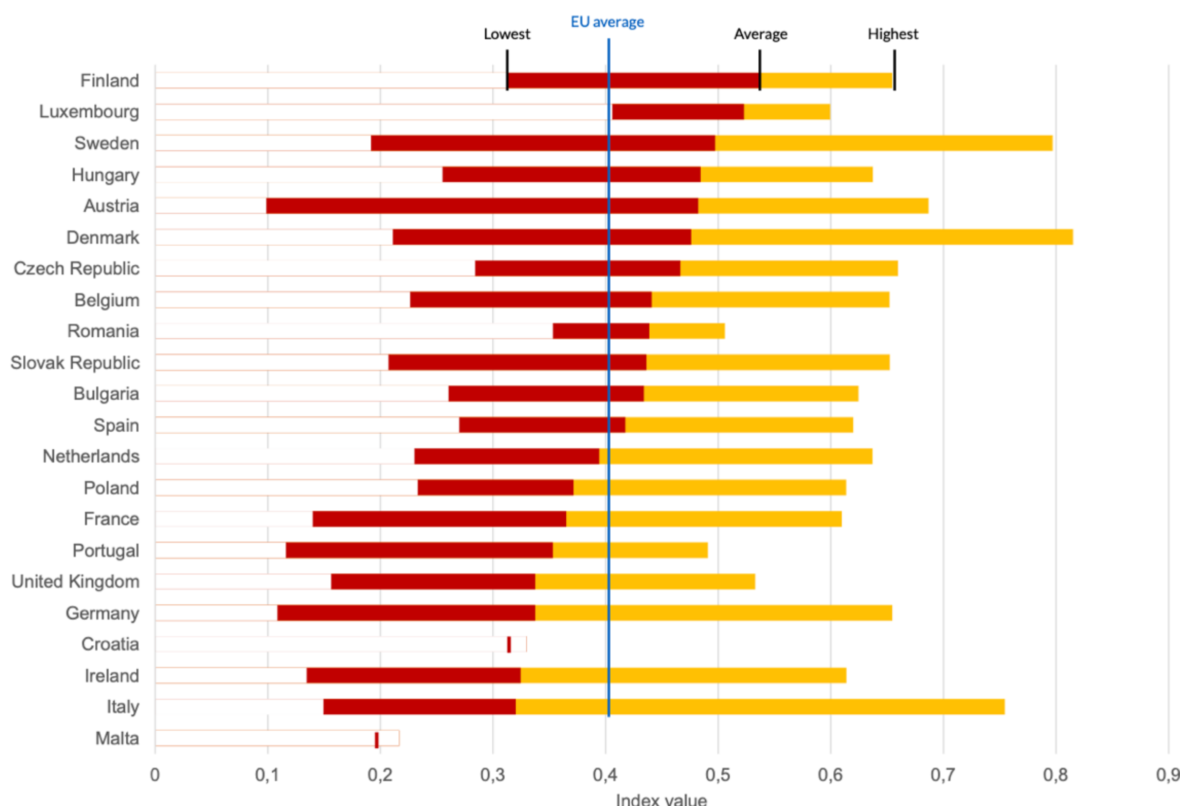
Christian Aid recognises the value of the measures set out in both UN and OECD treaty models, as well as the OECD BEPS process and its Multilateral Instrument, to protect source revenues and reduce avoidance. However, developing countries must be free to determine which measures are most appropriate in their particular cases, and in any particular negotiation. The impacts of different provisions are ultimately contingent on the economy of the prospective treaty partner, and the nature/scale of its particular economic linkages with Ireland – this is why detailed impact assessments for particular negotiating pairs are crucial, rather than blanket treaty models.

In this sense, if a developing country approaches Ireland for new or revised tax treaties, Ireland can and should afford magnanimity and flexibility in negotiations, including on the most appropriate protections of source taxation and against treaty abuse. Ireland can also take proactive steps to ensure that such protections are prioritised.

Firstly, Ireland should be prepared to accept an initial negotiating text that provides protections of source taxation beyond the OECD and UN models. reland's tax treaties with developing countries are some of the most restrictive in the world, limiting average source taxation rights more than any other EU Member State bar Italy and Malta. Figure 1 below sets out the distribution of 'source/residence' balance in tax treaties between developing countries and EU member states plus the UK, where a lower index value indicates more source taxation restrictions, and a higher index value indicates less.[28]

[28] M. Hearson, *The European Union's Tax Treaties with Developing Countries: Leading by Example?* (report for the European United Left/Nordic Green Left (GUE/NGL) in European Parliament, September 2018), Figure 8, https://martinhearson.files.wordpress.com/2018/10/hearson-2018-ep.pdf.

Figure 1: Distribution of source/residence balance, tax treaties between developing countries and EU Member States plus the UK



While this graph was calculated prior to the renegotiation of Ireland's (very source-tax-restrictive) 1971 treaty with Zambia, which constitutes the lower bound of its distribution, the general picture remains consistent and the more recent tax treaties with Ethiopia (2014) and Ghana (2018) are also very restrictive of source tax withholding rates.

However, Ireland has also previously accepted that source-taxation provisions beyond both the OECD and UN models may be appropriate in certain circumstances: for example, it accepted withholding taxes on technical services fees in six treaties signed since 2000 – with India, Albania, Armenia, Egypt, Botswana and Ghana – even before the inclusion of this clause in the UN Model Treaty in 2017.

Ireland should extend this willingness to depart from both OECD and UN models to other areas that protect source taxation, if the treaty partner proposes such provisions. Non-exhaustively, these might include:

- Provisions for source taxation of capital gains on indirect transfers of moveable assets (as in Article 13(5) of the UN Model Treaty, absent in the OECD model)
- Withholding taxes on management fees (included in a number of African and Asian countries' model treaties, absent in both the OECD and UN models)

- Providing for some source taxation on other forms of income not specified in the treaty (as in Article 21(3) of the UN Model, absent in the OECD model)
- Permanent establishment definitions covering the provision of services (as in Article 5(3)(b) of the UN Model, absent in the OECD model)
- Provisions for a 'limited force of attraction' of profits to a permanent establishment (as in Article 7(1) of the UN Model, absent in the OECD model);
- Provisions for using apportionment to attribute taxable profits to permanent establishments (as retained in Article 7(4) of the UN Model, absent in the OECD model);
- Provisions for taxing (either gross or net) the income arising from the provision of automated digital services (as in the 2021 proposed revision to Article 12B of the UN Model Treaty)
- Permanent establishment definitions covering various oil or mineral exploration activities (if relevant to the economy of the treaty partner in question).

The Government should ensure that the Department of Finance's pre-negotiation impact assessment, as recommended earlier, includes not only Ireland's standard treaty model, but also quantitative assessments of the presence or absence of additional provisions to protect source taxation, at a minimum including those listed above.

Recommendation 3: Include default measures to ensure a fairer source-residence balance, beyond the OECD and UN model treaty texts.

Second, it is crucial that Ireland is willing to include minimum standard anti-abuse measures in all existing or future tax treaties. This is particularly important given Ireland's role as a major international hub or conduit for financial flows and investment, and the aforementioned associated treaty shopping risks.

In October 2015 Ireland, along with the rest of the membership of the OECD, endorsed minimum standards for anti-abuse clauses in tax treaties (BEPS Action 6). Yet the only treaty it has signed with a developing country since that date (with Ghana) does not include these minimum-standard anti-abuse provisions, and it is not clear whether they were proposed during negotiations. Since signing the Ireland-Ghana treaty, the Irish Government has offered to include anti-abuse clauses in an additional protocol, yet it still sought to bring the treaty into force through ratification in 2018 without these provisions in place.

It is important to recognise concerns from some countries regarding the relevance and practical enforceability of some of the provisions prescribed by BEPS Action 6, such as the purpose tests or limitation of benefit clauses. This is particularly pertinent given imbalances in technical capacity and the complexity of certain anti-abuse clauses. Ghana's chief tax treaty negotiator, for example, has expressed reservations about the

utility of BEPS anti-avoidance provisions compared to the more basic issue of the imbalance of source/residence taxation rights,[29] although Ghana has nonetheless sought since 2018 to incorporate BEPS anti-abuse provisions into its standard treaty model.[30] The UN Tax Committee and the IMF have likewise identified several treaty-related avoidance issues potentially more relevant to developing countries which the BEPS process has not addressed.[31]

Ireland should at a minimum offer to include BEPS 'minimum-standard' anti-abuse clauses (as in Article 7 of the OECD Multilateral Convention or Article 29 of the UN Model Tax Treaty) in all its existing or future tax treaties, whether or not the treaty partner is a member of the BEPS Inclusive Framework or a signatory to the Multilateral Convention. Given the concerns outlined above, Ireland should also be willing to accept alternative anti-abuse provisions proposed by developing country treaty partners beyond those of BEPS Action 6. These may include, for example, provisions to ensure that more general anti-abuse rules in domestic law can function under the tax treaty; or simply more robust withholding tax provisions, particularly on categories of base-eroding payments.[32]

Recommendation 4: Propose OECD BEPS 'minimum standard' anti-abuse clauses in all existing or future tax treaties. Be willing to accept anti-abuse provisions beyond BEPS Action 6 if proposed by developing country treaty partners.

Conduct of negotiations: competition to cooperation

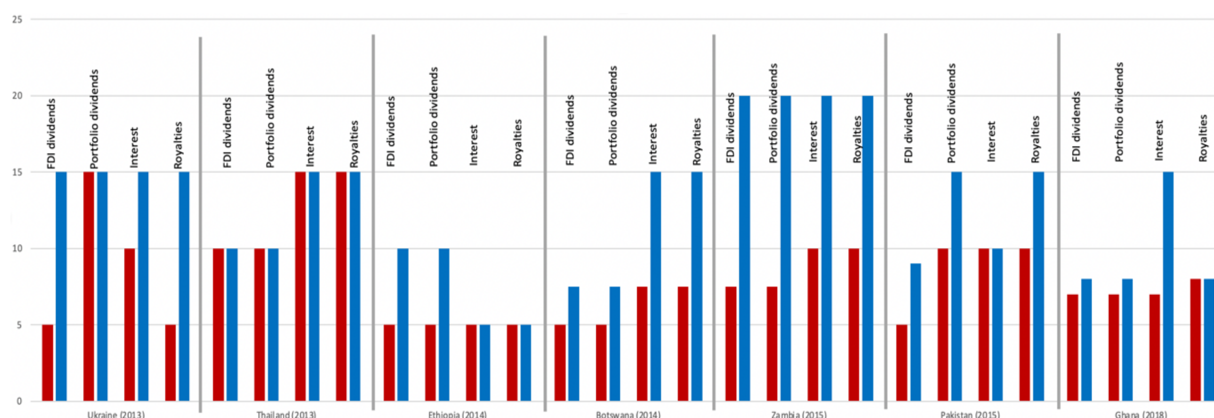
The Government's tactics and conduct during negotiations are as important as the provisions in its negotiating position. In line with the spirit of the Addis Tax Initiative, a new tax treaty policy should be based on an important conceptual shift – recasting negotiations between Ireland and small developing economies not as a zero-sum, competitive process but as a joint enterprise to efficiently and fairly manage investment. It must move beyond a focus on maximising a narrow set of economic benefits or concessions, and be consistent with wider international development policy.

The Ghana case is again instructive. Developing-country treaty partners should not be placed under pressure or time limits for signature, as Irish officials did with Ghana's negotiators and their Minister during 2015.[33] Withholding tax rates should not be driven

[29] Eric Mensah, Presentation to Tax3 Committee, European Parliament, Brussels 26 September 2018, http://www.europarl.europa.eu/cmsdata/155386/5%20-%2005%20ERIC%20NII%20YARBOI%20MENSAH%20statement.pdf
[30] Christian Aid interview with Ghanaian tax official, October 2018.
[31] United Nations, *UN Handbook on Selected Issues in Protecting the Tax Base of Developing* Countries, 2nd Edition (New York: 2017), p.33, https://www.un.org/esa/ffd/wp-content/uploads/2017/08/handbook-tax-base-second-edition.pdf. On capital gains double non-taxation, see IMF 2014 (n 1) paras. 41-43 and Appendix VI
[32] Michael C. Durst, *Beyond BEPS: a tax policy agenda for developing countries* (ICTD Working Paper 18), June 2014, https://www.ictd.ac/publication/beyond-beps-a-tax-policy-agenda-for-developing-countries/; Mensah (n 30)
[33] When disagreements between the two countries persisted after the second round of negotiations in mid-2015, Irish officials repeatedly pressed Ghana's negotiators to resolve outstanding issues in order that the treaty could be signed during a planned

down far below the treaty partner's domestic rates (Figure 2).[34] Treaty partners should not be locked into most-favoured-nation clauses (as Ireland pushed for in the Ghana-Ireland negotiations) or mandatory arbitration provisions as a quid pro quo for acquiescence on higher WHT rates or other source-taxation provisions.[35]

Figure 2: Source withholding tax rates (percent) in Irish tax treaties with low/middle income countries since 2013 (red), compared to withholding tax rates in the treaty partner's domestic tax law (blue)



A limited focus emphasising the business case for such provisions is short-sighted. The end result can see tax revenues forgone by the developing country as a result of the treaty exceed Irish Overseas Development Assistance, as we estimate is the case with Ireland's bilateral tax treaty with South Africa.[36] This not coherent from either a narrow economic or broader development perspective.

Recommendation 5: Negotiate in partnership, with a greater focus on development policy coherence. Source taxation protections should not be dependent on quid pro quos.

Enterprise Ireland trade mission to Ghana in December 2015, led by the Irish Minister for Agriculture (see email correspondence from Revenue officials to Ghanaian Ministry of Finance, 3 July 2015, 9 September 2015, 9 November 2015).

[34] WHT rates taken from ActionAid tax treaty dataset (https://www.ictd.ac/dataset/tax-treaties-explorer/) and Revenue Commissioners (https://www.revenue.ie/en/tax-professionals/tax-agreements/rates/index.aspx); domestic WHT rates taken from PWC Tax Summaries.

[35] Email from Irish Revenue Department to Ghana Revenue Authority, 9 November 2015, released Aid under FOI during 2018; Christian Aid interview with individual directly involved in Ireland-Ghana treaty negotiations, October 2018. On MFN clauses: for a practical example of the revenue risks of such clauses, see recent tax cases concerning dividend taxation between South Africa and the Netherlands, discussed in Dr Craig West, 'MFN dangers: the (potential) unravelling of tax treaty policy', *Leiden Law Blog,* 6 November 2020, https://leidenlawblog.nl/articles/mfn-dangers-the-potential-unravelling-of-tax-treaty-policy . On mandatory arbitration clauses: as the UN Tax Committee has suggested, arbitration (required under Article 25 of the OECD model treaty) is often expensive and resource-intensive compared to internal mutual agreement procedures. Its outcome often relies upon the legal and financial resources of the parties: those of small developing-country revenue authorities may be considerably less than large multinational taxpayers. See *UN Manual* (n 7) .

[36] Christian Aid Ireland, *Global Linkages*, (n 2)

Finally, Ireland should support efforts to increase transparency in tax treaty negotiations, which currently take place behind closed doors. Their existence is rarely announced until negotiations have concluded, or at least begun.

There is of course a case that such negotiations require at least some time away from the public eye. But cooperative coordination on a tax treaty of the kind proposed here can only benefit from:

- Wider expertise, particularly if there are imbalances in technical or administrative capacity;
- Public, parliamentary and private-sector scrutiny in both countries, to ensure that the process upholds the treaty partners' commitments to development policy coherence and tackling avoidance, reaffirmed in international processes like BEPS and in development fora like the Addis Tax Initiative.

Increased transparency during negotiations would above all avoid the present, unjustified situation where legislatures are asked 'all-or-nothing' to ratify treaty texts after entirely closed-door negotiations, with no opportunity to influence the text itself. Parliamentarians are currently given only the 'nuclear option' of refusing to ratify the text at all. In the case of the Ireland-Ghana treaty this has led to the situation where several TDs stated that they had to vote to ratify the treaty since they supported it in principle, despite serious reservations over the adequacy of its anti-abuse provisions;[37] and conversely where the Ghanaian ratification process is still not complete, three years after the treaty's signature.

The UN Tax Committee has previously recommended that even in competitive negotiations, "countries may wish to consider a procedure for reviewing the progress of negotiations during their course, with interested parties in the private sector. This review can most profitably be done after the general pattern of the new treaty has been established but before final decisions are made."[38]

Christian Aid proposes more concretely and transparently that the Government should seek the agreement of tax treaty negotiating partners to brief parliamentarians publicly on the progress of the treaty negotiations; and should include opportunities at the start and mid-points for business and civil society to provide input.

Recommendation 6: Negotiate transparently, ensuring detailed input and scrutiny from parliamentarians, business and civil society.

[37] Dáil Éireann debate - Wednesday, 3 Oct 2018, Vol. 972 No. 8
[38] United Nations, *UN Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries 2003* (New York: 2003), p. 224, https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-03/UNPAN008579.pdf

Conclusion

Ireland has a longstanding and hard-earned reputation of support for international development, global justice and human rights. Its overseas aid programme is widely respected, with broad public and political support. It is essential however that we reflect more deeply and critically on the lack of coherence between core development goals and aspects of government policy – particularly in the areas of fiscal policy and taxation.

Ireland's role in the international tax avoidance landscape is well-documented, recognised by the European Parliament,[39] numerous bodies within the U.S. Congress,[40] and several esteemed academics.[41] A recent Working Paper by the National Bureau of Economic Research (NBER) found that close to 40% of multinational profits were shifted to low- or no-tax jurisdictions in 2015, and identified Ireland as 'the number one shifting destination, accounting for more than $100 billion alone.'[42]

Tax avoidance of this scale has a serious impact on global inequality and poverty. Christian Aid research in 2019 estimated that developing countries lose over $400bn per year to tax avoidance, as revenue that is badly needed for essential public services like healthcare and education is siphoned away.[43] For comparison, this is more than double the yearly total given in official overseas aid.[44] Moving beyond a reliance on aid requires closing these gaps between policy and practice, and aligning domestic and international tax laws with principles of global justice.

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[39] European Parliament resolution of 26 March 2019 on financial crimes, tax evasion and tax avoidance (2018/2121(INI)).
[40] James R White, 'International Taxation: Large U.S. Corporations and Federal Contractors with Subsidiaries in Jurisdictions Listed as Tax Havens or Financial Privacy Jurisdictions' Government Accountability Office, Report to Congressional Requestors GAO-09-157 (December 2008); Offshore Profit Shifting and the U.S. Tax Code—Part 2 (Apple Inc.): *Hearing before the Permanent Subcommittee on Investigations* (S. Hrg. 113-90), U.S. Senate, 113th Cong. (2013) p.78; Jane G Gravelle and Thomas L Hungerford, 'Corporate Tax Reform: Issues for Congress', Congressional Research Service, Report RL34229 (22 September 2017) p. 7.
[41] See Stephen C. Loomis, 'The Double Irish Sandwich: Reforming Overseas Tax Havens' 43 St. Mary's Law Journal (2012) 825; Shane Darcy, '"The Elephant in the Room": Corporate Tax Avoidance & Business and Human Rights' 2 Business and Human Rights Journal (2017) 1; Javier Garcia-Bernardo, Jan Fichtner, Frank W Takes and Eelke M Heemskerk, 'Uncovering Offshore Financial Centers: Conduits and Sinks in the Global Corporate Ownership Network' 7 Scientific Reports (2017) 6246; Jannick Damgaard, Thomas Elkjaer and Niels Johannesen, 'Some $12 trillion worldwide is just phantom corporate investment' 55(2) Finance & Development (2018) 50; Alex Cobham, 'Procuring profit shifting: The State Role in Tax Avoidance' in Philip Alston and Nikki Reisch (eds) *Tax, Inequality and Human Rights* (OUP 2019) p. 156.
[42] Thomas R Tørsløv, Ludvig S Wier and Gabriel Zucman, 'The Missing Profits of Nations' (NBER Working Paper No. 24701) (June 2018, revised April 2020) pp. 27-28 <https://www.nber.org/papers/w24701.pdf> (last accessed 30 June 2020).
[43] Christian Aid 2019 (n 3)
[44] Net official development assistance and official aid received (current US$), World Bank indicators: https://data.worldbank.org/indicator/DT.ODA.ALLD.CD; Total official flows by country and region (ODA+OOF), OECD statistics database: https://stats.oecd.org/viewhtml.aspx?datasetcode=REF_TOTALOFFICIAL&lang=en

Annex: Economic linkages between Ireland and developing countries

1. Foreign Direct Investment (FDI) – the principal metric used by the 2015 Spillover Analysis of Ireland's tax treaties commissioned by the Department of Finance – is a highly incomplete measure either of economic linkage between two economies, or of tax spillover from one to the other. Many relevant financial flows whose tax treatment is affected by tax treaties may bear no relation to FDI. These include in particular: royalties/intellectual property income, and remote or digital sales income.

2. **Nonetheless even by the measure of FDI, linkages between Ireland and developing countries constitute, in many cases, a significant proportion of those developing countries' economies and investment stocks.** Available FDI statistics falsify the claim of the 2015 Spillover Analysis that economic linkages between Ireland and developing countries are small and thus that Ireland's tax treaty network is unlikely to have significant negative impacts on developing countries' tax bases.[45]

3. **Certainly Irish FDI to low- and middle-income countries is a small proportion of overall Irish FDI – between 1.9% and 3.3% from 2015 to 2019, or between USD 23.0 and 29.1 billion in absolute terms.[46]** This is unsurprising. Irish outbound FDI remains dominated by linkages to high-income economies, and particularly to major offshore financial centres, from where investment goes on to the economies where it is actually invested. In 2019 (the last year for which comparable figures are available), 44% of all outbound FDI that Ireland reported to the IMF went to Luxembourg (over three times the amount going to the USA, and four times the amount going to the UK). Over three-quarters of all Irish outbound FDI goes to just five countries: Luxembourg, the USA, the UK, the Netherlands and Bermuda.

4. In proportion to the recipient economies' size and investment stocks, however, several developing countries receive significant amounts of FDI from (or via) Ireland. Of the top 15 recipients of Irish FDI as a proportion of their GDP (Figure 1), six are eligible for overseas development assistance.

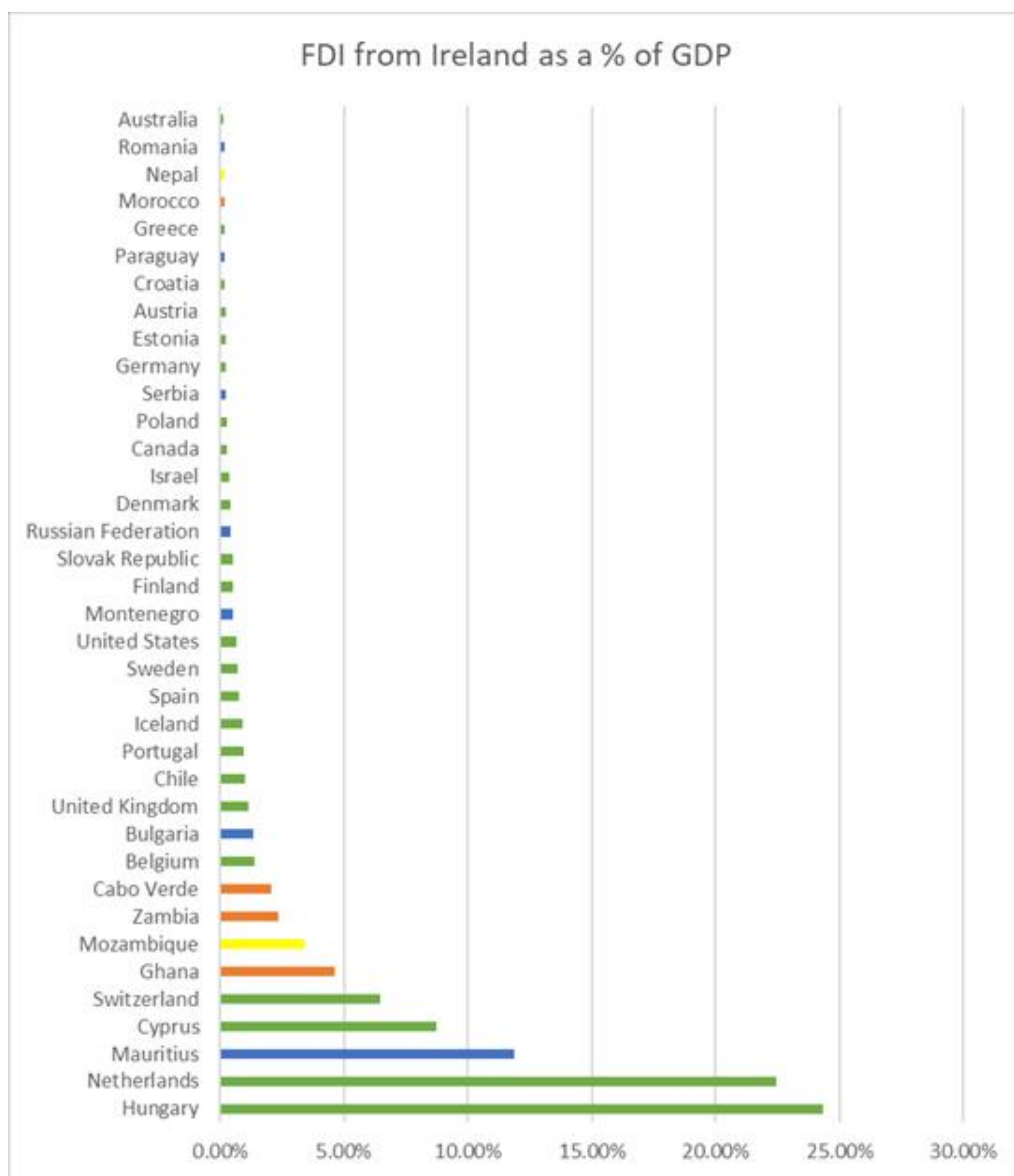
   - **Mozambique**, a low-income country, has reported that between 2015 to 2019 (the latest year available) it has received Irish FDI equivalent to 3.44% of its GDP.

   - **Ghana**, Ireland's latest tax treaty negotiating partner, reported that between 2015 and 2019 it received nearly a fifth of its FDI from/via Ireland (Figure 2), equivalent to 4.65% of its GDP.

[45] IBFD/Department of Finance, *IBFD spillover analysis: Possible Effects of the Irish Tax System on Developing Economies* (July 2015), http://www.budget.gov.ie/Budgets/2016/Documents/IBFD_Irish_Spillover_analysis_Report_pub.pdf

[46] Calculations by author from 'derived' FDI statistics in IMF CDIS database. All data and calculations are available from Christian Aid on request.

Figure 1: Top forty recipients of Irish FDI as a proportion of their GDP, 2015-19

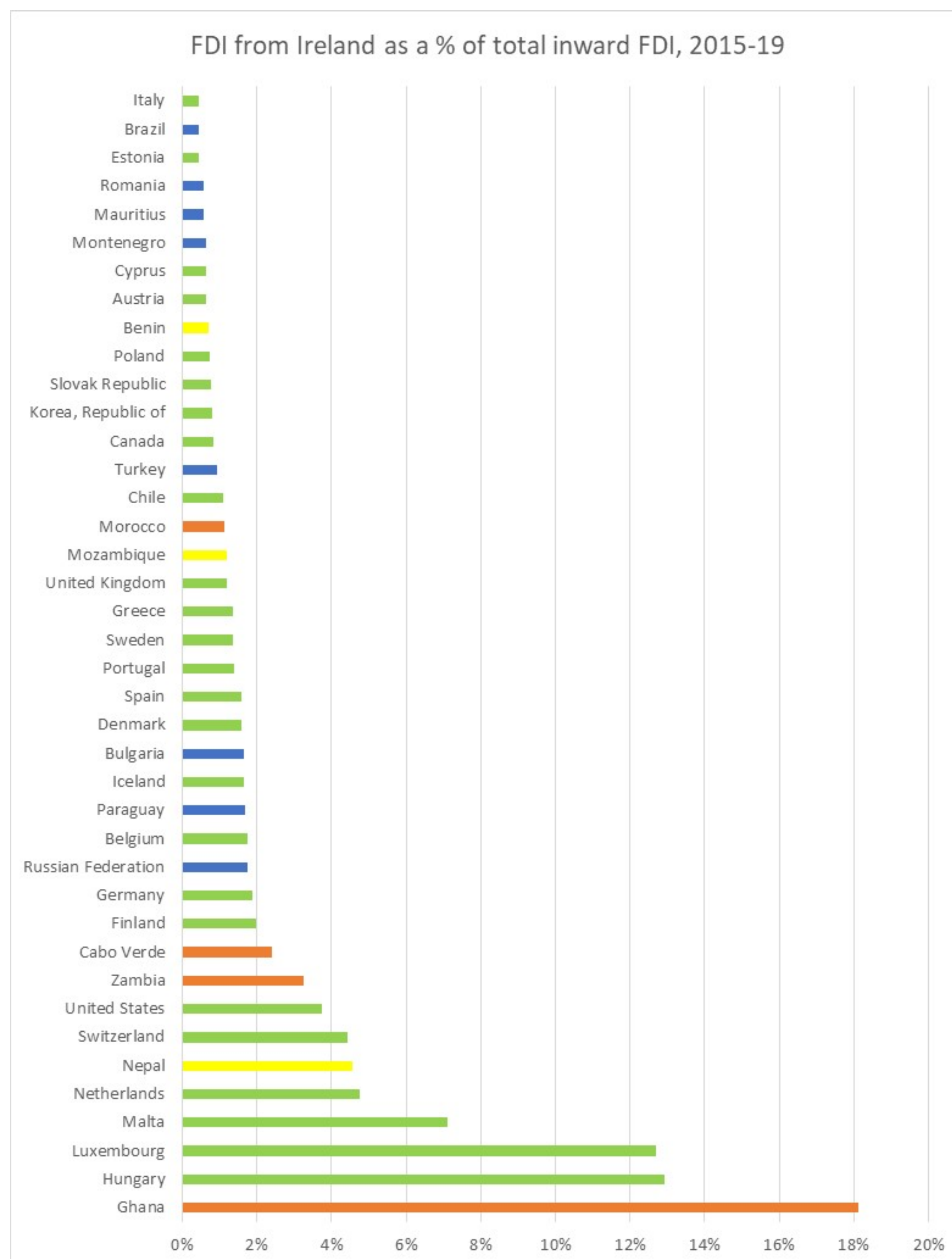


Key: Green = High-Income Country; Blue = Upper-Middle-Income Country; Orange = Lower-Middle-Income Country; Yellow = Low-Income Country.

- *All countries are classified according to the World Bank income/lending group classifications in 2015 (Romania moved from UMIC to HIC in 2019).*
- *N.B. The top three recipients of Irish FDI as a proportion of their GDP (Luxembourg, Bermuda and Malta) are not shown in this graph as they each receive Irish FDI instock equivalent to over 100% of their GDP. Their inclusion would change the X-axis scale, making it very difficult to read the bars for other countries.*
- *Recipients of Irish FDI which have redacted the size of their FDI instock from Ireland for all years 2015-19 will not appear on this graph.*

Source: Calculations by author from IMF CDIS dataset; GDP figures from World Bank, World Development Indicators (https://data.worldbank.org/indicator/NY.GDP.MKTP.CD), available on request.

Figure 2: Top forty recipients of Irish FDI as a proportion of their total FDI instock, 2015-19



Key: Green = High-Income Country; Blue = Upper-Middle-Income Country; Orange = Lower-Middle-Income Country; Yellow = Low-Income Country.

- *All countries are classified according to the World Bank income/lending group classifications in 2015 (Romania moved from UMIC to HIC in 2019).*
- *Recipients of Irish FDI which have redacted the size of their FDI instock from Ireland for all years 2015-19 will not appear on this graph.*

Source: Calculations by author from IMF CDIS dataset, available on request.