

# Definitely Not Boring: The U.N. Tax Committee and OECD Collide

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In this article, Katz-Pearlman explains the U.N. Tax Committee's work on international tax cooperation and the role it plays in providing a voice for developing countries and emerging economies, while acknowledging the potential overlap with the two-pillar work of the OECD and the reactions of OECD members.

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Tax law and tax lawyers are often thought of as boring. Those of us of a certain age will probably remember the pilot episode of a television show called *LA Law*, which opened with a tax lawyer found dead at his desk on a Monday morning, hand still clutching his Internal Revenue Code. As the police removed the unfortunate tax partner from his office, where he had been since his Friday evening demise, the implied commentary was clear: "Poor man, he must have died of boredom, tax is such a dull area," and so forth.

Perhaps in the past, tax law was less than scintillating, but in 2023 nothing could be further from the truth. Especially lately, tax law and tax policy have been decidedly *not boring* and have often been front-page news in the mainstream

press as the global economy awaits the final push toward implementation of the OECD's landmark base erosion and profit-shifting work, and the launch of pillars 1 and 2. The OECD has done extraordinary work in bringing the tax world together, exemplified by the inclusive framework on BEPS, which joins 137 jurisdictions. Each day, the tax world seems to inch closer and closer together as pillar 1 and pillar 2 seem more certain. But in mid-November 2022 a new and definitely *not* boring twist in the story emerged.

In November 2022 Nigeria (on behalf of the U.N. member states that comprise the Group of African States) proposed a U.N. resolution<sup>1</sup> that sought the direct involvement of the U.N. "to take the steps needed to ensure inclusive international tax cooperation and coordination."<sup>2</sup> On November 23, 2022, the U.N. adopted the resolution, which also called for increased U.N. involvement and responsibility over the international tax negotiation framework. The resolution is striking because it uses the term "inclusive" — inclusivity is the fundamental premise on which BEPS was built. Thus, a resolution that proposes that steps be taken to ensure inclusivity is troubling, as it implies the absence of inclusivity in the OECD's work.

There is concern from several OECD countries that the resolution and the work that will follow may confuse, derail, or duplicate the OECD's work. The United States, in an effort to limit the potential impact of the resolution, put forth an amendment deleting the resolution's reference to

<sup>1</sup> See U.N. Economic and Financial Committee (Second Committee), "Promotion of Inclusive and Effective International Tax Cooperation at the United Nations," A/C.2/77/L.11/Rev.1 (Nov. 16, 2022). The resolution was originally proposed in October 2022 but not acted on, and then repropoed in November.

<sup>2</sup> *Id.*

the U.N. becoming involved with “the possibility of developing an international tax cooperation framework or instrument that is developed and agreed upon through a United Nations intergovernmental process.”<sup>3</sup> The uneasiness over the U.N.’s foray into this work was set forth in a letter from the U.S. Mission to the United Nations, which said:

The Two-Pillar Solution on which consensus was reached in October 2021 by 137 jurisdictions collectively representing almost 95 percent of global GDP followed years of detailed and intensive work and negotiations. Those negotiations occurred in an inclusive setting in which jurisdictions around the world provided input. *We disagree with the notion implied by this resolution that there is not presently a highly inclusive forum working to strengthen international cooperation on tax.*

It is simply not consistent with implementation of the Two-Pillar Solution to decide to begin intergovernmental discussions at the United Nations on ways to strengthen the inclusiveness and effectiveness of international tax cooperation through the evaluation of additional options, including the possibility of developing an international tax cooperation framework or instrument that is not the multilateral convention contemplated under Pillar 1 of the Two-Pillar Solution, but instead is developed and agreed upon through a United Nations intergovernmental process. Rather, OP2<sup>4</sup> proposes a process that will tear down much of the progress that has been made in international tax cooperation since the 2008-2009 financial crisis and will undermine the Inclusive Framework at the OECD through which so much progress is being made. For that reason, the United

States must dissociate itself from OP2. OP3 similarly undermines our ability to work together constructively to improve international tax cooperation. Calls for a new report by the UNGA Secretary General at this time are inappropriate. *Establishing a UN-headquartered, open-ended ad hoc intergovernmental committee to recommend new actions before completion of the implementation of the Two-Pillar Solution will undermine efforts both to stabilize the international tax system and help it become fit for purpose for the 21st century.*<sup>5</sup> [Emphasis added.]

The concerns are clear:

- the potential for the U.N. resolution to undermine the OECD’s work; and
- the implication in the resolution that the OECD’s inclusive framework is *not* inclusive or is not as inclusive as it should be.

While the United States was not the only jurisdiction with these concerns, the original resolution passed without amendment. On November 21, 2022, before the vote, a proposed resolution budget was submitted, which restated the mandate:

1. Under the terms of operative paragraphs 3, 4 and 5 of draft resolution A/C.2/77/L.11/Rev.1, the General Assembly would: (a) Request the Secretary-General to prepare a report analysing all relevant international legal instruments, other documents and recommendations that address international tax cooperation, considering, inter alia, avoidance of double taxation model agreements and treaties, tax transparency and exchange of information agreements, mutual administrative assistance conventions, multilateral legal instruments, the work of the *Committee of Experts on International Cooperation in Tax Matters*, the work of the Organisation for Economic Co-operation and Development/Group of 20 Inclusive

<sup>3</sup> See U.N. Economic and Financial Committee (Second Committee), United States: Amendment to Draft Resolution A/C.2/77/L.11/Rev.1 (Nov. 23, 2022). The United States ultimately voted for the resolution, noting its disagreement with language in the resolution that it felt implied there was no inclusive framework. The final vote was 55 in favor of the resolution and 13 abstentions.

<sup>4</sup> OP2 and OP3 refer to the second and third “operative paragraphs” in the Nigerian resolution.

<sup>5</sup> United States Mission to the United Nations, “Explanation of Position on a Second Committee Resolution on the Promotion of Inclusive and Effective International Tax Cooperation” (Nov. 23, 2022).

Framework on Base Erosion and Profit Shifting and other forms of international cooperation, as well as outlining potential next steps, such as the establishment of a Member State-led, open-ended ad hoc intergovernmental committee to recommend actions on the options for strengthening the inclusiveness and effectiveness of international tax cooperation; (b) Request the Secretary-General, when preparing the report, to consult with Member States, the members of the *Committee of Experts on International Cooperation in Tax Matters*, the Platform for Collaboration on Tax, and other international institutions and relevant stakeholders; A/C.2/77/L.75 2/5 22-26365 (c) Decide to consider the report at its seventy-eighth session and to include in the provisional agenda of its seventy-eighth session, under the item entitled “Macroeconomic policy questions,” the sub-item entitled “Promotion of inclusive and effective international cooperation on tax matters at the United Nations.”<sup>6</sup> [Emphasis added.]

The mandate specifically identifies the involvement of the U.N. Committee of Experts on International Cooperation in Tax Matters (the committee), a subsidiary body of the U.N. Economic and Social Council (ECOSOC). While even many tax professionals are unaware of the U.N.’s involvement in the tax world, the committee has been operating for many years, providing practical guidance and commentary in the global tax policy space. As stated on its website:

The Committee of Experts on International Cooperation in Tax Matters is a subsidiary body of the U.N. Economic and Social Council, distinguished and globally recognized for its work in norm- and policy-shaping and for the practical guidance provided in the area of international tax cooperation.

<sup>6</sup> See U.N. Economic and Financial Committee (Second Committee), Programme Budget Implications of Draft Resolution,” A/C.2/77/L.75 (Nov. 21, 2022).

The Committee generates practical guidance for governments, tax administrators and taxpayers to help strengthen tax systems, with a view to mobilizing financing for sustainable development.

Through its work, the Committee aims to prevent “double (or multiple) taxation” and “non-taxation” and assists countries to broaden their tax base, strengthen their tax administrations and to curb international tax evasion and avoidance.

With a view to enhancing and promoting international tax cooperation among national tax authorities, the Committee identifies and works on new and emerging international tax issues, such as taxation of the digital economy, dispute avoidance and resolution, and environmental taxation.

The Committee is also responsible for making recommendations on capacity-building activities supporting tax administrations in developing countries. In all of its work, the Committee gives special focus to least developed countries and others in special situations, including small island states and landlocked countries.<sup>7</sup>

The committee developed from the preexisting Ad Hoc Group of Experts on Tax Treaties between Developed and Developing Countries, which was created in 1968. In 1980, under ECOSOC Resolution 1980/13, the group was renamed the Ad Hoc Group of Experts on International Cooperation on Tax Matters and increased its membership to 25 tax administrators from 10 developed countries and 15 developing countries and economies in transition. (This 10/15 split is not always strictly adhered to, and there is always room for interpretation of which countries are developing and which are developed.<sup>8</sup>)

<sup>7</sup> U.N. Department of Economic and Social Affairs, “About” (last accessed Jan. 18, 2023).

<sup>8</sup> See “The U.N. Tax Committee and Developing Countries,” *Tax Notes Talk* (Apr. 8, 2021), for an interesting podcast that discusses the work of the committee and some of the challenges it faces.

The committee members, who are generally high-level and experienced professionals from the revenue authorities in the involved countries, are nominated by their governments and appointed by the U.N. secretary-general for a four-year term.<sup>9</sup> Members are selected to ensure geographic representation as well as representation from different types of tax systems. The committee meets twice each year for a four-day period, as required by the Addis Ababa Action Agenda on Financing for Development (General Assembly Resolution 69/313). During the initial meeting, a work plan is developed, and between the two annual meetings, work is undertaken by various subcommittees, which are established by the committee.

In 2004 ECOSOC renamed the group and provided its mandate, which, among other things, requires it to:

- keep under review and update as necessary the United Nations Model Double Taxation Convention between Developed and Developing Countries (U.N. model tax convention) and the Manual for the Negotiation of Bilateral Tax Treaties Between Developed and Developing Countries;
- provide a framework for dialogue with a view to enhancing and promoting international tax cooperation among national tax authorities;
- consider how new and emerging issues could affect international cooperation in tax matters and develop assessments, commentaries, and appropriate recommendations;
- make recommendations on capacity-building and the provision of technical assistance to developing countries and countries with economies in transition; and
- give special attention to developing countries and countries with economies in transition in dealing with all the above issues.

<sup>9</sup>The committee members participate in their individual capacity and not as representatives of their governments. Current members are from Pakistan, India, Nigeria, Chile, the Republic of Korea, Malawi, Ghana, Mexico, Zambia, Jamaica, Ireland, Indonesia, Myanmar, Mauritania, Argentina, Angola, the Netherlands, the Russian Federation, Canada, Norway, Germany, Ecuador, Italy, Sweden, and China.

Like the U.N. itself, much of the committee's focus is on aiding and providing guidance to developing jurisdictions and ensuring that those jurisdictions have a strong voice that is heard. It is this voice that is effectively referred to in the Nigerian resolution seeking inclusivity:

The UN Tax Committee strengthens international cooperation on tax matters, domestic and international, with a special focus on needs and capacities of developing countries in this area. It generates practical guidance for governments, tax administrators and taxpayers to strengthen tax systems.<sup>10</sup>

The need for developing jurisdictions to have such a voice, and to be able to raise and address their specific concerns, is precisely the reason that the Nigerian resolution seeks the involvement of the U.N.<sup>11</sup> There has long been a sense that the OECD is primarily focused on the 38 large, well-funded, developed OECD countries; the U.N. committee has historically provided input from the less-developed jurisdictions. Indeed, in all areas, the U.N. has been seen as the voice of developing jurisdictions.

To carry out its mandate, the committee relies on various subcommittees and working groups, each focused on a specific area.<sup>12</sup> The subcommittees comprise committee members as well as business members and academics with an expertise or interest in a particular area. Over the years, the subcommittees have been responsible for manuals and guidance, including the U.N. Manual for the Negotiation of Bilateral Tax Treaties Between Developed and Developing Countries, part of the committee's specific mandate,<sup>13</sup> and the U.N. Practical Manual on

<sup>10</sup>U.N. Department of Economic and Social Affairs, "25th Session of the Committee of Experts on International Cooperation in Tax Matters" (Oct. 2022).

<sup>11</sup>Fewer than half of the African countries are participating in pillars 1 and 2.

<sup>12</sup>From 2017 to 2021, I had the privilege of serving on the committee's Subcommittee on Dispute Avoidance and Resolution. It was a truly extraordinary experience to work with a group of tax professionals from across the world to debate and create guidance for developing countries.

<sup>13</sup>U.N. Committee of Experts on International Cooperation in Tax Matters, "Revised Manual for the Negotiation of Bilateral Tax Treaties Between Developed and Developing Countries: Note by the Subcommittee on Tax Treaty Negotiation," E/C.18/2019/CRP.5 (Apr. 23-26, 2019).

Transfer Pricing for Developing Countries.<sup>14</sup> In 2021 the Subcommittee on Dispute Avoidance and Resolution released the Handbook on Avoidance and Resolution of Tax Disputes,<sup>15</sup> which provides developing countries with practical guidance and information regarding dispute resolution methods. A significant portion of the handbook is devoted to the mutual agreement process, a critical part of the tax dispute resolution process and an area in which developing jurisdictions often face capacity issues.

Subcommittees have dealt with other issues, such as exchange of information, tax challenges related to the digitization of the economy, and environmental tax. As a subcommittee achieves its mandate, it is dissolved. Occasionally, a subcommittee remains in place for multiple four-year terms. The committee guidance to developing nations takes various forms, including treatises and manuals. In 2022 the committee announced the issuance of the updated (fifth edition) U.N. model tax convention,<sup>16</sup> a major piece of work that is also part of the specific mandate of the committee.<sup>17</sup>

In June 2021 committee members for the 2021-2025 term were announced. The majority come from developing countries, “and for the first time since inception, the Committee has a majority of women experts.”<sup>18</sup> In October 2021 the 23rd session of the committee convened for the first time, virtually, to begin identifying

subcommittee topics and matters on which to focus.

There are 11 subcommittees and four working groups. Subcommittees can have a substantial number of members drawn from the committee, as well as the business community and academia, and are generally tasked with a specific mandate that is to be completed by the end of the four-year term. Working groups have a more informal status, have many fewer members, and are asked to offer thoughts and guidance on a topic.

What, then, is to be made of the resolution that directs the committee to become involved in work that may well duplicate the OECD’s work? The answer is unclear. What is clear is that “developing countries want an architecture overseen by the U.N. in which they would have an equal say.”<sup>19</sup> This need for a louder voice has been the subject of comment:

“Shifting power from the OECD is paramount to end the exploitation and plunder of developing countries,” Dereje Alemayehu, the executive coordinator of the Global Alliance for Tax Justice, said in a statement. U.N. Secretary-General António Guterres warned in August that current “tax norms need strengthening to address digitalization and globalization in ways that meet the needs and capacities of developing countries.”<sup>20</sup>

With pillar 1 a near-certainty in early 2023, the committee will need to plot a course forward in the near term. How the committee will navigate the OECD’s work while acting in accordance with the resolution’s mandate will be fascinating to observe. But one thing is for sure — it will most certainly not be boring! ■

<sup>14</sup>U.N., “Practical Manual on Transfer Pricing for Developing Countries 2021” (2021).

<sup>15</sup>U.N., “Handbook on Avoidance and Resolution of Tax Disputes” (2021).

<sup>16</sup>U.N., Model Double Taxation Convention Between Developed and Developing Countries (2021).

<sup>17</sup>U.N. Department of Economic and Social Affairs, “Mandate — Committee of Experts on International Cooperation in Tax Matters” (last accessed Jan. 27, 2023).

<sup>18</sup>U.N. Secretary-General, “UN Tax Committee — 25 Members Appointed” (July 21, 2021).

<sup>19</sup>Nosmot Gbadamosi, “Will the U.N. Tax Convention Empower Africa?” *Foreign Policy*, Nov. 30, 2022.

<sup>20</sup>*Id.*