

UN Resolution on International Tax Cooperation

On 8 August 2023 the Secretary-General of the United Nations issued an ‘Advance unedited version’ of a report on Resolution 77/244 titled *Promotion of inclusive and effective international tax cooperation at the United Nations*. It has subsequently been released as a final and official version.

That Resolution, which was adopted by the General Assembly on 30 December 2022, referenced approximately 20 items of previous work covering a wide range of tax-related matters from Base Erosion and Profit Shifting to illicit financial flows and requested work to be carried out on five items.

The first item is recognition of the timeliness and importance of strengthening international tax cooperation to make it fully inclusive and more effective.

The second is that it decides to begin intergovernmental discussions in New York at the United Nations Headquarters on ways to strengthen the inclusiveness and effectiveness of international tax cooperation through evaluation of additional options, including the possibility of developing an international tax cooperation framework or instrument that is developed and agreed upon through a United Nations intergovernmental process, taking into full consideration existing international and multilateral agreements.

The third item is the preparation of a report which aims to analyze all relevant international legal instruments, other documents and recommendations that address international tax cooperation. Then the resolution lists five inclusive items, being avoidance of double taxation model agreements, tax transparency, exchange of information, mutual assistance conventions and multilateral legal instruments. Also included is the work of UN Tax Committee and the OECD/G20 Inclusive Framework on BEPS and other forms of international cooperation. The Resolution requests that the report consider 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.’

The fourth and fifth items deal with consultation with Member States and others and to include the report in the provisional agenda of the seventy-eighth session of the General Assembly which opens in September with discussions taking place until the end of this year.

Importantly the United States moved an amendment to exclude the words italicized in the third paragraph above. That is, “including the possibility of developing an international tax cooperation framework or instrument that is developed and agreed upon through a United Nations intergovernmental process”. 55 jurisdictions voted in favor of this amendment, 97 against it and 13 abstained:

- The 55 jurisdictions that voted in favor of the US amendment included all the EU Member States, Japan, Korea, the UK, Australia and New Zealand plus 23 developed and developing countries. This comprised about a third of the member states who voted or abstained, but nearly 60 percent of Global GDP.
- China, India, Singapore, all the African nations and most of the developing countries voted against the US amendment. This comprised nearly 60 percent of member states and about 37 percent of Global GDP.



Submissions

The Secretary-General invited submissions on the resolution which were due in March 2023. More than 80 submissions were made. Nearly 30 submissions were from jurisdictions or regional bodies. Given the African Group represented 54 jurisdictions and the EU represented 27 jurisdictions, approximately 100 jurisdictions were covered, with 65 favoring a new role for the UN, including China, Singapore and Costa Rica, which qualified this position to minimize duplication with the OECD/G20 Inclusive Framework, and 35 jurisdictions arguing more strongly against UN involvement in the BEPS domain. Additionally, there was a submission in support of the UN from the Group of 24 Secretariat (which now has 28 members), although 4 of these members abstained.

There were 15 submissions from either the UN Tax Committee or UN Organizations, all supporting additional UN involvement, and five additional submissions from African organizations and the South. The submission from the OECD is more than 30 pages and outlines the increasing involvement of developing countries in the global tax co-operation infrastructure over the last decade. Another 30 submissions from civil society and academia support the UN approach, with three others broadly taking an approach that minimized duplication. There were 10 other submissions from business and similar organizations with all but one supporting the current involvement of the OECD/G20 Inclusive Framework.



Inclusiveness

This delineation is important because the main criticism of the Inclusive Framework, which contains more than 140 countries, is that it is not fully inclusive. The Report argues that while all parties enter the IF on an equal footing to form a consensus, there is not full equality. The reasons stated refer to the manner in which the agenda is set, the pre-existing framework on source and residence, and the differing capacities of developed and many developing countries. In addition it is asserted there is no global body that a jurisdiction can join as of right given that the Inclusive Framework requires that a jurisdiction commit to the BEPS agenda and its consistent implementation. What is needed, the draft report argues, is a fully inclusive process.

An issue raised by a number of countries, including the US, UK, Japan and Australia in the consultation process concerns the concept of a fully inclusive process, particularly given that the UN generally works on majority rule. The Japanese submission stated ‘...if the concerns expressed by over 50 countries are not to be addressed, an intergovernmental discussion on tax cooperation at the UN would not be an inclusive forum, taking into account the lack of inclusiveness in the process of the resolution formation. Moreover, if the majority decision-making process is to be introduced in the UN intergovernmental tax discussion and the voices of the minority are suppressed as a result, we cannot hope that it will constitute an inclusive forum for tax discussion.’

The draft report outlines main indicia of a fully inclusive process. This comprises full participation in agenda setting, full transparency of debates, the right to participate without any preconditions, the right not to participate or to choose not to be bound by the results, careful negotiation of the composition of any bureau or steering group to ensure that all participants are fully represented, an equal ability to fully engage whether by consensus or voting in the decision-making, and robust processes for avoiding and resolving tax disputes which are agreed through an inclusive process.

Applying this lens of inclusiveness, the draft report concludes that both the current UN Tax Committee and the OECD/G20 Inclusive Framework do not meet the standard of being fully inclusive.



Options

Three options are then considered. Option 1 is a legally binding treaty that would cover a wide range of tax issues. This would include objectives, definitions, information reporting rules and mandatory and preferably enforceable obligations. It is recognized that a political agreement is required for this and that a comprehensive agreement may not be viable, but that a legally binding convention may be achievable on some issues. An example given is tax-related illicit financial flows.

Option 2 is a legally binding 'framework' agreement. It would outline core principles governing cooperation and a governance structure including potentially a plenary forum and protocols which would deal with regulatory aspects that jurisdictions would be able to opt-into or out of depending on their priorities and protocols. Again the example given is adopting a protocol on illegal financial flows.

Option 3 is the development of a non-binding multilateral agenda for coordinated action on improving cooperation at the international, national, regional and bilateral levels. It is then said that some problems such as eliminating illicit financial flows require global action because a handful of jurisdictions can undermine the efforts of the majority.

The draft report recognizes that Option 1 can only be effective if there is political consensus on a solution and the issues are specific. Option 2 is said to be most likely to be effective if there is no immediate political consensus or the problem is evolving as the option allows for incremental progress. Option 3 is said to be most effective where there is no political consensus or the issue requires a multilevel approach including national, regional and bilateral solutions.

The draft report contemplates the UN General Assembly considering these three options and determining a way forward in the last months of this year. There would then be established a Member State-led, intergovernmental ad hoc advisory expert group to prepare for one of the three options agreed by the General Assembly or for each of the options if no agreement is reached on a specific way forward.



Conflation of a wide spectrum of tax behaviors and issues

Two observations should be made. Firstly, there is a conflation of a spectrum of tax behaviors. The draft report states that 'the current call for fully inclusive and more effective international tax co-operation shows agreement on the need to address tax evasion, aggressive tax avoidance, money laundering and illicit financial flows.' Evasion and money laundering are clearly in a realm of illegality. While aggressive tax avoidance may fall outside the realm of illegality, the arena of the BEPS 2.0 rules involves changes in the international tax architecture outside the realm of aggressive tax avoidance. Illicit financial flows are sometimes defined in very broad terms to include transfer pricing and aggressive tax planning. That said, if the focus of the UN was truly to address tax evasion, aggressive tax avoidance, money laundering and illegal illicit financial flows, the overlap between the BEPS 2.0 project and that focus would not be problematic.



Need for detailed analysis

Secondly, related to this point and as noted above, Resolution 77/244 required a report analyzing 'all relevant international legal instruments, other documents and recommendations that address international tax cooperation considering, inter alia, avoidance of double taxation agreements and treaties, tax transparency and exchange of information agreements, mutual administrative assistance covenants, the work of the UN Tax Committee, the OECD/G20 Inclusive Framework and other forms of international cooperation.' This is an important and extensive exercise. The Canadian submission notes that this should cover about 20 initiatives. The draft report does not do this. Possibly this will be left for a later phase but determining where, if any, the real gaps are through detailed analysis would be a critical element in improving the international tax environment.



Conclusion

Achieving international tax cooperation on an inclusive and effective basis is clearly an important goal for our global future. Achieving this is not an easy task. An institutional framework that can drive this process will be critical to all.

Assuming the report of the Secretary-General is accepted by the General Assembly later this year, it is worth considering how a new world of UN-driven international cooperation might operate. In particular whether jurisdictions will accept consensus based on majority voting in taxation matters and in what domains jurisdictions are likely to form agreement.

It is also worth considering that there are other multinational frameworks which may seek to have an influence in tax cooperation. These include the IMF and World Bank, which are part of the Platform for Collaboration with the UN and OECD. On 24 August 2023, the BRICS forum (involving Brazil, Russia, India, China and South Africa) announced that 6 new countries would join the forum from 1 January 2024 being Argentina, Egypt, Ethiopia, Iran, Saudi Arabia and the UAE. It was indicated that 22 other countries have been asked to be admitted. It is unclear what level of cooperation could exist in the future for such a group of divergent countries. What is clear is the need to watch this space with interest and care.

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