



The United Nations Tax Work - An Introduction*

International Monetary Fund

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** Only key points will be addressed in the presentation*

The Developmental Background

- Under the head of “Financing for Development” in UN framework.
- Secretariat therefore is in UN Department of Economic and Social Affairs (DESA) – Financing for Development Office.

Why “Financing for Development”?

- 2002 Monterrey Consensus on Financing for Development:
 - Follow-up in **Doha Declaration** – end of 2008.

Why “Financing for Development”?

- Main Ideas:

- “Each country has primary responsibility for its own economic and social development, and the role of national policies and development strategies cannot be overemphasized. At the same time, domestic economies are now interwoven with the global economic system and, inter alia, the effective use of trade and investment opportunities can help countries to fight poverty. National development efforts need to be supported by an enabling international economic environment.” (Monterrey Consensus, para 6)

Monterrey Consensus on FfD

- Aspects of Financing for Development, where UN Tax Cooperation “sits”:
 1. **Domestic resource mobilisation** (important tax role in development – schools, hospitals, roads etc. – it isn’t *only* about avoiding double taxation, even though that’s important – see 2.)
 2. **Foreign direct investment** (importance of investment to development, so ***not anti-business***)
 3. International trade
 4. Official development assistance
 5. External debt
 6. **“Systemic” issues** (“voice and participation” of developing countries in norm-setting – an important tax focus)

UN Tax Committee

- We provide Secretariat support to the **UN Committee of Experts on International Cooperation in Tax Matters** (“UN Tax Committee”).
- A Subsidiary Body of The UN’s Economic and Social Council (“**ECOSOC**”)
- Current issues of whether it should be:
 - An **inter-governmental** body;
 - **Better resourced.**
- See the **Secretary-General’s Report** at:
<http://www.un.org/esa/ffd/tax/>

Mandate of the UN Tax Committee

- (i) Review and update as necessary the *United Nations Model Double Taxation Convention between Developed and Developing Countries* and the *Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries*;
- (ii) Provide a **framework for dialogue** with a view to enhancing and **promoting international tax cooperation** among national tax authorities;
- (iii) Consider how **new and emerging issues** could affect international cooperation in tax matters and develop assessments, commentaries and appropriate recommendations.

Mandate of the Committee

- (iv) Make recommendations on **capacity-building and the provision of technical assistance** to developing countries and countries with economies in transition; and
- (v) Give **special attention to developing countries and countries with economies in transition** in dealing with all the above issues.

Composition of the Committee

- Comprised of **twenty-five members** nominated by Governments and acting in their **personal capacity**.
- Selected to reflect an adequate **equitable geographical distribution**, representing different tax systems.
- **Appointed by the UN Secretary-General**, after notification to the UN Economic and Social Council.

Composition of the Committee

- Term of office is **four years** (end of June 2013).
- Meet on a **yearly** basis for no more than 5 days (so relies on a **subcommittee system** for papers and continuing work).
- But others attend and **actively participate** in its **Annual Session** – especially from other country governments, business, non government organisations, advisors and academics. **People from those sectors also participate** in subcommittees.

Current Membership (2009-2013)

"D'ing" country# experts (15)

Morocco
Egypt
South Africa
Nigeria
Ghana
Senegal

China
Malaysia
Republic of Korea*
India
Pakistan

Barbados
Chile*
Mexico*
Brazil

"D'ped" country# experts (10)

Belgium*
Italy*
Spain*
Germany*

Norway*
Switzerland*

United States*
New Zealand*
Japan*
Bulgaria

Though nominated by countries,
Members serve in their own
capacity

* Denotes OECD Member

Work of the Committee

- **Annual Session** (5 days a year maximum)
7th session: **24 – 28 October 2011**
(Geneva)
- **Subcommittees and Working Groups**

Subcommittees & Working Groups

- Revision of Model - overarching
- Services
- Dispute Resolution
- Transfer Pricing – Practical Issues
- Manual for the Negotiation of Bilateral Tax Treaties
- Capacity Building
- Capital Gains (Article 13 paras. 4 and 5)
- Beneficial Ownership (Working Group)

The UN Model Tax Convention – Double Tax Treaty Work

- A long history – commencing 1921 in the League of Nations (UN's predecessor)
- 1943: *Mexico Model* completed – more source State oriented.
- 1946: *London Model* completed – more residence State oriented.
- 1946: **United Nations Fiscal Commission established** (continued to work until 1954).
- Late 1950's – the Organisation for European Economic Co-operation (OEEC), begins work – precursor to the Organisation for Economic Co-operation and Development (OECD).
- 1963: **OECD Fiscal Committee** begins drafting a Model.
- 1968: **UN starts work again** – AD Hoc Group of Experts formed.
- 1977: First [non draft] **OECD Model** "*OECD Model Double Taxation on Income and on Capital*" completed. (Most recent version: 2008).

A Very Brief History of the UN Model Tax Convention

- 1979: *UN Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries.*
- 1980: *UN Model Double Taxation Convention between Developed and Developing Countries*, 1980 and revised in 2001.
- Currently UN Model and Manual are under further revision, with a view to a **new version in 2011**.
- **UN Committee of Experts on International Cooperation in Tax Matters** is the custodian.

Some Differences to the OECD Model

- UN Model and Manual and other documents available at:
 - www.un.org/esa/ffd/tax
- Basic difference: attitude to **preservation of source [such as place of investment] state taxation rights in certain instances.**
- In the “distribution of taxing rights” to avoid double taxation, more is retained by source country, with credit or exemption required by residence country.

Some Differences to the OECD Model

- Source State taxation is legitimate under international law, without a treaty, so it is a question of how much you give away of that taxing right in the treaty for:
 - obtaining the treaty;
 - encouraging investment, including sending positive signals to possible investors;
 - balancing capital exporting/ importing interests; and
 - avoiding double taxation (although double taxation will often be unilaterally avoided by the other country's domestic legislation anyway).

Some Differences to the OECD Model

- The UN Model seeks to achieve a balance for developing countries between **a fair reservation of taxation rights and openness to investment.**
- But it is ultimately up to each country to determine its attitude to exertion of taxing rights and openness to investment.
- **Not necessarily a developing/ developed country divide** on every issue, e.g. Australia, Canada and New Zealand have traditionally taken some strong source country positions.

Some Differences to the OECD Model

- **Article 5** (Permanent Establishment)
 - level of economic engagement required to justify source country taxation under treaties
 - greater source state taxation rights preserved under UN model.

Some Differences to the OECD Model

- **Article 5** – The UN Model **services** provision:
“3. The term ‘permanent establishment’ also encompasses:
 - ... (b) The **furnishing of services**, including consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only if activities of that nature continue (for the same or a connected project) within a Contracting State for a period or periods aggregating more than **six months within any twelve-month period.**”

Some Differences to the OECD Model

- OECD – no special provisions for services but Commentaries are an important part of the differences between the two Models
- OECD 2008 Model Commentary:
 - “ the provision of services should, as a general rule subject to a few exceptions for some types of service (e.g. those covered by Article 8 and 17), be **treated the same way as other business activities** and, therefore, the same permanent establishment threshold of taxation should apply to all business activities, including the provision of independent services.” (para 42.11)

Some Differences to the OECD Model

- Article 7 (Business Profits)
- Limited force of attraction provision in UN Model
 - 1.... If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to (a) that permanent establishment; (b) sales in that other State of goods or merchandise of the same or similar kind as those sold through that permanent establishment; or (c) other business activities carried on in that other State of the same or similar kind as those effected through that permanent establishment.

Some Differences to the OECD Model

- **Article 7** – force of attraction rule therefore extends attribution beyond the PE itself.
 - Limited to Article 7 - **not extended to income from capital (dividends, interest and royalties) covered by other treaty provisions.**
 - Neither sales through independent commission agents nor purchase activities would become taxable to the principal under the rule.

Some Differences to the OECD Model

- Article 7

- Those supporting limited force of attraction (many don't use) point to the **administrative benefits** because it is not necessary to precisely determine whether particular activities are related to the permanent establishment or the income involved attributable to it.

Some Differences to the OECD Model

- Article 7
- OECD Model is changing – culmination of long “attribution of profits” project.
- What does it mean for developing countries?
 - Requirement to give deductions for notional interest and royalty flow between parts of the same entity.
 - But no countervailing right to tax such “notional payments”.
 - Complex
 - Impact on source countries? How many OECD countries will follow it?
- UN Model does not require this – another key “fork in the road” between the two Models.

Some Differences to the OECD Model

- Article 10 (Dividends)

- Maximum WHT rate not specified (subject to negotiation – compared to 5 per cent in subparagraph (a) for direct investment dividends and 15 per cent in subparagraph (b) for portfolio investment in the OECD Model)
- many in the UN negotiations considered the OECD rates too low, but each country should make own decision – the UN way.
- Best approach for UN Model is to explain pros and cons in different situations.
- Lack of rate specified reflects greater developing country diversity than in the OECD – though even there we find increasing diversity.

Some Differences to the OECD Model

- **Article 11** (Interest) - rate not specified.
 - Loans will often specify a net return after WHT, so is a high rate just crippling your own people's competitiveness?
 - But on the other hand **a benefit to individuals may not be a direct substitute for a benefit to the revenue**, which can be applied to public goods.
 - Some countries were concerned at forex outflows as well as revenue losses. Nowadays?
 - Again, **each country must weigh up pros and cons of higher versus lower rate** – UN Commentary fairly addresses the various issues.

Some Differences to the OECD Model

- **Article 12** (Royalties) - source state taxation of royalties - an approach followed by about half of the OECD countries also.
 - Pros of transfer of technology?
 - Right to return of IP owner – recovering R&D?
 - Benefits of new markets?
 - Feeling among many developing countries that the technology they get tends to have costs recovered already; how true is it nowadays?
 - Importance of WHT as an administrable tax for developing countries?

Some Differences to the OECD Model

- **Article 13 (Capital Gains)**
 - Para 4. **Alienation of shares in land-rich companies**
 - **Influenced the OECD Model** (source country adherents in the OECD!)

Some Differences to the OECD Model

- **Article 14** (Independent Personal Services)
 - Deleted from OECD Model.
 - UN Model includes a 6 month test, even without a fixed base [or having to prove it].
 - UN Tax Committee discussed possible deletion, while seeking to preserve source state taxing rights.
 - But a lot of support for Article 14 as differentiated from Art. 5 (e.g. fixed base vs. PE, Non Discrimination consequences?)
 - It will stay, will be examined for possible improvements, and deletion will only be an option addressed in Commentary.

Some Differences to the OECD Model

- **Article 21** (Other Income)
- Para 3 – “other income” sourced in treaty partner may be taxed by that State.
 - Addition to Article 21 of the OECD Model Convention. It is intended to **permit the country in which the income arises to tax such income if its law so provides.**
 - **Otherwise only the residence country could tax,** even though income arises from its treaty partner, rather than a third State.
 - Again respects source country taxation rights in the “carve-up” of taxing rights needed to avoid double taxation.

Other Relationships to the OECD Model?

- Arbitration – under discussion and dispute resolution in tax agreements needs to be improved, but issues include:
 - Is initial focus better put on improving Mutual agreement procedure?
 - Cost for developing countries – extra budgetary allocations as compared with MAP and courts (where judges and facilities otherwise paid for)?
 - Need for foreign exchange?
 - Developing country arbitrators/ experience?
 - Inherent developed country advantages?
 - All need consideration and suspicions need to be addressed – the UN is a good place to do that.

Other Relationships to the OECD Model?

- **Article 26** (Exchange of Information) – Some minor drafting differences, OECD changes **adopted** for inclusion in next version of UN Model as regarded as suitable for developing countries.
 - Issue of **automatic exchange** of information and the UN and OECD work?

Other Relationships to the OECD Model?

- Article 27 of OECD Model has been agreed for next version of Model, because seen as potentially beneficial for at least some developing countries.
- Will there generally be greater convergence or divergence between the UN and OECD Models?

“Value Add” of UN Tax Treaty Work

- The UN Model helps non-OECD countries in negotiation efforts.
 - Recognises legitimacy of preserving source country taxation in bilateral treaties.
 - Assists in administration and combatting tax avoidance (exchange of information & mutual assistance).
 - Should be differentiated from the OECD Model by its focus on issues that may not be accepted – or even raised - in the OECD e.g. legitimate source country positions and practical administration issues for developing country administrations.

“Value Add” of the UN Tax Work Generally

- Ensures widespread participation in norm-creating work: **192 countries in the UN**, 34 in the OECD.
- But good OECD etc work can get wider “ownership” - avoid unnecessary proliferation of differing norms and guidelines – and unnecessarily high tax compliance and collection costs.

Transfer Pricing - Practical Issues

- 2009 Annual Session

- Tax Committee responds to **perceived lack of sufficient clear and relevant guidance for developing countries** on the policy and administrative aspects of applying transfer pricing analyses to some of the transactions of multinationals.
- Agrees to preparation of a practical manual by a new subcommittee.
- **Others (incl. OECD and WB) have focussed on this more since then – a vindication of the work, not a reason to stop working in this area.**

Subcommittee on Transfer Pricing

– Practical Issues

- **Mandate:**

- develop a practical manual on transfer pricing, based on the following principles:

- a) That it reflects the operation of Article 9 of the United Nations Model Tax Convention, and the Arm's Length Principle embodied in it, and is consistent with relevant Commentaries of the UN Model [these "recommend" following the OECD Guidelines].

- b) That it reflects the realities for developing countries, at their relevant stages of capacity development.

- c) That special attention should be paid to the experience of other developing countries [i.e. South-South sharing of experiences].

- d) That it draws upon the work being done in other fora³⁸

Transfer Pricing Manual

- Complete draft manual for adoption to the 2012 Tax Committee Annual Session.
- Opportunities to comment (including at Tax Committee Annual Session 24-28 Oct, Geneva).
- Likely to be a roll-out of Chapters as they are completed.
- Integrated into renewed UN (and hopefully other) capacity building efforts.
- No easy path! – no budget, no contributions to UN Tax Trust Fund. Some strategic Norwegian, German support, however.

Transfer Pricing Manual

- Areas of focus:
 - What sort of approach might be **appropriate for a DC at its particular stage of development**, and in line with its own sovereign priorities; e.g. at what point is a specific TP regime a distraction/ unnecessary/ advisable/ necessary?
 - **TP should be understood as a journey** – how should it be planned – a staged approach? initial focus areas?
 - **Integration with other aspects**, e.g. general investment promotion policy, dispute resolution policy, risk assessment and audit capabilities and priorities.

Transfer Pricing Manual

- Areas of focus:
 - Can arm's length pricing (ALP) approach be addressed in a way that better works for DCs (especially by allowing focus of limited resources on areas of greatest concern at a point in time, and by reducing levels of data seeking and crunching required for each individual case) and still be ALP?
 - Can we learn from e.g. Brazilian fixed margins, use of "safe harbours" and even the "formulary apportionment" debate, to make ALP more "workable" for both governments and taxpayers, yet still be identifiably an ALP approach?
 - How do we fairly deal with the imprecision and complexity of ALP and distribute its burdens?

Transfer Pricing Manual

- Areas of focus:
 - Relevance, language and readability to non-specialists.
 - Improving/ adding examples and inputs from developing countries and testing to see if it meets the needs (upcoming meeting).
 - Recognising there are not single “developing” or “developed” country views.
 - Integrating into capacity building efforts of ourselves and others.

Transfer Pricing Manual

- Areas of focus:
 - Hopefully **greater collaborative work**, including but not limited to: the G-20 context, OECD, WB, IMF, regional and broader associations of tax administrations, UNDP, UN regional commissions, development banks.
 - But in that collaboration we must stay **true to the UN's global membership, mandates and perspectives** and particularly to the voices of developing countries.

Capacity Building

- A part of Mandate never fully met, largely due to resourcing issues, but improving (see S-G's Report on Int'l Tax Cooperation at paras 16-17).
- South-South sharing of successful tax practices project, a partnership with the Special Unit on South-South Cooperation of the United Nations Development Programme (UNDP), and two non-governmental organizations, the New Rules for Global Finance coalition and the Tax Justice Network.

Capacity Building

- Objective of S4TP is to facilitate knowledge-sharing and cooperation in tax administration and tax policy among developing countries.
- Also aims to facilitate developing country input into the work of the Tax Committee, including its **Subcommittee on Capacity-Building**, and to ensure greater access to online and face-to-face courses by developing country participants.
- The Governments of Germany and Norway have provided some funding for the project. IBFD has also assisted.

Capacity Building

- In addition, the Department of Economic and Social Affairs has developed a broader strategy on capacity development in the tax area through the organization of training seminars (including on double tax treaty negotiation and administration and transfer pricing administration)
- Depends on the allocation of funds under the United Nations regular programme of technical cooperation, including one dedicated post of interregional adviser.

Capacity Building

- Another vehicle for implementation will be a United Nations Development Account project, entitled “Strengthening capacity of national tax administrations of developing countries in Latin America to reduce tax transaction costs and thereby maximize their tax revenues”, intended to be carried out in cooperation with the Inter-American Center of Tax Administrations and others.
- We see this as a “pilot” for similar work in other regions.

Some Common Questions

- **How does this relate to work of other agencies** – is it just duplicating or is it creating a separate set of “guidelines”? [A: it is neither; applying the UN perspectives and mandates to this issue where they differ from other agency approaches or add to them is not a duplication, though we should have good lines of communication. **Rejecting unnecessary duplication does not necessitate monopoly provision of assistance**].
- Is it **business friendly or unfriendly?** [A: it is “good-business friendly” in terms of compliance costs, but will allow countries to more robustly assert legitimate taxing rights].

Some Common Questions

- Why is the UN TP work supporting Arm's Length Pricing rather than **formulary apportionment**? [A: it is the immediate practical focus of DCs looking to TP issues at present – does not preclude other “tracks” being considered if the Committee wishes].
- What else can be done practically to deal with **data, knowledge, skills gaps**. [A: creative, needs-responsive thinking and action needed to reduce these deficits and the impact of them].

Final Reflections

- Important work, but specific TP response may not be right for every country – LDC's immediate needs have to be addressed!
- Must be a genuine effort to meet needs and priorities of developing countries, not “pushing products”.
- Importance of UN working with others, including IMF, WB, OECD, UN Regional Commissions, Regional Development Banks, UNDP etc, with a focus on meeting the capacity development part of the Mandate in a very practical way.

More Final Reflections

- Who bears the costs of uncertainty and complexity at present, and who should in future?
- How do we ensure DCs have - and can in practice make the most effective use of - seats at the table in *setting* norms, not just receiving and implementing them.
- How can the UN work be better supported by countries, and how can it best earn that support?
- Website: <http://www.un.org/esa/ffd/tax/>