

The United Nations Tax Committee as a Player in the International Tax Policy Discussion

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- 1. Introduction**
- 2. International Tax Policy Regime and International Relations Theory**
- 3. Current Role of UN on International Tax Policy**
 - 3.1. Reflections from the Past: History
 - 3.1.1. Metamorphosis: UN Model Convention
 - 3.2. UN Tax Committee – Existing Framework
 - 3.3. Major Contributions by UN on International Tax Policy
 - 3.3.1. Objectives
 - 3.3.2. UN Model Convention between Developed and Developing Countries
 - 3.3.3. UN Manual for the Negotiation of Tax Treaties between Developed and Developing Countries
 - 3.3.4. UN Practical Manual on Transfer Pricing (TP) for Developing Countries
 - 3.3.5. UN Handbook on Selected Issues for Taxation of the Extractive Industries
 - 3.3.6. Other Significant Contributions
- 4. Going into the Future: UN as a Voice for Developing Economies in Post BEPS Era**
 - 4.1. Significance of Emerging Economies in International Tax Policy
 - 4.2. UN Tax Committee; Time for an Evolution by Getting on to the Table from the Menu
- 5. Conclusion: UN Tax 2.0 Version**

1. Introduction

Global tax governance is currently the trending discussion in the international tax policy regime as the existing international tax rules are criticized for being archaic and not suited for the modern digital economy.¹ In this context, it is worth reminiscing the concluding remarks from the Organization for Economic Co-Operation and Development (OECD) tax policy director on a panel discussion in 2018 that “*Consensus is better than Chaos*”.² The plea by the OECD tax policy director to arrive at a multilateral consensus on tax policies by all governing stakeholders is mostly due to the chaos created by a multinational enterprise which has evaded taxes amounting to almost US 600 million dollars.³ Due to the mounting tax evasions, international tax policy is under an immense spotlight and has become a critical agenda point on all significant political discourses in recent times. Even though the current tumultuous scenario in the international tax regime, is attributable to the evolution of the digital economy, was the tipping point was the 2008 global financial crisis which acted as a significant catalyst for necessary policy reforms and provided the much-needed impetus to bring in improvements in line with the 21st century.⁴ As an aftermath of the crisis, the major governments responded by coming together at the G20 Summits, to introspect, take stock and arrive at solutions to ensure there is a crisis-free future.⁵ From the 2008 financial crisis to till date, the international tax policy regime has undergone significant transformations,⁶ and there are clear indications that there is more to come.⁷ With global tax cooperation being the need of the hour, many countries in the Global North as well as the Global South are victims of tax evasions, putting global tax governance in the hot seat. Global tax governance is pivotal for international taxation policy since the existing international tax policy regime is a concomitant of hard and soft law:⁸ hard law in the form of tax treaties to avoid double taxation and facilitate trade and soft law in the form of guidance provided by International Organizations (IO) on facilitating the tax treaties, strengthening administrative cooperation etc. IO such as the League of Nations (erstwhile UN), OECD, United Nations (UN) etc., have played and are playing an influencing role

1 Tax Justice Blog (24 April 2019) <https://www.taxjustice.net/2019/04/24/adapt-or-step-aside-pressure-on-oecd-to-reform-pre-world-war-ii-tax-rules-as-united-nations-convenes-historic-tax-meeting/> (accessed 13 May 2019).

2 Panel discussion held during the 72nd Congress of the International Fiscal Association at Seoul, South Korea, http://taxsutra.com/sites/taxsutra.com/files/webform/IFA%202018%20-%20Day%203_0.pdf (accessed 17 March 2019).

3 IMF Paper on *Corporate Taxation in the Global Economy* (2019).

4 OECD Economic Policy Reforms (2012): *Going for Growth*, OECD Publishing.

5 G20, *The Pittsburgh Summit* (2009).

6 OECD/G20, *Inclusive Framework on Base Erosion and Profit Shifting*.

7 OECD policy note released on 29 January 2019 – “*Addressing the Tax Challenges of the Digitalisation of the Economy – Policy Note*”.

8 There is no single definition for Soft law. Soft law is commonly defined by scholars to include hortatory, rather than legally binding obligations.

in shaping the international tax regime.⁹ The UN, through its tax committee and inclusive approach, plays a significant part by bridging the gap between developing and developed economies' international tax policies. Therefore, the significant role of the IO in international tax policymaking drives us to an opinion that the international tax regime is based on soft law.¹⁰

Hence, based on the context set out above, section 2. of this paper will focus on the role of IO from International Relations (IR) theory perspective, and their influence in designing international tax policy will be analysed. Section 3. will dwell upon the crux of this chapter, the role of the UN tax committee as an IO in shaping the design and destiny of international tax policy and more specifically how UN tax committee is playing a decisive role as a voice for Global South economies on international tax policy. Section 4. discusses the future of the UN tax committee and the role it can play in global tax governance. Section 5. will provide concluding remarks and thereby set the tone for the rest of the qualitative pieces penned in this book that highlights the technical efforts of the UN tax committee's work on the UN Model Convention 2017.

2. International Tax Policy Regime and International Relations Theory

Taxation is one of the key elements for states to raise revenue for state building and thereby, it is one of the critical features of sovereignty for nations.¹¹ In this regard, when it comes to international tax, as much as the states among other things decide on the allocation of taxing rights, it is the IO who have been the architects in designing the international tax policy regime. Therefore, before we look into the IO actors involved in the international tax policy regime, it is imperative to reflect on how the IO emerged and what their role is at the global level. We can search for answers in the International Relations (IR) study.¹² IR may be defined as the study of relationships and interactions between countries, including the activities and policies of national governments, international organizations, non-governmental organizations (NGOs), and multinational corporations (MNCs).¹³ In other words, IR is the study of the interactions among multiple participants in a global setting on an independent field of inquiry.¹⁴ Very few scholars have

9 Christians Allison, *Hard Law, Soft Law, and International Taxation* 25 WISC. INT'L L.J. 325, 331 (2007).

10 *ibid*

11 Christians Allison, *Introduction to Tax Policy Theory* (May 2018).

12 Thomas Kuhn, *The Structure of Scientific Revolutions (Second Edition)*; (New York: The University of Chicago Publications 1997).

13 Robert Jackson and Georg Sorensen, *Introduction to International Relations, Theories and Approaches*. (Oxford: Oxford University Press, 2013) p. 4.

14 Diane M. Ring, "International Tax Relations: Theory and Implications." *Tax LawReview* 60 (2007): pp. 83–154;

focused on analysing the international tax regime from an IR perspective.¹⁵ However, with increased political involvement in international tax, many International Political Economy (IPE)¹⁶ scholars have been focusing their research on international tax relations in recent times.

Due to the rapid growth of economic globalization, international tax reforms have gone on the path of neo-liberalisation.¹⁷ Neoliberalism theory is where states can benefit significantly from cooperation if they trust one another to live up to their agreements. Therefore, according to neoliberals,¹⁸ interdependence,¹⁹ integration and democracy are critical aspects of IR. The neoliberalism school believed that third parties such as an international organisation could lead to more cooperation between the states and, in turn, prosper peace between nations.²⁰ IO can, therefore, be defined as “*purposive entities, with bureaucratic structures and leadership, permitting them to respond to events.*”²¹ The League of Nations²² was set up in this premise under the tutelage of the then United States of America (USA) president Woodrow Wilson, a liberalist thinker, who believed after the first world war that creation of an international organization would put relations between states on a firmer institutional foundation, that international relations would be regulated by international law. The International Chamber of Commerce (ICC) was also founded on these lines in 1919 after the first world war to create an international organization that represents the business community.²³ The ICC founders are hence tagged as the “merchants of peace” as they recognized that robust role trade and investment could foster peace and prosperity amongst states.²⁴ The European Union (EU) is a modern-day example of institutional liberalism, wherein the EU states co-operate with each other to create a single market in the economic sector, wherein the EU establishes and monitors necessary regulatory framework. The UN, OECD, World Trade Organization

15 Altman, *Dispute Resolution Under Tax Treaties* (IBFD: 2005); Diane M. Ring, *Tax Law Review* 60 (2007): pp. 83–154; Diane Ring, Who is Making International Tax Policy? International Organizations as Power Players in a High Stakes World, *Fordham International Law Journal* 33(3) (2010): pp. 649–722.

16 IPE is a branch of IR as it studies the relationship between economics and IR. Due to growth of economic globalization, IPE has become a separate field of study by itself.

17 Bird R, Taxation and development: what have we learned from fifty years of research, *International Center for Tax and Development Working Paper* 1 (2012).

18 Neo-liberalism is the contemporary version of the liberalist theory (post war liberalism). The liberalist generally embraces the emergence of modern liberal state.

19 Interdependence liberalism means an increased level and scope of interdependence between states. That means a world of more cooperative international relations. European Union is an example.

20 Jeffrey W. Meiser, *Chapter 2 Liberalism, International Relations Theory* (E – International Publication: 2017).

21 Robert O. Keohane, *Regime Theory And International Relations* (Volker Rittberger: 1993): p. 28.

22 The League of Nations was an international organization, headquartered in Geneva, Switzerland, created after the First World War to provide a forum for resolving international disputes.

23 ICC: <https://iccwbo.org/> (accessed on 07 May 2019).

24 ICC: History <https://iccwbo.org/about-us/who-we-are/history/> [accessed on 07 May 2019].

(WTO), International Monetary Fund (IMF), World Bank, etc., are other examples of IO.

The institutional liberalists believe that stronger institutions, i.e. institutions with proper governance structure, can make up for lack of trusts between states. However, a major criticism of institutional liberalism comes from the neorealists. According to the neorealists, only states are the actors in IR and power plays a significant role in an anarchical international system. The neorealists believe that power is the most critical factor, and only the state which has considerable power will dictate terms.²⁵ They believe in bipolar systems and not multipolar. They also believe that institutional liberalism does not take relative gains, i.e. in the name of co-operation, other states gain more than they themselves, which does not augur well for the cooperating nations.²⁶

From an international tax policy context, this is a classic scenario where developed economies take undue advantage when concluding tax treaties with developing economies.²⁷ In other words, the criticism is that the OECD model tax convention being followed in the majority of bilateral tax treaties is tilted in favour of rich economies.²⁸ Therefore, even though tax treaty regime has been neo liberalistic with its free trade agenda, when it comes to governance and policy decisions the OECD has been the leader and at the forefront in dictating its terms, with international tax policies favouring the developed economies, more known as rich countries club.²⁹ Thus, the international tax policy can be said to be partly neoliberalism and partly neo-realism on account of policy decisions that are driven by power factions.³⁰

In this regard, to make the tax treaty regime attain its primary objective, i.e., to enable free movement of trade between states without double taxation, the UN Tax Committee has also been playing a significant role to neutralize the existing bias emanating from OECD's tax policy objectives and make the international tax policy regime more neutral and inclusive.³¹

25 Robert Jackson and Georg Sorensen, *Introduction to International Relations, Theories and Approaches*: pp. 65–99.

26 Ashley RK, *The Poverty of Neorealism*, *International Organization*, 38(2) (1994): pp. 225–86.

27 Katrin Mcgauran, *Should the Netherlands sign tax treaties with developing countries?* (SOMO Netherlands: 2013).

28 Yariv Brauner, *Treaties in the Aftermath of BEPS*, 41 *Brook. J. Int'l L.* 973 (2016).

29 Reuven S. Avi-Yonah, *Tax, Trade, and Harmful Tax Competition: Reflections on the FSC Controversy*, 21 *TAX NOTES INT'L* 2841, 2844 (2000).

30 Robert Jackson and Georg Sorensen, *Introduction to International Relations, Theories and Approaches*.

31 Michael Lennard, *The Purpose and Current Status of the United Nations Tax Work*, *Asia Pacific Tax Bulletin*, IBFD (2008), pp. 23–32.

3. Current Role of UN on International Tax Policy

3.1. Reflections from the Past: History

Before we get into the UN Model Convention, it is imperative that we look into the origin of the League of Nations, the predecessor of the UN, as the starting point, as that will set the tone on the evolution of international tax policy regime and enable us to appreciate the distance covered by the UN tax committee in this regime.

States and the state system are features of modern political life. The states would construct a stable international system by entering into agreements. The treaties were in the form of Friendship, Commerce and Navigation (“FCN” treaties as it is commonly known as).³² However, as we enter into the twentieth century, immediately after the first world war in 1917, the then USA President, Woodrow Wilson, mooted the theory of liberalism.³³ He mooted for “*a general association of nations must be formed under specific covenants to afford mutual guarantees of political independence and territorial integrity of great and small nations alike*”.³⁴ This established the League of Nations, and according to Wilson, the idea of a league of nations was that creation of an international organization would put relations between states on a firmer institutional foundation that would promote peaceful cooperation.

With the resurrection of states being the primary motive post the first world war, raising of revenues was imperative. Therefore, the main objective of the League of Nations was to ensure there are no barriers for trade and seamless conduct of trade between countries. As tax plays a primary role in business and to avoid double taxation of income between the states in 1923, the League of Nations published the Report by the Experts on Double Taxation.³⁵ The report prepared by four economists was said to be the model for bilateral tax treaties.³⁶ Sunita Jogarajan, in her paper,³⁷ has extensively analysed the working documents of the expert committees and makes an interesting observation in her conclusion to the paper that the experts while arriving at a relief mechanism on double taxation: “*Despite the general view of the Report as a theoretical or intellectual study of the issue, it is*

32 Stephen C Neff, *A Short History of International Law* (Oxford University Press: Oxford, 2014), Chapter 1 p. 3.

33 Robert Jackson and Georg Sorensen, *Introduction to International Relations, Theories and Approaches*, 2013.

34 Vasquez, J. A., *Classics of International Relations* (Upper Saddle River, NJ: Prentice-Hall 1996) 3rd edition.

35 G.W.J. Bruins et al., *Report on Double Taxation: Submitted to the Financial Committee* (Geneva: League of Nations, 1923).

36 M. Graetz and M. O’Hear, The Original Intent of US International Taxation, *46 Duke Law Journal* 5 (1997), p. 1078.

37 Sunita Jogarajan, Stamp, Seligman and the Drafting of the 1923 Experts’ Report on Double Taxation, *World Tax Journal*, 2013, pp. 368–392.

also interesting to see that the conclusions regarding the appropriate method for relief are strongly tempered by practical considerations and recognition of institutional path dependence".³⁸

Pursuant to the experts' report, in 1943 the League drafted a Model Bilateral Convention in Mexico. The Mexico treaty gave equal weight to source-based taxation, because many of the countries which attended this meeting were from the developing economies, as the major European economies were engulfed in the second world war.³⁹ The Mexico draft was a significant refinement to the League's original 1928 draft. Subsequently, the Fiscal Committee of the League of Nations convened in London and redrafted the Mexico model bilateral tax conventions. The London model convention was modified to suit the residence-based allocation of taxing rights again. For example, the Mexico draft provided that royalties paid for the right to use a patent or secret process would be taxable only in the State where the rights are exploited. In contrast, the London Draft reserved the right to tax such royalties to the country of residence.⁴⁰

Therefore, to conclude, the original of the draft prepared by the League of Nations was drafted, keeping in mind the resurrection of war-torn states and focussed more on residence-based taxation. The League of Nations got dissolved as it failed its mission to be a protector against aggressors on account of the second world war.⁴¹ The United Nations came into existence officially from 1945.

3.1.1. Metamorphosis: UN Model Convention

While the League of Nations ceased activities after failing to prevent the Second World War, the need for peaceful resolution of conflicts through international collaboration and dialogue continued to grow. The term "United Nations" (UN) was coined by US President Franklin D. Roosevelt during the Second World War and came officially into existence on 24 October 1945, headquartered in New York, USA. The UN has 193 sovereign states as its members, thereby making it the largest intergovernmental organization in the World.⁴² One of the UN primary purposes, as set out in its charter, is to *cooperate in solving international economic, social, cultural and humanitarian problems and in promoting respect for human rights and fundamental freedoms*.⁴³ This primary purpose of the UN is

38 Ibid. p. 392.

39 Michael Lennard, The Purpose and Current Status of the United Nations Tax Work, *Asia Pacific Tax Bulletin*, IBFD (2008), p. 23–32.

40 Ibid.

41 Stephen C Neff, *A Short History of International Law* (Oxford University Press: Oxford, 2014), Chapter 1 p. 3.

42 What are Member States? <https://www.un.org/depts/dhl/unms/whatisms.shtml> (accessed on 21 March 2019).

43 *Basic Facts about the United Nations, 42nd Edition* (UN Department of Public Information; New York) 2017.

carried out by one of its six principal organs, i.e. the Economic and Social Council (ECOSOC) which is responsible for taxation aspects.⁴⁴

The Fiscal Committee of the United Nations, which was set up in 1946 had invited the UN ECOSOC to review both the Mexico and London model drafts. However, with the dissolution of the league, the work went into an impasse as the UN primary focus was to restore balance in the decolonized states which attained independence. The Organization for European Economic Cooperation (OEEC) took over the initiative to revive the tax treaty work and accordingly its successor the OECD through its fiscal committee published its “Draft Double Taxation Convention on Income and Capital” in 1963. The draft convention in 1963 was massively influenced by the London Draft released by the League of Nations and also included additional features which benefited the developed economies, in other words benefiting the residence-based principle.⁴⁵

The UN membership, meanwhile, increased substantially as many states in Asia and Africa attained their independence from European colonisation. The developing economies then decided to have their own model of the convention, since the OECD model was highly in favour of the developed economies/residence-based.⁴⁶ Therefore, the UN ECOSOC in 1968 established the Ad Hoc Group of Experts on Tax Treaties who would represent the interests of both developed and developing economies. The group was composed of tax officials and experts from twenty countries. In principle, these officials were to act in their individual capacity and not as representatives of their government.⁴⁷ In 1979, the group of experts had published a manual on the *Negotiation of Bilateral Tax Treaties between Developed and Developing Countries*, which was revised recently as a toolkit for competent authorities to take into account relevant considerations while negotiation their tax treaties. The manual serves as a handy guidance tool for developing economies, who, in need of revenue, usually sacrifice their taxing rights and succumb to base erosions. Further, in 1980, the Group of Experts finalized the *United Nations Model Double Taxation Convention between Developed and Developing Countries*, (**UN Model Convention**) whose aim was to promote the conclusion of treaties between developed and developing countries, acceptable to both parties and who would adequately safeguard their respective revenue interests.⁴⁸ Some significant aspects of the UN model though are traces of inspiration from the

44 The six principal organs of UN are 1. General Assembly, 2. Security Council, 3. Economic and Social Council, 4. Trusteeship Council, 5. International Court of Justice and 6. Secretariat.

45 Michael J. McIntyre, Bird RM and Fox W.F: *Developing Countries and International Cooperation on Income Tax Matters: An Historical Review* [Unpublished 2005].

46 Ibid, p. 8.

47 ECOSOC Resolution 1980/13, 28 April 1980, <https://undocs.org/E/1980/80> (accessed 26 May 2019).

48 History of UN Tax Committee, <https://www.un.org/esa/ffd/tax-committee/about-committee-tax-experts.html> (accessed 21 March 2019).

OECD model, especially with regards to the arm's length principle and separate entity concept for PEs.⁴⁹

Therefore, the UN model convention was a response to the OECD model convention on tax treaties to create a level playing and an inclusive field factoring the needs of developing economies.

3.2. UN Tax Committee – Existing Framework

The Adhoc Group of Experts on Tax Treaties between Developed and Developing Countries was renamed in 1980 to “*Ad Hoc Group of Experts on International Cooperation in Tax Matters*” and increased its membership from 20 to 25 drawn from tax administrators of 10 developed and 15 developing countries and economies in transition. In 2005, the Adhoc group of experts got upgraded to a Permanent Committee structure, and ECOSOC decided to rename the group, *Committee of Experts on International Cooperation in Tax Matters (UN Tax Committee)*. The Financing for Development office provided the UN Tax Committee with a *small secretariat* under the leadership of Mr Michael Lennard. The Committee is currently comprised of 25 members nominated by the respective Governments, acting in their expert capacity and not as country representatives. The members, who are appointed by the Secretary-General for a term of four years, are drawn from the fields of tax policy and tax administration and are selected to reflect a fair, equitable geographical distribution, representing different tax system and capabilities.⁵⁰ The existing committee was appointed during August 2017, and their tenure will run till June 2021. The current committee is represented by members from countries such as Jamaica, Djibouti, Ecuador, Russia, Zambia, Liberia, China, India, Japan, Germany, Sweden, Switzerland and Singapore.⁵¹ The majority of the committee members are from developing economies.

The mandate of the Committee of Experts was to provide updates to the UN model convention and other issues about international cooperation in tax matters. Therefore, the Group of Experts examined areas beyond the UN model convention.⁵² The UN Tax Committee, as a subsidiary of ECOSOC, has the following mandate:⁵³

49 Michael J. McIntyre, Bird RM and Fox W.F: *Developing Countries and International Cooperation on Income Tax Matters: An Historical Review*.

50 UN Tax Committee, <https://www.un.org/esa/ffd/tax-committee/about-committee-tax-experts.html> (accessed 21 March 2019).

51 UN Tax Committee Members, <https://www.un.org/esa/ffd/tax-committee/tc-members.html> (accessed 21 March 2019).

52 In areas such as transfer pricing; mutual assistance in collection of debts and protocol for the mutual assistance procedure; treaty shopping and treaty abuses; interaction of tax, trade and investment; financial taxation and equity market development; tax treatment of cross-border interest income and capital flight; and taxation of electronic commerce. History of UN Tax Committee: <https://www.un.org/esa/ffd/tax-committee/about-committee-tax-experts.html> (accessed on 21 March 2019).

53 Committee Mandate, <https://www.un.org/esa/ffd/tax-committee/tax-committee-mandate.html> (accessed 21 March 2019).

- Keep under 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*;
- Provide a framework for dialogue to enhance and promote 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;
- Give special attention to developing countries and countries with economies in transition in dealing with all the above issues.

The 2015 Addis Ababa conference on Financing for Development in Addis Ababa was a watershed moment in the history of the UN tax committee. Apart from the fact that the Addis Ababa Action Agenda (AAAA) provides a foundation for implementation of the UN Sustainable Development Goals (UN-SDG),⁵⁴ from a tax perspective, developing economies and international NGOs mooted upgrading the UN tax committee into an Inter-Governmental Body (IGB). According to tax advocacy NGOs, their demand for an inclusive tax governance body was that the rich economies were influencing tax policies and hence developing economies were mute victims to the power play. In other words “*if you are not at the table you are at the menu*”.⁵⁵ Therefore, the UN tax committee as an IGB will provide impetus to enable developing economies to increase their revenue through taxes by effective tax cooperation and transparency. Further, the present status of the Tax Committee does not set the same effective signals as that of an IGB in terms of influencing the fundamental principles that determine developing countries’ abilities to succeed in taking their fair share of the revenue.⁵⁶ Additionally, in the current system, the experts represent in their personal capacity and therefore upgrading to an IGB will enable concrete political decision by Governments to be made.

However, the request for upgrading the tax committee into IGB was not accepted by members from the developed economies primarily because they were of the view that it could lead to duplication of work along with OECD tax committees

54 Action agenda, https://www.un.org/esa/ffd/wpcontent/uploads/2015/08/AAAA_Outcome.pdf (accessed 26 May 2019).

55 See at <https://eurodad.org/files/pdf/1546576-campaigners-call-for-a-global-tax-body-to-fix-the-broken-system--1460902740.pdf> (accessed on 26 May 2019).

56 “ECOSOC: The World Needs an Intergovernmental Commission on Tax Cooperation. *Tax Justice Network: Why Tax Havens Cause Poverty*, Blog. 28 June 2011. <http://taxjustice.blogspot.com/2011/06/ecosoc-world-needsintergovernmental.html>.