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The UN Framework Convention on International Tax Cooperation: What do we want it to achieve?

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The UN Framework Convention on International Tax Cooperation: What do we want it to achieve?

By Chenai Mukumba

On 16 August 2024, United Nations (UN) Member States adopted the Ad Hoc Committee's Draft Terms of Reference (ToRs) for a UN Framework Convention on International Tax Cooperation by an overwhelming majority.[1] The ToRs were adopted after an arduous session – the third and last in a series of protracted negotiations.

The decision to convene the Ad Hoc Committee was made in 2023 after the UN General Assembly passed Resolution 78/230 on the promotion of inclusive and effective international tax cooperation. This historic resolution indicated that the General Assembly was to "establish a Member State-led, open-ended ad hoc intergovernmental committee for the purpose of drafting terms of reference for a United Nations framework convention on international tax cooperation."[2]

This article explores what led up to the proposal by the Africa Group and the concerns they have long sought to resolve through this convention.

Introduction

The historic vote on 16 August 2024 came almost a decade after the High Level Panel (HLP) on Illicit Financial Flows from Africa, which was chaired by former South African President Thabo Mbeki, called on Africa to step up efforts to ensure that the UN played a more prominent role in tacking illicit financial flows (IFFs).[3] In the early 2000s, there was growing literature documenting the impact of IFFs globally by various institutions and academics, such as Professor Leonce Ndikumana. As awareness around this issue started to grow, African leaders wanted to understand how much of an impact IFFs had on the African continent.

In 2011, at the 4th Joint African Union Commission/United Nations Economic Commission for Africa (AUC/ECA) Conference of African Ministers of Finance, Planning and Economic Development, Member States mandated the ECA to establish the High Level Panel on Illicit Financial Flows from Africa. Underlying this decision was the determination of African Member States to ensure that Africa's accelerated and sustained development relied as much as possible on its own resources.[4] The decision was also informed by the fact that it was clear that African countries were not going to meet the Millenium Development Goals by 2015. African Member States, therefore, asked the panel to develop a report that undertook the following:

- develop a realistic and accurate assessment of the volumes and sources of these outflows

1 https://financing.desa.un.org/sites/default/files/2024-08/Chair%27s%20proposal%20draft%20ToR_L.4_15%20Aug%202024____.pdf

2 https://financing.desa.un.org/sites/default/files/2024-01/A.RES_.78.230_English.pdf

3 UN Economic Commission for Africa (2015).

4 https://codafrica.org/wp-content/uploads/2020/10/The-Journey-So-Far.pdf

- gain concrete understanding of how these outflows occur in Africa, based on case studies of a sample of African countries and

- ensure specific recommendations of practical, realistic, short- to medium-term actions are taken both by Africa and by the rest of the world to effectively confront what is, in fact, a global challenge.[5]

The report was completed and published in 2015 and identified 15 different findings on IFFs, together with policy implications. One such finding was that, "Illicit financial flow issues should be incorporated and better coordinated under the United Nations processes and frameworks" and the "policy implication" drawn from that finding was as follows:

> "Africa needs to act in concert with its partners to ensure that the United Nations plays a more coherent and visible role in tackling IFFs. This involves ensuring that efforts to combat IFFs are included in the Post-2015 Development Agenda. Similarly, Africa needs to initiate steps for the United Nations to adopt a unified policy instrument on IFFs in order to place the matter squarely on the agenda of the world organisation."[6]

Indeed, the HLP Report noted that the issue of IFFs was not firmly on the policy agenda of the UN system and urged more rigorous efforts in support of a unified global architecture on the issue of IFFs. Following this, the report and its recommendations were adopted by the African Union as Assembly Special Declaration on Illicit Financial Flows.[7] Paragraph 9 of the declaration noted that Member States were to:

> "Express the need to ensure that illicit financial flows and their impact on domestic resource mobilization is given the necessary attention by the 3rd International Conference on Financing for Development, and in this regard stress the need for robust international cooperation to address the problem."[8]

Illicit financial flows were therefore a significant feature of the discussions at the 3rd International Conference on Financing for Development that was held in Addis Ababa, Ethiopia in July 2015. These conversations were subsequently reflected in the outcome – the Addis Ababa Action Agenda – which highlighted the importance of tackling multinational tax avoidance.[9] However, while the call for the establishment of a policy instrument was not adopted in the Addis Ababa Action Agenda, it did "call for more inclusiveness to ensure that these efforts [in international tax cooperation] benefit all countries".[10]

Winds of change

Today's global tax system is currently governed by the Organisation for Economic Co-operation and Development (OECD). It took over this role from the UN following the dissolution of the United Nations Fiscal Commission in 1946 when it suffered from a lack of support mostly from developed countries that did not see the need for a UN body to address tax issues.[11] Today, there are several institutions that play different roles within the international tax system. The G20, the International Monetary Fund (IMF) – through its Fiscal Affairs Department, the World Bank Group, the European Union and the Platform for Collaboration on Tax – a collaborative effort by the OECD, UN, IMF and World Bank.

The UN has also continued to play a role through the UN Committee of Experts on International Cooperation in Tax Matters, by largely reflecting the interests of developing countries in international tax discussions. Of all the institutions at play within the inter-

5 UN Economic Commission for Africa (2015), p. 2.
6 Ibid, p. 76.
7 AU Doc. Assembly/AU/17(XXIV) (https://au.int/sites/default/files/documents/29831-doc-assembly_declaration_on_illicit_financial_flow_-_english.pdf)
8 Ibid, para. 9.
9 UN General Assembly (2015).
10 Ibid, para. 28.
11 Owens/Ndubai (2021).

national tax system, however, the OECD is the most influential. While the OECD cannot impose binding rules or sanctions and rather depends on soft power mechanisms, it does wield significant influence over its actors. In addition, the OECD's recommendations are often considered as authoritative in the international tax field.[12]

As a result of the increasing call for more inclusive participation in the global rule-making of tax issues, the OECD established the OECD Inclusive Framework, which convened its inaugural meeting in 2016 in Kyoto, Japan.[13] This Inclusive Framework was established to allow for the increased participation of developing countries that were increasingly asking for a seat at the table when it came to making the rules. Despite the expansion of the number of countries that were now able to participate in rule-making, developing countries still raised concerns about the effectiveness of this participation.

In October 2020, the OECD proposed a Two-Pillar Solution to address the tax challenges arising from the digitalization of the economy. This proposal was part of the broader OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS). Under Pillar One, the Two-Pillar Solution sought to work on the reallocation of some taxing rights to market jurisdictions where multinational enterprises (MNEs) have users or consumers; and under Pillar Two, the proposal was to introduce a global minimum corporate tax rate to ensure that MNEs pay a minimum level of tax, regardless of where they operate. However, the African Tax Administration Forum, various civil society organizations and a number of developing countries thought the proposals fell far short of a solution that addressed the key tax issues facing Africa.

In December 2020, an Africa Union Briefing was published to inform the Extraordinary Specialised Technical Committee on Finance, Monetary Affairs, Economic Planning and Integration. It stated:

> "…developed countries are not listening to the concerns of developing countries and have no intention of redressing the balance of taxing rights in any significant way. Africa must mobilize itself at a political level if it is to change the stance of developed countries and address these key tax issues." [14]

Addressing the gaps

Led by Nigeria, the Africa Group kickstarted the process to overhaul global tax rule-making. In 2022, the group spearheaded the adoption of UN General Assembly Resolution 77/244 on "Promoting inclusive and effective international tax cooperation." [15] The resolution called on the UN Secretary-General to publish a report that served as an assessment of the current global tax landscape and to make recommendations on how to address the gaps.

Published as report A/78/235, the Secretary-General assessed the inclusiveness and effectiveness of current international tax cooperation considering both the substantive and procedural criteria of fully inclusive and more effective international tax cooperation.[16] The report flagged that:

> "the substantive rules developed through these OECD initiatives often do not adequately address the needs and priorities of developing countries and/or are beyond their capacities to implement."[17]

The report also highlighted that there was:

> "significant evidence showing that often the substantive guidance produced through these [OECD] processes […] is not implemented by developing countries. This is because they consider

12 Tychmańska (2021).

13 https://www.oecd.org/en/topics/policy-issues/base-erosion-and-profit-shifting-beps.html#:~:text=At%20its%20inaugural%20meeting%20in,jurisdictions%2C%20including%2014%20observer%20organisations

14 African Union (2020), p. 12.

15 https://documents.un.org/doc/undoc/gen/n23/004/48/pdf/n2300448.pdf

16 UN Secretary-General (2023).

17 Ibid, para. 47.

> that the guidance does not respond to their more immediate needs and priorities, and instead draws resources away from such issues, and/or that they are not capable of implementing it as a result of their tax administration capacities. The substantive aspect of inclusive and effective international tax cooperation does not, therefore, appear to be adequately met."[18]

It also added that:

> "In the publications produced by the Global Forum and the Inclusive Framework, it is consistently indicated that all members participate on 'an equal footing' in decision-making processes 'by consensus'. […] In practice, however, it may be difficult for countries with small international tax staff to influence decision-making processes in these forums. In the case of the Inclusive Framework, a country is considered to agree to a proposal unless it raises an objection. It is not required to affirmatively 'opt-in' to be part of the consensus. Therefore, a country that cannot keep up with the pace of work and never expresses a view on a proposal is considered to agree to it."[19]

The Secretary-General's report also noted, however, that the UN did not have a sufficient platform either as the current tax committee was not fully representative. As a consequence, the Secretary-General's report proposed the establishment of a Member State-led, intergovernmental committee to "recommend actions on the options for strengthening the inclusiveness and effectiveness of international tax cooperation".[20] The report concluded by delineating three potential pathways for the reconfiguration of global tax governance, namely:

1. A multilateral convention on tax
2. A framework convention on international tax cooperation
3. A UN framework for international tax cooperation.

On behalf of the Africa Group, Nigeria proposed option two, noting that a "United Nations framework convention on international tax cooperation is needed in order to strengthen international tax cooperation and make it fully inclusive and more effective". General Assembly Resolution A/RES/78/230 was adopted in December 2023 – with 111 Member States voting in favour, 46 Member States voting against and 10 Member States abstaining.[21] All African countries and some Latin American and Asian countries – along with Russia and China – voted in favour of the resolution. Of note was that two-thirds of the members of the OECD Inclusive Framework voted in favour of the resolution, which demonstrated a shift in perspective regarding the OECD's leadership role on global tax rules.

What do we want it to achieve?

A question that is often asked is what does the Africa Group and supportive developing countries want to achieve through the UN Framework Convention? The background to the discussion on the UN Framework Convention identifies two clear issues. The first is inclusivity. Despite the repeated calls to make global tax rule-making more inclusive, it is far from surprising that developing countries are calling for a decision-making process that is more participatory. The objective of inclusivity is not an objective in and of itself, however. The primary reason why the Africa Group and developing countries are calling for inclusivity is to make the global tax system more effective. Evidence indicates an increase in IFFs over the years, as well an increase in the base erosion and profit shifting (BEPS).

The draft of the recently adopted Terms of Reference (ToRs) reflected this in the objectives of the convention that is to be deliberated from the year 2025 onwards:

18 Ibid, para. 41.
19 Ibid, para. 44.
20 Ibid, para. 67.
21 https://financing.desa.un.org/sites/default/files/2024-01/A.RES_.78.230_English.pdf

"a. Establish fully inclusive and effective international tax cooperation in terms of substance and process;

b. Establish a system of governance for international tax cooperation capable of responding to existing and future tax and tax-related challenges on an ongoing basis;

c. Establish an inclusive, fair, transparent, efficient, equitable, and effective international tax system for sustainable development, with a view to enhancing the legitimacy, certainty, resilience, and fairness of international tax rules, while addressing challenges to strengthening domestic resource mobilization." [22]

The draft ToRs were adopted on 16 August 2024 with 110 countries voting in favour.[23] While in 2022, 46 countries voted against Resolution 78/230, the negotiations of the ToRs saw only eight countries voting against the process, reflecting what one could call a shift in perspectives in favour of this process.

Where do we go from here?

At the beginning of 2025, an intergovernmental negotiating committee will be established and is due to meet in 2025, 2026 and 2027 for at least three sessions per year to develop the UN Framework Convention. It is expected to complete its work and submit the final text of the convention to the General Assembly for its consideration in the first quarter of the 82nd session in 2027. In addition to this, the intergovernmental committee is also expected to complete two early protocols that will also be submitted for early consideration. Discussion around the early protocols has already proved to be quite controversial, with various countries proposing a range of topics to be tackled by the committee. One of the points that proved to be difficult to navigate was whether the UN Framework Convention should tackle issues that have yet to be addressed as proposed by developed countries, or topics that have been addressed yet remain insufficient to address the concerns of developing countries.

Eventually, Member States agreed that one of the protocols would focus on "taxation of income derived from the provision of cross-border services in an increasingly digitalized and globalized economy".[24] However, due to the difficulty in agreeing on the second protocol, they indicated that the "[t]he subject of the second early protocol should be decided at the organizational session of the intergovernmental negotiating committee".[25]

While the proposal lists several topics, there is a hope from the African Group that this will include measures against tax-related illicit financial flows. Indeed, this was where the discussions started almost 10 years ago with the publication of the High Level Panel Report of Illicit Financial Flows.

As the Tax Justice Network Africa (TJNA), we fully support the work of the Africa Group and agree with their understanding that there is a need to establish a fully inclusive system of governance that the Framework Convention will address. The substantive component of the discussions will take place during the negotiations of the protocols. We are delighted to see that the topic of the digital economy has been prioritized and we would like to see the topic of tax-related IFFs adopted as the second early protocol. This topic was the primary reason the High Level Panel recommended the need to centralize the role of the UN on the topic of tax. The second topic that we hope will be prioritized is the fair allocation of taxing rights. This issue has been raised several times by developing countries during the negotiations and remains one that is central to African countries' ability to raise the domestic resources required to support the attainment of its developmental objectives.

22 https://financing.desa.un.org/sites/default/files/2024-08/Chair%27s%20proposal%20draft%20ToR_L.4_15%20Aug%202024____.pdf
23 https://news.un.org/en/story/2024/08/1153301
24 Ibid, para. 15.
25 Ibid, para. 16.

References

African Union (2020): Briefing for the Ministers on Taxing the Digital Economy and the Global Tax Debate. Addis Ababa.
https://au.int/sites/default/files/newsevents/workingdocuments/39572-wd-briefing_paper_on_global_tax_debate_for_1st_extraordinary_stc.pdf

Owens, Jeffrey/Ndubai, Joy Waruguru (2021): Tax Competition: Understanding History's Influence on the New Normal. In: Tax Notes International, Volume 103.
https://www.taxnotes.com/tax-notes-today-international/competition-and-state-aid/tax-competition-understanding-historys-influence-new-normal/2021/10/01/77608

Ryding, Tove (2022): Who is really at the table when global tax rules get decided? Brussels: Eurodad.
https://www.eurodad.org/who_is_really_at_the_table_global_tax

Tychmańska, Aleksandra (2021): The OECD as the Future International Tax Organization: An Inevitable Course of Events? In: Intertax, Volume 49, Issue 8 pp. 614-635.
https://kluwerlawonline.com/journalarticle/Intertax/49.8/TAXI2021064

UN Economic Commission for Africa (2015): Illicit financial flows: report of the High Level Panel on illicit financial flows from Africa. Addis Ababa.
https://au.int/sites/default/files/documents/40545-doc-IFFs_REPORT.pdf

UN General Assembly (2015): Addis Ababa Action Agenda of the Third International Conference on Financing for Development. New York (UN Doc. A/RES/69/313).
https://undocs.org/A/RES/69/313

UN Secretary-General (2023): Promotion of inclusive and effective international tax cooperation at the United Nations: report of the Secretary-General. New York (UN Doc. A/78/235).
https://digitallibrary.un.org/record/4019360?v=pdf

UNCTAD (2020): Africa could gain $89 billion annually by curbing illicit financial flows. Geneva.
https://unctad.org/news/africa-could-gain-89-billion-annually-curbing-illicit-financial-flows

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