

# Transfer pricing may appear mundane but the fact is tha...

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With commendable openness, the UN Tax Committee (who have long had the support of the Tax Justice Network) has published [a letter](#) that its head of tax, Michael Lennard, received from the US Council for International Business (USCIB) — also copied to all sorts of US Treasury and IRS officials.

In the letter, the USCIB addresses the committee's publication of a draft transfer pricing manual and generously "recognizes the importance of this work to both developing countries and the business community operating in those countries"; although it tempers this immediately by stressing that it "strongly supports your efforts to provide a manual *based on the OECD Transfer Pricing Guidelines*" (my emphasis).

That is what is troubling about this whole letter. Its whole thrust is that work by the UN committee to help developing countries administer the OECD guidelines is welcome, but anything that might deviate from those OECD guidelines is not welcome and should be, as the phrase has it, "clarified or deleted". It is also very obvious that the letter is a play for time, with a claim that there has not been sufficient opportunity to scrutinise the draft.

Some of the key points were highlighted in tweets late last week by [Alex Cobham](#). *The first was the USCIB's concern that the manual might allow governments to disregard potentially abusive tax structures too easily. The manual highlights the value of multinational groups having "a consistent global policy which cannot be altered to exploit tax laws. A well developed and consistently applied transfer pricing policy should reduce an MNE's risk of transfer pricing adjustments and the potential for double taxation, thereby increasing profitability by minimizing transfer pricing costs. Moreover, a global transfer pricing policy may be used as evidence in negotiations with tax authorities when transfer pricing disputes occur."*

*Those are fine sounding rhetorical sentiments: the problem is with what they imply and their relationship to what happens on the ground in too many cases. USCIB are suggesting that governments cannot on the one hand seek globally consistent policies from MNEs as a way of seeking to limit transfer mispricing without also agreeing not to*

*challenge the outcomes (except, they say, in the case of ‘abuse’) — since “Governments cannot require taxpayers to comply with their global policies, but feel free to reject prices computed under such policies merely to bring more revenue into their jurisdiction.”*

*The paradox inherent in this claim is obvious. What UCSIB is saying is that governments should not reject multinational groups’ internal pricing arrangements simply because they remove revenue from the state and yet this is, of course, the whole core of the transfer pricing battleground.*

*In their second major point, on the complexity of intangibles, USCIB argues that “identifying the developer of an intangible is not necessarily straightforward. Is the developer the person who funds the development, the person actually performing the functions, a participant in a cost contribution arrangement? This is a complex issue that ought to be considered in depth when the topic of intangibles is taken up”, The aim seems to be a simple one, which is that the UN manual should be mute on this major subject, suggesting as a reason that it’s all too complicated for now. This, though ignores the fact that this is one of the biggest current issues in transfer mispricing.*

*The third point the USCIB letter makes is a fundamental one. They object directly to the manual’s suggestion that governments should be able to request a very specific piece of information from multinational groups. The letter states (my emphasis):*

*Paragraph 8.6.9, item 12 provides: “Group global consolidated basis (sic) profit and loss statement and ratio of taxpayer’s sales towards group global sales for five years.” It is not clear precisely what this requires. If global consolidated profit is determined based on the company’s financial statements, then this information should be available for publicly traded companies. However, this number is unlikely to be useful for transfer pricing purposes since it does not bear any relationship to any particular transaction. As the manual points out in paragraph 8.6.6.2 the accurate review and assessment of financial results would be impossible without segmented profit and loss statements. This item needs to be either **clarified or deleted**.*

This information is needed as it is the basis for the simplest possible flagging system for potential abuses, which is presumably why there is such a determination to avoid the inclusion of the possibility. As with the similar information that would be made public under country-by-country reporting, this would allow tax authorities to quickly see, for example, if a multinational group conducted in its jurisdiction a much larger proportion of its economic activity than the proportion of its declared taxable profit. This would, in turn, be of particular value to a tax authority with limited resources (say in a developing country) in deciding on which companies to focus its scrutiny of potentially abusive transfer pricing. Unsurprisingly as a result some do not seem to want countries to have this data.

Overall, the USCIB response is interesting because it clarifies just how much the UN

transfer pricing manual is seen as a risk, and just what sort of risk. That risk is that the UN approach to transfer pricing might create the possibility of a shift in the ongoing global battle over the location of the corporate tax base. The possibility that some power could shift from multinational groups and the secrecy jurisdictions they exploit to book profits at artificially low tax rates, to the countries where the underlying economic activity took place is one that worries multinational corporations. That concern is written all over UCSIB's letter

To quote [@alexcobham](#) , ***this tells you all you need to know about the flaws of the OECD transfer pricing guidelines to which the USCIB is wedded, and the importance for international development of making progress on these issues — at the UN tax committee and elsewhere.***

***The UN tax committee will be considering this matter in the coming days: it's vital that they stick to their agenda in support of developing countries. The precise numbers are disputed, but it is now widely recognised that developing countries suffer losses resulting from transfer pricing abuses that at the very least cancel much of the benefit of the world's aid budgets. A fight over a transfer pricing manual may appear mundane but the truth is that the well being of hundreds of millions of people is at stake. That's why this is so important.***