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**Revision of the Manual for the Negotiation of Bilateral
Tax Treaties between Developed and Developing Countries**

**Note Provided at the Request of the Coordinator of the
Subcommittee on Revision of the Manual for the Negotiation of
Bilateral Tax Treaties between Developed and Developing Countries**

Summary

This paper has been provided by Professor Stephen Crow and Professor Jon Bischel, at the request of the Coordinator of the subcommittee on Revision of the Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries, Professor Frank Brunetti. It addresses a proposed Appendix for Special Consideration Articles, a proposed protocol for inclusion in such an Appendix, and a proposed timeline for consideration of possible inclusion.

* This report should not be taken as necessarily representing the views of the United Nations.

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I. Preamble

1. At the Fourth meeting of the UN Committee of Experts on International Cooperation in Tax Matters in October of 2008, the Secretariat indicated that the development of this section of the Manual “...with a practical and solutions oriented focus...”ⁱ was very important and would be very valuable. It was also stated that “...the Manual needed, for full impact, to be an interactive web-based product.”ⁱⁱ At the conclusion of the discussion regarding the new structure of the Manual, the suggested general format of the Manual, including this section was approved.

2. Further, it was requested at the closing meeting of the meeting that a first step towards implementation of this section of the newly formatted Manual would be the suggestion of a protocol whereby articles will be selected for inclusion. The following discussion is a preliminary proposal, mostly in general terms, to begin the discussion and evolution of such a protocol.

II. Introduction

3. The Appendix for Special Consideration Articles serves as a separate section of the revised Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries (hereinafter “Model”). The purpose of the appendix is to provide a repository for articles that articulate discussion items that have been raised in discussion or review of the Model. While they are topics or issues that arise in the context of such a discussion or review, and appear to have a high level of interest to member countries, technically, they do not meet established conventions for inclusion in either the provisions of the Model or the “Commentary.”

4. While they are viewed as having relatively high priority in the process of the timely and accurate dissemination of helpful information for the treaty negotiation process they are orphans of the process and, outside such a repository as this, are not centrally located for review by the Model’s stakeholders. Such a situation may result from a number of factors, e.g. the issue is unsettled at the time, the issue might focus on elements that are experience based and so specific that they are deemed inappropriate for inclusion the general provisions of the Model, or the issue might arise in between revisions of the Manual. In any case, with their practical and solutions oriented focus, they can be extremely helpful to stakeholders who may be looking for guidance in a particular area or who may benefit from another party’s experience and expertise in the negotiations process.

5. Typically, the articles included in this section would arise from discussions at meetings of the Committee of Experts on International Cooperation in Tax Matters, but it is proposed that such articles could be proposed outside that specific venue, according to protocols agreed to by the Committee members.

6. Regardless of the reason for non inclusion, the usefulness of the Manual would be enhanced with, and in some cases compromised without, the availability of articles such as these. The Manual should be both timely and accurate. If significant issues such as these are not available for guidance, the usefulness of the Manual, their integrity or accuracy, may be sacrificed. The same result obtains if such information cannot be added on a timely basis. It would appear appropriate to have a designated repository for this type of article, a Special Appendix to which stakeholders can refer for guidance on issues that the Committee deems affect the scope, accuracy, or timeliness of the Model and its interpretation and application.

7. It is important to establish a process whereby articles selected for inclusion in the Special Appendix further those stated purposes. In that context, the integrity and accuracy of the Special Appendix must be preserved in the process of developing a protocol for the submission for consideration materials for inclusion in the Appendix.

III. Discussion of Principles for Basic Guidelines for Inclusion

8. In looking for a place to start the discussion it appeared that there are a number of similarities between this selection issue and the same basic selection issue for academic and professional journals. For example, the materials present the results of primary investigation, that is, it is not comprised strictly of the compilation of existing materials or opinions, but must consist of analysis of issues that are current and relevant to stakeholders which is supported by facts and reasoned analysis.

9. Discussion and conclusions should be presented in an intelligible fashion, with any instance of hypothesis or speculation clearly identified. The structure and content should, above all else, be consistent with the purpose of the Appendix, and promote the intentions for which it was established and adhere to the highest of ethical standards. Finally, the most efficient way to achieve compliance with these standards or goals is to subject the submissions to a rigorous Peer Review process that concentrates on technical and qualitative concerns to determine whether the materials are accurate, timely, and useful to the stakeholders of the Model.

IV. Guidelines: A Proposal

10. The following are very preliminary, but could serve as a starting point for the discussion:

- a. The articles included in the Appendix should have a practical and solutions oriented focus.
- b. The articles should preserve and strengthen the integrity and accuracy of the Manual and the Commentaries.
- c. The content included in the Appendix should be considered for its contribution to facilitating effective communication among the stakeholders.
- d. The discussion should facilitate the dissemination of knowledge and experience among Manual users that is relevant to the negotiation process.
 - i. The topics or articles that appear have a high level of interest to stakeholders, but, technically, they do not meet established conventions for consideration as an inclusion in either the provisions of the Model or the Commentaries, e.g.
 - (1) the issue is unsettled at the time of the discussion, but it is important and relevant, and should be available for general discussion,
 - (2) the issue focuses on elements that are experience based and are to specific to be considered for language to be interjected into provisions, or are to preliminary to receive the formal approval required for inclusion in the Commentaries, but are critical in nature to the negotiation process.
 - ii. The topics are viewed as having relatively high priority in the process of the timely and accurate dissemination of helpful information for the treaty negotiation process.
 - iii. The issue takes on the nature of a discussion item that needs development before it is presented in a manner that could be considered for inclusion in another section of the Manual.
- e. The information presented must focus on the discussion of the topic of the particular inquiry.
- f. The information must be timely and accurate.
- g. The submission process should be transparent to and accessible by interested parties.
- h. The determination to include a submission in the Appendix should be the product of a Peer Review process with a panel to be comprised of Committee members and observers.

V. Guidelines for Inclusion

11. In the context of the preceding, the actual guidelines can be developed with reference to the principles set out therein.

12. The articles included in the Appendix should preserve and strengthen the integrity and accuracy of the Manual. This is a fundamental principle. There can be nothing included in the Appendix that compromises any of those characteristics of the Manual Provisions or Commentary. It is for such reasons that all submissions must be reviewed in the light of the basic purpose of the Manual (*insert such verbiage here*) and such review needs to be conducted, as a preliminary filter, by identified parties that are Committee members or observers and who are privy to and experienced in the negotiation process. Keep in mind, acceptance for inclusion in the Appendix is acceptance of an item to promote discussion, communication, and development, not adoption as part of the Manual Provisions or Commentary, on any level.

13. As discussed in the preceding paragraph, one characteristic of submissions that are to be considered for inclusion should be an assessment of its contribution to facilitating effective communication among the stakeholders. Does the discussion and presentation identify, at the very least, a fundamental level of the depth and breadth of the implications of the topic for the range of stakeholders? Does the submission communicate, in itself, the perceived nature of the problem such that the potential stakeholders can see the significance of its consideration? Why is this a topic that is of interest to and should be communicated to the stakeholders?

14. As stated in the principles for guidelines discussion, the article that is included should address issues that are relevant to the negotiation process, and the issues will have a high level of interest to stakeholders. They may consist of issues that are in discussion by the Committee and observers or novel issues that stem from the experiences or expertise of stakeholders. The issues may be such that discussion needs to be disseminated with a high priority or emphasis on timeliness and accuracy. A dramatic shift in business or economic structures may warrant communication to the stakeholders on a more timely basis than would be provided if the only resolution was to propose changes to the Model provisions or Commentary. It may be that the experiences of a small group of stakeholders needs to be put forth in order that the general population of stakeholders is apprised of the issue and can evolve the discussion.

15. In keeping with a proposed mission statement for the revision of the Manual. “The Manual has three main objectives to take in consideration “- the Manual is an important tool to support countries in the implementation and negotiation of treaties to avoid double taxation. At the same time, the Manual is a unique document to train tax officials in these matters.”ⁱⁱⁱ

16. The Appendix should not be a forum for general discussions on a wide range of topics or on disparate levels of discussion of the same issue. Keep in mind that this is an Appendix to the Manual and usefulness should be prioritized in the process of selecting and editing that which is included. There needs to be sufficient focus and specificity to be useful to stakeholders, not a general discussion of many related topics.

17. Whatever process is implemented, there needs to be a priority placed on a timely dissemination of useful information that is accurate for the views and facts presented at that level of the discussion. The review or selection process should be transparent to and accessible by interested parties. The submitting parties must be aware of the criteria and how the criteria are applied. The selection process needs to be above criticism and without any appearance of bias or predisposition at any stage. Also, the parties need to be apprised of the criteria for and process of selection so that they may evolve their submissions in a manner that addresses all the criteria and facilitates compliance with procedural requirements.

18. The individual items that will be included in the Appendix are individual articles. It may be that implications of one discussion will affect other issues, but each article will be judged on its own as a separate and independent piece of work (unless a special section of contributions is called for by the Committee, as might be the case with a special topic). What has been set forth all addresses relevance, interpretation, and application. To be adequately addressed in the selection process it will require a review body that has both experience and expertise that has the breadth and depth to address the various issues, and can subsume the diversity of perspectives. It is imperative that an integral part of this process be placed in the hands of a Peer Review Group that is comprised in such a way as make the Group as robust a source of experience and expertise as possible. This may mean that the Group is selected for specific articles from a pool of potential members, an Ad Hoc Group if you will.

VI. Concluding Remarks

19. There is no question that flesh needs to be added to the bones of the skeletal structure as presented above. As stated earlier, this process has many similarities to the general process that is adopted by academic journals in selecting articles to publish, from the submissions they receive. One very critical element of the academic process which must be adopted as a necessary element of the process here is the Peer Review element.

20. In general, the articles must be relevant, timely, accurate, and useful to the stakeholders. The selection group must make sure that the information provided does not detract from the integrity or validity of the Model or Commentary.

21. It will be like any selection process. There are submissions that will be clearly at or above the standards that are ultimately articulated and are appropriate for inclusion, and some that will be clearly inappropriate for inclusion, for any number of reasons. The difficulty, as usual, lies with those submissions that fall somewhere in between. In some cases the Peer Review Committee (PRC) will suggest revision and resubmission, in some cases not. As standards for inclusion in this type of forum cannot be strictly objective, it becomes critical that the PRC be comprised in such a manner that captures the various levels of experience and expertise, and represents the diverse nature and interests of the stakeholders. Hence, design of and selection for the PRC is something that must be taken very seriously.

Annex

Appendix for Special Consideration Articles: A Proposed Timeline for Submission and Consideration of Articles for the Appendix for Special Consideration Articles

1. As has generally been an issue, timeliness of submission of articles for inclusion in the proceedings of the Committee of Experts on International Cooperation in Tax Matters is of critical importance, given the nature of the process and the multitude of actions that is required for each paper that is finally placed on the agenda. Most of the papers that have been placed on the agenda in the past, for the Committee of Experts on International Cooperation in Tax Matters, deal with topics that have been settled on far in advance of the meeting for which they are proposed. In the case of the Special Consideration Articles, there would be an additional step. As these would typically be proposals submitted by the individuals without call from the Committee, they would be submitted to a panel of reviewers for approval for consideration, and then would be placed on the agenda of the next upcoming meeting of the Committee for discussion and approval, denial, or revision. That review process will put additional time pressure on the process. Therefore, it is suggested that dates certain be established for submission, distribution to the review panel, and status resolution. The exact dates or time frames would be established by the Committee, in discussion with representatives present at the Committee meeting where such timeline is approved.

2. In general, the review panel should be made up of a pool of Committee members and other representatives from the government and non-government sectors. It would not be foreseen that there would be such a volume of proposals submitted that the task would be onerous; however, there could be times when the burden on the reviewers is greater than others. Therefore, it is suggested that each review be conducted by a panel of three, that at least one be a Committee member, and the other two be drawn from the pool. It would be appropriate that the pool could be expanded if it was felt that a member or representative that was not in the pool had a recognized level of expertise in a particular topic and would have valuable input into the decision making process. It would also be appropriate that the review be a blind review; that is, the reviewers are anonymous. That is another reason to have a pool of eligible reviewers.

3. Keep in mind, this panel is only determining whether the proposal should be placed on the agenda for a Committee annual meeting, not for inclusion in the appendix. If the item was placed on the agenda and discussion went forward at the meeting, there could be a vote for acceptance for inclusion in the Special Appendix.

4. This begs the question as to who would be eligible to vote. One response is that the Committee members would hold a secret ballot. This could lead to some discussion of the

structure or composition of the Committee if it were felt that the appropriate interests were not represented. An extension of that would be to have a secret ballot of all the Committee members, the government representatives who are attending the meeting, and the representatives in attendance who are there in their capacity representing coalitions of member countries who do not send individual representatives. I think that since it is the Manual for the UN Model Convention, that voting should be limited to representatives of the UN membership. Neither process is without room for critique, but it would seem the latter is the most representative and leaves the least amount of room for scrutiny.

5. As to the timeline itself, if the logistical requirements indicate the staff must have the document two months prior to the Committee meeting, it would seem appropriate that submission to the panel must be no later than 5 months before the Committee meeting date. This would give the reviewers time to read and evaluate the proposal. If it was felt that the proposal needed modification, that would give time for a return of the proposal for revision and resubmission. The call for submissions should be made at each meeting to put the constituents on notice of the timeline and the process, even though the parties submitting the proposal need not necessarily be present at the meeting where the call is issued.

6. All of these suggestions can serve as a basis for initiating the discussion. The terms or requirements may also change if it is felt there would be a large number of submissions. Unfortunately, the level of interest cannot be predicted with any accuracy, and it may very well vary from year to year. So, there needs to be elements of rigor, consistency, and flexibility in the timeline consideration.

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- i. Draft report of the Fourth Meeting of the UN Committee of Experts on International Cooperation in Tax Matters, paragraph 65, E/C18/2007/19
 - ii. Draft report of the Fourth Meeting of the UN Committee of Experts on International Cooperation in Tax Matters, paragraph 67, E/C18/2007/19
 - iii Ms. Ayala, statement made by Ms. Ayala during Manual Revision Subcommittee discussions, regarding proposal for a Mission Statement.